NEW CASES ON TRUSTS OF HOMES

15.8 THE UNCONSCIONABILITY APPROACH

This essay is taken from a draft of Chapter 15 of Equity & Trusts, 5th edition, 2007, and considers some interesting cases on trusts of homes which have been decided since the last edition was written. The principal point is that the courts are shifting towards a general notion of “unconscionability”, but not all of the cases are by any means agreed as to what that might mean! The footnotes are somewhat eccentric due to a merging of different software packages – some appear as blocks in the text and others at the foot of the page as one would expect. Be patient.

A note before we begin on new developments
At the time of writing there has been an appeal brought in front of the House of Lords in the case of Stack v Dowden1 which may or may not introduce clarity in this field. It is suggested that, even if the House of Lords does attempt to introduce clarity, nearly all of the questions raised in this chapter will remain of significance. If judgment is delivered by the House of Lords too late to be included in the upcoming edition of this book, then a casenote and an amended full chapter on Trusts of Homes will appear on this website (www.alastairhudson.com/trustslaw) as soon as possible, as well as on the publisher’s web-site supporting this book.

15.8.1 The nature of the unconscionability approach
At the time of writing it appears that there is a further approach emerging on the cases based on the court considering whether or not there would be any unconscionability in denying the claimant an equitable interest in the property. In Chapter 12, we considered that constructive trusts were imposed wherever the defendant had acted knowing of some unconscionability in her treatment of property;217 and similarly in Chapter 13, we considered that, further to the decision of the Court of Appeal in Jennings v Rice,218 the doctrine of proprietary estoppel might be metamorphosing into a general doctrine of equitable estoppel which is based on unconscionability in general terms. Consequently, a test based on unconscionability in relation to trusts of homes would bring this area into line with the mainstream principles on constructive trusts. In the developing “unconscionability approach” in the law on trusts of homes, it is suggested, the courts are looking to consider whether or not it would be unconscionable for the defendant to deny property rights to the claimant. This may yet lead to a fusing of the principles of constructive trust and of proprietary estoppel in this context. This is very similar in form to the test of unconscionability which has been used in Australia for some time, as considered in para 15.9.2 below. It should be noted that identifying the existence of this “unconscionability approach” is my own theory – collecting together otherwise disparate decisions of differently constituted courts – but it is suggested that it is the best way to understand the latest drift in the law.

The doctrinal significance of the unconscionability approach is that the courts are allocating equitable interests in the home without needing to base that finding on a

common intention. Therefore, unlike the need in *Lloyds Bank v Rosset* to identify a common intention between the parties, the courts are considering whether or not it would be unconscionable to deny the claimant an interest in the home. This finding of unconscionability usually begins with a consideration of whether or not the parties have in fact reached an agreement, but even then the often vague finding of an agreement is usually tempered by a consideration of the entire course of dealing between the parties. Some of these courts have then expressed their intention as being to do what is “fair” between the parties. Consequently, the doctrine of proprietary estoppel, with its remedial nature, and the general doctrine of constructive trusts, based on institutional and conscionable trusts, are considered to be functioning in very similar fashions.

There are two distinct characteristics of the “unconscionability approach”. First, it is prepared to merge the doctrines of constructive trust and of proprietary estoppel so that the courts will be able to reach the decision which they consider to be most conscionable on the facts of any given case. This is different from the approach in *Lloyds Bank v Rosset* where Lord Bridge sought to merge these doctrines but precisely so that there could not be any such flexibility for the courts. Secondly, the courts are accepting that it will not be possible to generate any single set of principles which will cover all circumstances, primarily because there are so many different forms of relationship, and therefore achieving the most conscionable solution to any given set of facts is considered to be the only feasible means for a court to proceed. Consequently, the courts which have adopted this approach are paying lip-service to the test in *Lloyds Bank v Rosset* while also seeking to use the approach of Waite LJ in *Midland Bank v Cooke* to allow themselves to survey the whole course of dealing between the parties beyond merely financial contributions to the purchase of the property. As Patten J put this matter in *Turner v Jacob*:

> ‘The question of unconscionability requires the court to look at all the relevant circumstances and not at particular factors in isolation.’

The cases considered below indicate this drift in the cases clearly.

**15.8.2 The consensual approach taken in Oxley v Hiscock**

*The decision in Oxley v Hiscock*

The most significant case at the time of writing appears to be that of *Oxley v Hiscock*. This decision of the Court of Appeal has become influential on subsequent decisions of the Court of Appeal even though, as will emerge, it attempts an uncomfortable elision of most of the cases considered so far in this chapter into one combined test. We shall consider the facts of the case first, and then we shall consider how Chadwick LJ seeks to combine the earlier authorities.

