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[1990] 1 All ER 1111

Lloyds Bank plc v Rosset and another

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD GRIFFITHS, LORD ACKNER, LORD OLIVER OF AYLMEYTON
AND LORD JAUNCEY OF TULLICHETTLE

12, 13, 14, 15 FEBRUARY, 29 MARCH 1990

Husband and wife - Matrimonial home - Husband sole owner at law - Husband purchasing property requiring substantial renovation to make it habitable - Common intention of parties that house should be renovated as joint venture and thereafter be family home - Parties let into possession by vendor prior to completion of purchase - Builders starting work on extensive repairs and wife co-ordinating work and assisting in renovation and decoration - Husband financing renovation by charging house to bank without wife's knowledge - Husband defaulting on loan - Whether wife having beneficial interest in house prior to completion - Whether husband holding house as constructive trustee for himself and wife - Whether common intention of parties evidence in relation to intentions with respect to beneficial ownership of property - Land Registration Act 1925, s 70(1)(g).

In 1982 the husband and wife decided to buy a semi-derelict farmhouse for £57,000 using money given to the husband by the trustees of a family trust, who insisted that the house be purchased in the husband's sole name. It was the common intention of the parties that the renovation of the house would be a joint venture, after which it was to be the family home. The vendors permitted the husband and wife to enter on the property prior to completion and the builders engaged by the husband and wife started on the extensive repairs that were necessary to make the house habitable. The wife spent almost every day at the property from the beginning of November 1982 helping the builders. The husband, without the wife's knowledge, obtained a bank overdraft to provide £15,000 towards the purchase price and the cost of repairs to the property. The husband exchanged contracts for the purchase on 23 November. The purchase was completed on 17 December and on the same day the husband executed a charge in favour of the bank. The transfer and the bank's charge were not registered until 7 February 1983. By mid-February the work on the house was substantially complete and the parties moved in. The amount owing on the husband's overdraft continued to rise and in February 1984 the bank demanded repayment of the amount outstanding, which was then nearly £23,000. The husband was unable to repay the amount owing, with the result that the bank started proceedings for possession and sale of the property. The wife resisted the bank's claim on the ground that she had an overriding interest under s 70(1)(g)^a of the

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Land Registration Act 1925 because she had a beneficial interest in the property under a constructive trust and had been in actual occupation of the land on the date when the bank's charge was registered. The judge found that the husband held the property as constructive trustee for himself and his wife but upheld the bank's claim for possession, on the grounds that the proprietor of a legal charge took subject to overriding interests which were subsisting on the date of creation of the charge rather than the date of its registration, that the wife was not in actual occupation of the property on 17 December 1982 when the charge was created and that therefore her equitable interest was not protected as an overriding interest by s 70(1)(g) so as to prevail against the bank's legal charge. The Court of Appeal affirmed the judge's decision that the relevant date on which the wife had to show that she was in actual occupation in order to establish an overriding interest was the date of the creation of the bank's charge, but allowed the appeal on the ground that she was in actual occupation on that date. The bank appealed to the House of Lords.

a Section 70(1), so far as material, provides: 'All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto ... (that is to say) ... (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed ...'

Held - In resolving a dispute between two persons who had shared a home in circumstances where one party was entitled to the legal estate and the other party claimed to be entitled to a beneficial interest, or in determining whether the person claiming to be entitled to a beneficial interest had an 'overriding interest' in the property prior to completion of the disposition of the property to a third party so that, by virtue of s 70(1)(g) of the 1925 Act, the transferee's estate was subject to that interest, the fundamental question which had to be resolved was whether, on the basis of evidence of express discussions between the partners and independently of any inference to be drawn from their conduct in the course of sharing the property and managing their joint affairs, there had been at any time prior to the acquisition of the property, or exceptionally at some later date, any agreement, arrangement or understanding reached between them that the property was to be shared beneficially coupled with detrimental action or alteration of position on the part of the person claiming the beneficial interest or, failing that, whether there had been direct contributions to the purchase price by the person claiming the beneficial interest from which a constructive trust could be inferred. On the facts, the monetary value of the wife's work expressed as a contribution to the cost of acquiring the property was almost de minimis and although discussions had taken place between the husband and wife no decision had been made prior to completion that she was to have an interest in the property. It followed that the wife was not entitled to a beneficial interest in the property and, accordingly, the question whether she had an overriding interest in the property prior to completion which by virtue of s 70(1)(g) of the 1925 Act took priority over the bank's charge did not arise. The appeal would therefore be allowed on that ground (see p 1115 *c e f*, p 1116 *d*, p 1117 *j*, p 1118 *c to e h* to p 1119 *b* and p 1120 *b to e*, post).