In *Oxley v Hiscock* a woman exercised her statutory right to buy the house over which she had been a secure tenant: to effect the purchase, she used money given by her partner, a man to whom she was not married. The house was bought as a home for the couple and her children by a previous marriage, after he had been released from his confinement as a hostage during the 1990 Gulf War. The property was sold for £232,000 after their

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1219 It has been followed in *Stack v Dowden* [2005] EWCA Civ 857; [2006] 1 FLR 254; *Crossley v Crossley* [2005] EWCA Civ 1581, [2006] BPIR 404; and *Turner v Jacob* [2006] EWHC 1317.
relationship broke down and issues arose as to which of them had what equitable interest in the property. Ultimately, the court held that this was a case of pooling resources where Mr Hiscock had contributed £60,000 and Ms Oxley had contributed £36,000 and other outgoings: therefore, the court divided the property in the ratio 60:40 in favour of Mr Hiscock. In reaching this conclusion, the court attempted a survey of the whole of the case law in this area and, even more optimistically, sought to reconcile the various cases. The court considered *Springette v Dafoe*, Walker v Hall, *Grant v Edwards*, Lloyds Bank v Rosset and Midland Bank v Cooke, broadly in that order. These cases have all been considered already in this chapter.

*The rationale underpinning the decision of Court of Appeal in Oxley v Hiscock*

Relying particularly on *Grant v Edwards* as an explanation of Pettitt v Pettitt and Gissing v Gissing, the court held that the first question which a court must ask itself was whether or not there had been any common intention formed between the parties, either on the basis of direct evidence or inferred from the circumstances. Having identified such a common intention, it was held that one must then quantify the size of the right intended by that agreement. The speech of Lord Bridge in *Lloyds Bank v Rosset* was considered to be an affirmation of the judgment of Browne-Wilkinson VC in *Grant v Edwards*, rather than being a new approach entirely, although Chadwick LJ in *Oxley v Hiscock* did lapse into Lord Bridge’s habit of referring in composite terms to ‘constructive trust or proprietary estoppel’ as though they were the same doctrine. It was said that the remedial techniques of proprietary estoppel can be used so as to alter the size of the share which either party may acquire in the property. The evident differences between *Springette v Dafoe* and *Lloyds Bank v Rosset* were explained away on the basis that the former case concentrated solely on the question as to the parties’ common intention, whereas the latter required a further question to be answered as to whether or not the parties had reached any agreement. (That one case was concerned with resulting trust and the other with “constructive trust or proprietary estoppel” was overlooked by Chadwick LJ.) *Midland Bank v Cooke* was considered by Chadwick LJ to
have established a different understanding of the law based on a survey of the whole course of dealing, but it was further considered that the decision in *Drake v Whipp* had subsequently reasserted that equitable interests would be based on resulting trust, while also permitting the respective rights of the parties under that resulting trust to be adjusted so as to achieve fairness between them. If one reads the judgment of Peter Gibson LJ in *Drake v Whipp*, however, it is plain that the Court of Appeal chose to base their judgment on constructive trust principles and not to limit themselves to the formulaic mathematics of resulting trusts. However, *Midland Bank v Cooke* was also explained by Chadwick LJ as being a case where Mrs Cooke was accepted as having acquired some interest under trust in the house and that the decision in that case was therefore really focused on quantifying that right. This approach, even if it is correct (which I doubt), does not tell us how Mrs Cooke is said to acquire a right from payment of bills and so forth in a manner which would not have been accepted in *Lloyds Bank v Rosset* as being anything more than a *de minimis* contribution at its highest.

The conclusion to which Chadwick LJ came in *Oxley v Hiscock* was that:

‘… what the court is doing, in cases of this nature, is to supply or impute a common intention as to the parties’ respective shares (in circumstances in which there was in fact no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition) is shown to be fair … and it may be more satisfactory to accept that there is no difference in cases of this nature between constructive trust and proprietary estoppel.’

It is suggested that the “unconscionability” element of this approach is encapsulated in the notion that the court is looking for an understanding of the parties’ common intention which would be “fair”, to quote Chadwick LJ. The court is thus concerned with establishing a fair result, as opposed to giving effect to the pre-existing rights of the parties. This is, it seems to me a very significant point: the court is prepared to “supply” the parties’ common intention, not simply to find it on the facts. That means the court is prepared to make up what the court thinks their common intention would have been, not simply to try to find out what it actually was. This is, therefore, a fiction of sorts. The court is doing what the court thinks is “fair”, not necessarily what the parties agreed to do. The reason for this is that the parties often do not discuss their property rights in advance and so the courts feel compelled to supply an agreement for them. This is, I would suggest, a very long way away from Lord Bridge’s clear requirements in *Lloyds Bank v Rosset* that there must have been an agreement, arrangement or understanding reached before the acquisition of the property.

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4 See for example *Akhtar v Arif*[2006] EWHC 2726 in which Stuart Isaacs QC, sitting as a deputy judge of the High Court, was faced with contradictory evidence from numerous parties as to what their rights must have been and as to what their intentions must have been. Eventually the court ruled that the parties should be taken to have the equitable interest half each. It is a strange judgment which cites no case law authority at all but in which a judge at first instance can be seen wrestling with contradictory evidence and ending up with the compromise of equal division because there is no “correct” answer on the facts. Thus the unconscionability approach does anticipate the plight of the ordinary judge in trying to impose a suitable answer on confused circumstances.
Thus, the approach of Chadwick LJ appears to be remedial, like proprietary estoppel, as opposed to being institutional, like traditional constructive trusts: this means that the court is deciding what the parties’ rights ought to be (and thus is in the form of a remedy invented by the court at its discretion) rather than simply seeking to give effect to the parties’ pre-existing property rights based on their contributions to the purchase price (as with an institutional constructive trust). What this quasi-remedial, unconscionability approach also does is to fabricate or invent the parties’ common intention – by inferring it from the circumstances – and opposed to requiring cogent evidence that that was consciously the common intention of the parties. It is this artificiality which has concerned other Commonwealth jurisdictions so much, as is considered below in relation to the New Zealand and Australian cases. Those courts are concerned that the English cases require them to “supply” the parties’ intention, even though the parties may not actually have had that intention consciously. What might be more intellectually satisfying would be for the English courts to accept that they wish to behave like family law courts and simply decide what sort of remedy would be fairest for the parties in all the circumstances, regardless of what they may have done beforehand.

Furthermore, considering the passage just quoted from the judgment of Chadwick LJ, I would suggest that this conclusion is insupportable on the decided cases as they have already been discussed in this chapter. It seems that Chadwick LJ’s reference to ‘cases of this nature’ is a reference to cases in which there has been no agreement, or else Rosset would simply require that the agreement be enforced.²²⁹ (Oddly, his Lordship considered this to be limited to cases where both parties contributed to the

222 [2004] 2 FLR 669, para [36].

223 Ibid, para [36].


225 [2004] 2 FLR 669, para [48].

purchase price (ignoring the cases where that did not happen) and where people intended to live together as husband and wife (thus ignoring the cases on same-sex couples and non-romantic home sharers).)

Even if it should be taken to be a reference to all cases on trusts of homes, there is a clear difference between the first category of Rosset common intention constructive trusts by agreement, the balance sheet cases and the family assets cases, as discussed earlier in this chapter. Rosset was concerned with finding an agreement or inferring a common intention only from payment of the purchase price or the mortgage; it was not concerned with finding a common intention in the abstract. Moreover, Rosset and the ‘balance sheet cases’ are not concerned with a survey of all of the material circumstances, as was Midland Bank v Cooke, but rather only with contributions of money. None of the cases have expressed themselves to be concerned simply with ‘fairness’, except the ‘family assets cases’. And, for the reasons given at the end of this section, it is not possible simply to declare that constructive trust and estoppel are the same: if they are to be merged, then the basis on which one or other of the doctrines is to be altered must be explained. Therefore, Chadwick LJ cannot succeed in explaining all of the cases as being in agreement with one another. What must be done instead is to declare some cases correct and other cases incorrect – something which a Court of Appeal cannot do in the wake of a House of Lords judgment. Or better, as in this chapter, one should instead understand the differences between the cases.

The clearest example of Chadwick LJ’s attempt to merge together doctrines which simply cannot be merged arises from his Lordship’s attempt to reconcile Lloyds Bank v Rosset and Midland Bank v Cooke in one combined test. In Lloyds Bank v Rosset, Lord Bridge set out perfectly clearly that if there was no agreement between the parties then only contributions to the purchase price of the property or to the mortgage instalments would be sufficient to acquire an equitable interest in the land. By contrast, Waite LJ held that the court should ‘survey the whole course of dealing’ in Midland Bank v Cooke when deciding what conduct might be appropriate in the acquisition of an equitable interest in the land. Therefore, Waite LJ was clearly prepared to consider all conduct, even if it stretched beyond contributions to the purchase price of the property or to the mortgage instalments. Waite LJ is clearly taking an approach typical of a family court judge in considering all of the circumstances of the case. So, we come to Chadwick
LJ in *Oxley v Hiscock*. His Lordship purported to reconcile these two radically different approaches (and all of the other approaches ranged across the spectrum between them) so that they could be merged into one test. That test would require that the court should look first for an agreement between the parties and only then at ‘the whole course of dealing’ if no such agreement could be found. This is simply to ignore the fact that the House of Lords in *Rosset* did not intend to permit such a broad survey to be undertaken by the court. Indeed the majority in the House of Lords in *Gissing v Gissing* expressed themselves to be reluctant to accept the suggestion of Diplock LJ in … that common intentions could be identified on such a broad scale. It is suggested, therefore, that the exercise which Chadwick LJ undertook in *Oxley v Hiscock* is simply intellectually unsustainable. Nevertheless, this approach has been followed by two differently constituted Courts of Appeal.