Per curiam. Neither a common intention by spouses that a house is to be renovated as a joint venture nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property.

Decision of the Court of Appeal [1988] 3 All ER 915 reversed (see p 1117 *b* and p 1120 *c to e*, post).

Notes

For determination of proprietary rights between husband and wife, see 22 *Halsbury's Laws* (4th edn) para 1030, and for cases on the subject, see 27(1) *Digest* (Reissue) 182-193, 1571-1608.

For the Land Registration Act 1925, s 70, see 22 *Halsbury's Statutes* (4th edn) 578.

Cases referred to in opinions

Abbey National Building Society v Cann

[1990] 1 All ER 1085, HL.

Eves v Eves [1975] 3 All ER 768, [1975] 1 WLR 1338, CA.

Gissing v Gissing [1970] 2 All ER 780, [1971] AC 886, [1970] 3 WLR 255,
HL.

Grant v Edwards [1986] 2 All ER 426, [1986] Ch 638, [1986] 3 WLR 114,
CA.

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McFarlane v McFarlane [1972] NI 59, NI CA.

Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777, [1969] 2 WLR 966, HL.

Appeal

Lloyds Bank plc appealed with the leave of the Appeal Committee of the House of Lords given on 20 October 1988 on terms as to costs against the decision of the Court of Appeal (Purchas and Nicholls LJJ, Mustill LJ dissenting) ([1988] 3 All ER 915, [1989] Ch 350) on 13 May 1988 allowing an appeal by the second respondent, Diana Irene Rosset (Mrs Rosset), against the order of his Honour Judge Scarlett sitting in the Thanet County Court on 22 May 1987 by which he granted the bank an order for possession of the property known as Vincent Farmhouse, Manston Road, Manston, Kent, which was occupied by Mrs Rosset. The first respondent, Gerard Marcel Rosset, Mrs Rosset's husband, who was the legal owner of the property, took no part in the appeal. The facts are set out in the opinion of Lord Bridge.

Michael Crystal QC, Alastair Walton and Simon Browne-Wilkinson for the bank.

Leolin Price QC and T J Bowles for Mrs Rosset.

Their Lordships took time for consideration

29 March 1990. The following judgment was delivered.

LORD BRIDGE OF HARWICH.

My Lords, the subject matter of this dispute is Vincent Farmhouse, Manston Road, Thanet (the property). The property is registered land which the first respondent, Mr Rosset, contracted to purchase on 23 November 1982 and which was conveyed to him on 17 December 1982. On the same date Mr Rosset executed a legal charge on the property in favour of the appellant, Lloyds Bank plc, to secure an overdraft on his current account with the bank. The bank's charge was registered on 7 February 1983. The bank initially agreed to allow Mr Rosset to borrow up to £15,000, but later raised this limit to £18,000. The limit was in due course exceeded, the bank's demand for repayment was not met and the bank instituted proceedings in the Thanet County Court for possession of the property in July 1984 against Mr Rosset and his wife. Mr and Mrs Rosset, who had initially occupied the property as their matrimonial home, had by this time parted. Mr Rosset, who was no longer residing in the property, did not resist the bank's claim. Mrs Rosset, however, alleged by way of defence to the bank's claim and by way of counterclaim against her husband that she had been entitled, since the date when her husband contracted to purchase the property, to a beneficial interest in the property under a constructive trust which qualified as an overriding interest under s 70(1)(g) of the

Land Registration Act 1925 because she was in actual occupation of the property both on 17 December 1982 and 7 February 1983, whichever was the relevant date to be considered in determining the existence of the overriding interest to which she alleged the bank's charge was subject.