**Two cases in support of Oxley v Hiscock**

In *Stack v Dowden* Chadwick LJ again delivered a judgment which took the same approach as in *Oxley v Hiscock*. In this case, Chadwick LJ suggested that there is a presumption that each of two parties whose names were put on the legal title of land were to take some equitable interest in that land. Furthermore, when deciding the extent of the parties’ equitable interests the court should survey the entire course of the parties’ dealings so as to reach a “fair” conclusion. The trial judge had failed to consider whether or not there had been an agreement, arrangement or understanding between the parties: it was held that that ought to have been the trial judge’s first task. On these facts, the parties had acquired their house with a woman’s savings and the sale proceeds of her solely-owned house, and a mortgage in relation to which the man had made all of the income and capital repayments. It was held that the property should be divided in the proportions 65:35 which represented the respective financial contributions of the parties. This much could have been decided on resulting trust principles – although the court did not limit its judgment to resulting trust, thus following dicta of Lord Diplock in *Gissing v Gissing* to the effect that it was unnecessary to decide which form of trust gave rise to the equitable interest on these facts. The complicating factor in this case was that the conveyance of the property had contained a statement to the effect that the parties were to be beneficial owners of the property in equal shares. It was accepted, however, that this did not reflect the parties’ true intentions. Consequently, it was held that there was no effective declaration of trust over the property and therefore that the equitable interest in the property ought to be divided in accordance with the parties’ common intention.

In *Crossley v Crossley* the Court of Appeal appeared to perpetuate a tendency in the courts to take the requirement in *Lloyds Bank v Rosset* - that an agreement, arrangement or understanding between the parties be taken to be their common intention - to mean that the court is at liberty to formulate precisely what it considers that understanding ought to be understood to have been, as opposed to insisting that there is precise evidence as to what the parties’ understanding actually was. Thus the precision required in *Rosset* seems to have been diluted slightly in these cases. Thus it was considered appropriate for the trial judge to have decided that the parties had agreed

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merely that the claimant would have some beneficial interest in the property, without needing to find a precise understanding as to the extent and nature of that interest. Here Corinna and Alan acquired the local authority house in which they lived under the right-to-buy legislation. They used a mortgage to acquire the property which was taken out in the name of Corinna, Alan and also their son, Paul. Paul did not make any payments towards the purchase of the property. When Alan died, the question arose whether or not Paul had an equitable interest in the property or whether the entire equitable interest passed to Corinna under the survivorship principle. Having found such an intention that the claimant was to have an interest, the trial judge then estimated, without suggesting from where this inference came, that the size of that interest to be equal to one-third of the total equity in the property. Similarly, it is suggested, the Court of Appeal proceeded to infer the common intention from the circumstances, based in part on the finding of a common intention that Paul was to have some interest in the property and then, presumably, on the basis that that interest should be an equal share. Thus a broader use is being made of Rosset than a literal reading of that case would permit, in favour of a general approach based on preventing unconscionability: thus adopting the eclectic approach typified by Oxley v Hiscock.

15.8.3 Proprietary estoppel and unconscionability: Jennings v Rice

Proprietary estoppel was considered in section 15.7 above, and in much greater detail in chapter 13 on Equitable Estoppel. The purpose of this brief section is to correlate recent cases on proprietary estoppel with the “unconscionability approach”. It was Walker LJ in Jennings v Rice who expressed the view that proprietary estoppel is intended to prevent unconscionability. What emerged from the discussion of proprietary estoppel above, and which is observable in the case of Jennings v Rice itself, is that a successful claimant may not be awarded property rights to prevent unconscionability. Instead the court may order that, to prevent the claimant suffering the effects of unconscionable behaviour, the claimant should be awarded an amount of money sufficient to compensate her for her detriment. So, in Jennings v Rice itself it was held by the Court of Appeal that a man who had helped an old woman around her home for a number of years should be entitled to something to compensate him for his trouble on the basis that she had given rise in his mind to some expectation in reliance on which he had acted to his detriment. The remedy was for an arbitrary sum of money: “arbitrary” in the sense that it bore no specific relation to any particular detriment which he had suffered nor to any salary he might otherwise have earned. Instead, the court decided that was fair compensation in the circumstances generally. This approach in equitable estoppel is not entirely new, of course, as evidenced by the following passage from Oliver J in Taylor Fashions v Liverpool Victoria Trustees Co Ltd to the effect that if an award of proprietary estoppel were not made in that case then:

it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his

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7 [2005] EWCA Civ 1581, [23]-[29], per Sir Peter Gibson.
8 [2002] EWCA Civ 159.
Therefore, we can see that proprietary estoppel is increasingly based on the notion of unconscionability, arguably in common with the ordinary test for constructive trusts under *Westdeutsche Landesbank v Islington*.11

This proximity between the doctrines of constructive trust and proprietary estoppel is considered in detail in section 15.10.2, where it is suggested that there have always been significant differences between the doctrines. However, a semi-conscious elision of the concepts has been accepted in the unconscionability cases because there is a superficial similarity between their shared notions of “unconscionability”. So, in *Yaxley v Gotts*12 it was held that both doctrines are “concerned with equity’s intervention to provide relief against unconscionable conduct”. Similarly in *Grant v Edwards*13 it was suggested that “useful guidance may in future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing*”. Thus there is a reasonably long pedigree underpinning the idea that common intention constructive trusts and proprietary estoppel are based on similar principles. Most of these judicial comments do not suggest that the two doctrines should actually be seen as being one. The point is also made in *Van Laetham v Brooker* by Lawrence Collins J that the remedies provided in proprietary estoppel and constructive trust are effectively the same in that the courts award whatever rights they consider appropriate in good conscience.15 So, his lordship identified an amount of money which the claimant was entitled to receive in that case which reflected her financial and manual contribution to the acquisition and development of various properties, while also taking into account the skilled and larger contributions of the defendant. Thus, instead of arguing that the two doctrines are identical, the courts tend to suggest that there are merely general similarities between them. That they do conceptually remain distinct is considered below at 15.10.2.

15.8.4 Seeking fairness in all the circumstances: *Cox v Jones*

An example of a court seeking to achieve a fair result in the circumstances, without concerning itself overly closely with the niceties of doctrine, is *Cox v Jones*. In *Cox v Jones*12 two barristers became engaged to be married and set up home together.232 It was evident that their relationship was in difficulties from the beginning when the couple only managed to cohabit successfully for three months after their engagement.234 Mr Jones was much older than Miss Cox and his legal practice was much more successful than hers. The couple bought a country house in Essex together for £480,000 in October 1999, but the property was placed in Mr Jones’s sole name, with Mr Jones taking out a mortgage in his sole name for £450,000. The property required extensive renovation which Miss Cox supervised but for which Mr Jones paid almost exclusively. Mr Jones raised a mortgage to acquire a flat in Islington which Mr Jones contended was intended to be purchased by him, whereas Miss Cox contended that it was intended to be purchased by him as a

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10 This approach was followed in *Turner v Jacob* [2006] EWHC 1317, [81].
13 [1986] Ch 638, 656, *per* Browne-Wilkinson V-C.
15 [2006] 2 FLR 495, para [263].
nominee for her, with Miss Cox providing just over half of the deposit. Miss Cox also owned a Fiat car which Mr Jones used overseas: Mr Jones claimed to have bought the car from Miss Cox, whereas Miss Cox claimed that she had only lent the car to Mr Jones. Mr Jones had bought an engagement ring for Miss


234 Mr Jones lived in a flat in Stone Buildings in Lincoln’s Inn and Miss Cox had a large Alsation dog called ‘Bootsie’ which caused tension due to its ebullient behaviour in a small flat.

235 The couple met, it appears from evidence, in chambers when she was seeking a tenancy and where he was already a long-standing tenant, although their relationship did not start until after she had left that chambers.

Cox for £10,000: their engagement was broken, but there was no agreement about whether the engagement ended in 1998 (albeit their relationship continued in some form) or only some years later in 2001. Their relationship ended ultimately in 2001 after the last in a string of situations in which Mr Jones had been physically violent towards Miss Cox.

The claims were as to ownership of the Essex country house, the Islington flat, the car and the engagement ring. As to findings of evidence, it was made clear in the judgment that the facts were found on the judge’s impression as to the credibility of each of the witnesses in the witness box. 236 This demonstrates how it is frequently very difficult to arrive at ‘the truth’ in trusts of homes cases precisely because the parties frequently cannot prove everything they allege, because the parties have frequently fallen out with one another, and because people are frequently poor witnesses when asked to discuss their personal lives. As to the Essex house, Mann J held that the parties’ intentions were contained in an agreement (akin to that identified in Lloyds Bank v Rosset) whereby the couple had agreed that the house would be held jointly between them and in relation to which Miss Cox had acted to her detriment by supervising the renovation works and by
giving up her legal practice to do so. However, because Mr Jones had suffered much greater detriment than Miss Cox, the property would be distributed 75:25 between them as opposed to being divided equally.

What is interesting here is that Mann J did not find any clear agreement as to what interest each person was supposed to have: rather, he found that there was some form of general agreement but felt himself entitled to declare what share should result from it. The court instead looked for a solution which would be ‘fair having regard to the whole course of dealing between them in relation to the property’. This is a much more flexible approach than that used in *Lloyds Bank v Rosset*, where the assumption was that the parties must have reached an agreement either as to the shares which each party would have (which the parties had not in this instance) or as to the amount of money which each party would contribute (where Miss Cox had contributed nothing and so would have had to receive no interest at all). So, it was held to be unconscionable to have denied some interest to Miss Cox because the parties had intended the house to be a jointly-held house, whereas it was also considered unconscionable to give Miss Cox a half-share in that house given the size of her contribution.

As to the flat, it was found that the parties’ intention was that the flat was intended to have been bought by Mr Jones as nominee for Miss Cox because only he

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236 When the couple had an argument and Mr Jones pretended to throw the engagement ring out of the window (although he actually retained the ring and gave it back to Miss Cox the next day).
237 This may seem surprising in itself in that the principal witnesses were barristers whom one might have expected to make competent witnesses. It just goes to show that one often behaves very differently in relation to one’s personal affairs when compared to one’s business affairs.
238 Interestingly, of course, supervision of building works had been ignored by the House of Lords in *Lloyds Bank v Rosset* itself.
239 Giving up her legal practice, however, would constitute detriment even though supervision of building work would not ordinarily acquire an equitable interest in the property.

could have obtained the mortgage, whereas she could not have done so (due to his income being larger than hers). Therefore, Miss Cox was found to be entitled to the entire equitable interest in the flat. It was found as a fact that Miss Cox procured the purchase of the flat at a lower price than otherwise it would have been sold because she knew the vendor personally and so convinced him to make a private sale rather than purchasing it at a higher rate through estate agents. She did not acquire an equitable interest on the
basis of this reduction in price (by extrapolation from *Springette v Defoe*), but rather it was taken into account as something beneficial to Mr Jones which she had contributed, together with the detriment associated with her not seeking to acquire the flat in her sole name. As to the chattels, it was held that the ring was intended to have been given to Miss Cox absolutely and that Miss Cox had intended to transfer outright the car to Mr Jones; consequently, neither chattel was to be returned.

On the basis of the foregoing discussion, the ‘unconscionability approach’ requires the court to consider the extent to which it would be unconscionable for the defendant to deny an equitable interest in the property to the claimant. This approach seems content to meld the strict approach in *Lloyds Bank v Rosset*, ostensibly based on constructive trust, with general principles of good conscience as emerge in the general law on constructive trusts and on proprietary estoppel. There are two key difficulties with this approach. First, Lord Bridge’s speech in *Rosset* was clearly not intended to be as flexible as it is being portrayed in these cases; rather, it is the more flexible approach in *Grant v Edwards* which is really being applied. It would be more intellectually satisfying, it is suggested, if the courts acknowledged that the tests set out in *Rosset* are inappropriate in this context and so explored more satisfactorily the principles which they wish to apply. Pretending to apply a test which is not really being applied at all (or, at least, applying it improperly) is only likely to cause confusion and to hide the courts’ real purpose. Secondly, this approach continues to purport to meld the doctrines of constructive trust and proprietary estoppel together when they operate on very different bases: the former institutional and the other remedial. To meld them together would require that one or other or both of the doctrines be altered significantly: to do this, the courts must analyse what those changes are, or admit that such a synthesis of principle is impossible.”

15.8.4 A model of the general constructive trust combined with the common intention constructive trust

What the Court of Appeal was seeking to do in *Oxley v Hiscock* was to combine the general law on constructive trusts with the general principles of proprietary estoppel with the common intention constructive trust. A much more convincing model of this sort of combined approach was attempted in *Van Laetham v Brooker*. In that case Lawrence Collins J incorporated the general understanding of constructive trusts principles into the area of trusts of homes under the sub-heading “constructive trusts” in the following terms:

‘A trust arises in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest and (ii) the claimant has acted to his

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17 [2005] EWHC 1478, para [61].
detriment in the belief that by so acting he was acquiring a beneficial interest …’
This formulation of the constructive trust is familiar from the material considered in
Chapter 12 in relation to constructive trusts in general, but it is combined here with the
sort of constructive trust which was applied in Lloyds Bank v Rosset. This formulation
connects the general notion of good conscience in relation to constructive trusts with the
common intention constructive trust.

A differently constituted Court of Appeal in Oates v Stimson\textsuperscript{18} took a similarly
ecklectic approach to the law in this area, although on different bases from Oxley v
Hiscock. In that case two men acquired a house together by means of an endowment
mortgage. The couple agreed that they would make equal payments towards the
mortgage. Latterly, the claimant was made redundant and the defendant agreed to take on
responsibility for all of the mortgage repayments and other outgoings on the house. It was
found that the two men had agreed orally that the defendant would take on these added
responsibilities in return for a right to acquire the house on payment of an agreed sum.
Issues arose as to what rights the parties had. It was held by Sir Christopher Staughton
that:

‘If there must be a search for the minimum equity to do justice, there is also an
obligation to take into account all relevant circumstances including the conduct of
the parties.’\textsuperscript{19}
This encapsulation of the test combines ideas reminiscent of proprietary estoppel (in the
“search for the minimum equity to do justice” akin to Crabb v Arun DC) with the
approach in Midland Bank v Cooke (the requirement to “take into account all relevant
circumstances”) but with no reference is made in this judgment to Lloyds Bank v Rosset
(unless were are supposed to infer it from the reference to “the conduct of the parties”,
which seems unlikely in the context). It is thus not at all clear on what doctrinal basis his
Lordship reaches his decision. What is clear is that on the facts his Lordship considered
that the claimant should be bound by the agreement he reached with the defendant to the
effect that the defendant would acquire responsibility for the mortgage repayments and
surrender to the defendant the rights which he had agreed to sell to him.

By contrast, Auld LJ expressed his conception of the test in the following fashion:
‘Mr Oates’s conduct, in reliance upon which Mr Stimson acted to his detriment
and/or changed his position, gave rise to a constructive trust in favour of Mr
Stimson rendering it unconscionable not to permit him to enforce the oral
agreement for [the sale of the property].’
This conceptualization of the test was based expressly on Lloyds Bank v Rosset and
Yaxley v Gotts and is a combination of common intention constructive trust and of
proprietary estoppel respectively which bases the “constructive trust” on “detriment” and
on the unconscionability which would be occasioned if the claimant could not enforce the
agreement. It could be that this “constructive trust” arises on a general basis as with
Westdeutsche Landesbank v Islington. Keene LJ expressed agreement with Auld LJ
rather than Sir Christopher Staughton.

\textbf{15.8.5 The “excuses” cases: rights not based on common intention}

\textsuperscript{18} [2006] EWCA Civ 548.
\textsuperscript{19} [2006] EWCA Civ 548, para [13].
Oddly, for all of the talk of “common intention” in this area of law, there have been cases in which constructive trusts have been upheld over the home in flat contradiction of the intention of one of the parties: and thus these cases are definitely not concerned with the common intention of the parties. Van Laetham v Brooker\(^{20}\) concerned, inter alia, a situation in which the defendant provided an excuse for not putting the land in question in joint names: his excuse was that the woman would have had to pay capital gains tax if the property had been put in her name. Two earlier decisions had considered excuses. In Eves v Eves\(^{21}\) the claimant was told by the defendant that her name could not be put on the legal title of the property until she was 21. It was held that because the defendant had led the claimant to believe that she would acquire a beneficial right in the property by using excuses, when in truth he intended to deny her any rights in the property, the claimant was entitled to an equitable interest in the property. In Grant v Edwards\(^{22}\) the defendant gave an excuse for not putting the claimant on the legal title which, as the Court of Appeal found, suggested that her name would be added to the legal title in the future. Consequently, it was held that the excuse amounted to a representation that she would acquire such a right in the future and therefore it would be unconscionable to deny her a right in the property. It was held by Lawrence Collins J that these cases could be considered to be proprietary estoppel cases and not true common intention constructive trust cases because the very fact that the defendant had made excuses to the claimant suggested that the parties did not have a common intention as to who owned the beneficial interest in the property: that is, the defendant thought the claimant had no rights, whereas the claimant thought that she did.\(^ {23}\) Therefore, rather than the claimant’s rights being based on a common intention, those rights are based on the unconscionability of denying a beneficial interest in the property. This is the antithesis of Rosset. The excuses cases are based on unconscionability and not on common intention.

15.8.6 Conclusions on the unconscionability approach
The notion of unconscionability is gaining ground across equity generally. It should be recalled that all constructive trusts are based on a notion of good conscience such that a person will be required to hold property on constructive trust whenever she has knowledge of some factor in relation to that property which affects her conscience, such as having stolen the property or having received it under a mistake. This principle is considered in section 12.1 in relation to the decision of the House of Lords in Westdeutsche Landesbank v Islington.\(^ {24}\) In another context, in relation to constructive trusteeship imposed on people who receive trust property further to a breach of trust, the most recent Court of Appeal decisions have found that liability will be based on the defendant having received the trust property in unconscionable circumstances.\(^ {25}\) Consequently, it is only in relation to trusts of homes, oddly, that this notion of unconscionability has been slow to take hold. In this most traditional of contexts, the courts have continued to apply comparatively rigid principles, such as the common

\(^{21}\) [1975] 3 All ER 768, [1975] 1 WLR 1338, 1342, per Lord Denning.
\(^{22}\) [1986] Ch 638.
\(^{23}\) [2005] EWHC 1478, para [67].
\(^{24}\) [1996] AC 669.
intention constructive trust, instead of the general principles of good conscience which have traditionally informed equity. Consequently, it is unsurprising that the courts have begun to develop a means of thinking about rights in the home which is based on fairness. Like grass growing between paving flags, it is a phenomenon which is always likely to re-emerge whether in the form of Lord Denning’s family assets doctrine, or Waite LJ’s use of family law methodologies to allocate rights in the home, or this general notion of unconscionability.

A note of caution in relation to the unconscionability approach, however. The Court of Appeal in Stack v Dowden was required to consider Huntingford v Hobbs in relation to the terms of the conveyance in that case. This required Chadwick LJ to quote the following dicta from Sir Christopher Slade in the Court of Appeal in Huntingford v Hobbs: ‘… the parties’ respective beneficial interests in the property fall to be determined not by reference to any broad concepts of justice, but by reference to the principles governing the creation or operation of resulting, implied, or constructive trusts’. Thus, it can be observed that the balance sheet approach did not envisage a general notion of good conscience or justice as has been used by the courts under the unconscionability approach, any more than the House of Lords in Lloyds Bank v Rosset or the majority in Gissing v Gissing did. Therefore, it cannot be said that the unconscionability now constitutes a settled view of the law. Rather it is a trend in the case law used by judges to reach decisions which they consider to be appropriate on their own facts. In the next section we shall turn to consider how other Commonwealth jurisdictions have dealt with these ideas, before attempting to correlate some of the conceptual approaches to the case law principles.

15.8.7 An odd case not relying on conscionability
The case of Kean v McDonald has not yet made an appearance in the full, printed law reports and I doubt that it ever shall. I make mention of it here only to illustrate a more general point about the way in which English property law operates in practice out there in the murky world beyond the high-minded certainties and decencies of the university seminar room. The parties in this case agreed in 1997 to transfer title in land (seemingly a flat near Southport, Merseyside) on payment of £10,000. That sum of money strikes one as a small amount for a transfer of rights in land, even a flat. This agreement was found by Michael Crystal QC, sitting as a deputy High Court judge, to constitute a common intention constructive trust further to Lloyds Bank v Rosset. There are a number of oddities, I would suggest, about this decision. A common intention constructive trust was held to exist even though the parties seem to have agreed that there would be an outright transfer of title in the property as opposed to a trust, but no conveyance was ever carried out so as to effect that intention.

Let us take an analogy with the law on express trusts. Under the principle in Milroy v Lord, and even though there had not been a proper conveyance of title at common law (simply a purported payment of money further to the agreement, which would not have constituted a valid contract for a sale of an interest in land) we might

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27 [2006] All ER (D) 348.
28 It is available only on-line.
29 (1862) 4 De GF&J 264.
have thought that no trust could be effected on the basis that equity will not assist a volunteer, or on the basis that there is no equity to perfect an imperfect gift. Of course, consideration (it seems) did pass in this case on payment of £10,000, and therefore the claimant was not a volunteer. But none of these issues of technicality arises in relation to constructive trusts. That is in the nature of constructive trusts under s 53(2) of the Law of Property Act 1925 under which there is no formality required for their existence.

Interestingly, however, the common intention constructive trust seems to arise here regardless of the equity of the case and not only regardless of principles like that in *Milroy v Lord*. Furthermore, it did not matter to the court (Deputy Judge Crystal QC), it seems, that some of the parties were involved in criminal activities and that the Crown Prosecution Service (“CPS”) was objecting to the constructive trust. The presence of the CPS is intriguing and not explained fully in the judgment. A number of parties were refused the right to appear before the court; there were references to the criminal records of many or all of the witnesses; the payment of £10,000 is only “alleged” to have been made; one claimant to a right in the property is, we are told, “a fugitive from justice”; the property was purportedly, possibly fraudulently (but ultimately unsuccessfully) transferred to a company for a consideration of £1; the CPS contended that much of the evidence was untruthful: and thus one is left with the impression that property is being passed between people suspected by the CPS of involvement in criminal activity so as to put property beyond the reach of the CPS at an undervalue. If this were so, would it not constitute unconscionable behaviour in general terms?

No point was taken by the court as to whether or not the parties here had acted and come to equity with clean hands. In parallel with the decision in *Tinsley v Milligan* 30 the claimant here is entitled to take an equitable interest on the basis that he has paid for that interest and on the basis that its acquisition was not proved to have been directly the result of an illegal act. Had Lord Goff, who dissented in *Tinsley v Milligan*, been deciding *Kean v McDonald* then he might very well have held that the criminal activities in which the parties had been involved, and the clear attempt to transfer this land at an undervalue between them, ought to mean that equity (in the form of a common intention constructive trust) should not have been available to the claimant. In this case there was no consideration at all of any authorities other than *Lloyds Bank v Rosset* and *Yaxley v Gotts* (to the effect that an equitable interest may pass on the basis of detrimental reliance without the need to be bound by statutory principles under the Law of Property (Miscellaneous Provisions) Act 1989). It would have been interesting to know whether or not the new judicial enthusiasm for unconscionability would have led to this claimant being denied a right in the property.

This case demonstrates, I would suggest, how many cases are decided before the courts which we would not have known about before the advent of electronic reporting of all decisions in the higher courts: it demonstrates how many of those cases are disposed of entirely on their own facts without reference to all of the possible authorities which might be discussed in the textbooks. It demonstrates how many important decisions are made in a rush and under great pressure, with attention only to the precise circumstances in front of our noses. How like life.

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241 It is unclear then whether or not Mr Jones is obliged to pay off the mortgage or whether Miss Cox is obliged to assume liability for the mortgage henceforth.

242 She had lived in a flat in the same block of the vendor and so knew him personally: this was credited with enabling her to obtain a reduction in the purchase price.

243 An odd argument this: she is taken to have given something of benefit whereas, of course, Mr Jones was otherwise buying her a flat so the benefit was a benefit she was really contributing to herself rather than to him.

244 It is unclear how this head of detriment is said to relate to the acquisition of the flat, however, given that she still had the flat acquired for her by Mr Jones’s mortgage.

245 As discussed in section 12.1 above.

246 As discussed in section 13.3 above.