At the trial his Honour Judge Scarlett found that Mrs Rosset was entitled as against her husband to a beneficial interest in the property in an amount to be determined at a future hearing. He held that, on the true construction of the 1925 Act, the proprietor of a legal charge takes subject to overriding interests which are subsisting on the date of creation, as opposed to the date of registration, of the charge. He accordingly asked himself whether Mrs Rosset was in actual occupation of the property on 17 December 1982 and, finding that she was not, concluded that her equitable interest was not protected as an overriding interest by s 70(1)(g) so as to prevail against the bank's legal charge. He gave judgment for possession in favour of the bank. Mrs Rosset appealed, but Mr Rosset has taken no further part in the proceedings.

The Court of Appeal unanimously affirmed the judge's decision that the relevant date on which Mrs Rosset had to show that she was in actual occupation in order to establish an overriding interest which would prevail against the bank was 17 December 1982, the

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date of creation of the bank's charge. But they differed on the facts whether she was in actual occupation on that date: Purchas and Nicholls LJ held that she was Mustill LJ held that she was not (see [1988] 3 All ER 915, [1989] Ch 350). The bank now appeals by leave of your Lordships' House against the majority decision of the Court of Appeal in Mrs Rosset's favour.

The important question arising under the 1925 Act as to the relevant date on which to ascertain whether an interest in registered land is protected by actual occupation so as to prevail under s 70(1)(g) against the holder of a legal estate has now been resolved by your Lordships' decision in *Abbey National Building Society v Cann* [1990] 1 All ER 1085, in favour of the view that it is the date when the estate is transferred or created, not the date when it is registered.

The primary ground of the bank's appeal challenges the judge's finding, which was also unanimously affirmed by the Court of Appeal, that Mrs Rosset had by the date of completion acquired a beneficial interest in the property.

The Rossets were married in 1972. There are two children of the marriage, a daughter born in 1972 and a son born in 1981. From 1976 until the events giving rise to the present dispute, the parties were living in premises which had been built as an extension to a bungalow in Broadstairs which was the home of Mrs Rosset's parents, Mr and Mrs Gardner. Mr Rosset had borne the cost of building the extension, but it was occupied on the terms of an agreement between the Rossets and the Gardners which provided that, on the Rossets vacating the extension, each should be paid a fixed sum by Mr and Mrs Gardner. Mrs Rosset's father had insisted on his daughter being joined in the agreement in this way.

Mr Rosset is a Swiss national. He was working in 1982 as a courier conducting coach parties of tourists on the continent of Europe and was away from home a great deal. Some time before 1982 he became entitled to a substantial sum of money under a trust fund established by his grandmother in Switzerland. In 1982 the Rossets were looking for a new home to be bought with Mr Rosset's inheritance. It was Mrs Rosset who first found the property. It had been unoccupied for seven or eight years and required substantial work to render it suitable for occupation. Mrs Rosset took her husband to see it. He liked it and made an offer to purchase it for the asking price of £57,500. This was accepted on 3 August 1982 subject to contract.

On 25 October 1982 Mr Rosset opened an account at the Broadstairs branch of the bank. He saw the manager and told him that he was intending to buy the property with money he had inherited in Switzerland.

On 2 November Mr Rosset received a payment of £70,200 from Switzerland of which £59,200 was paid into his account with the bank. On 23 November contracts for the purchase of the property were exchanged. On 14 December Mr Rosset saw the bank manager and asked to be allowed to overdraw on his current account up to £15,000 to meet the cost of the works of renovation which were needed to be undertaken to the property. The manager asked whether the property was to be acquired in joint names. Mr Rosset replied that the property was to be acquired in his sole name because his wife and children were living with her parents. The manager agreed the overdraft and Mr Rosset signed the bank's form of charge which was then sent to Mr Rosset's solicitor to be dated on completion and registered on behalf of the bank. Completion took place on 17 December with funds drawn from the account which required an initial overdraft of £2,267. Mrs Rosset knew nothing of the charge to the bank or the overdraft.

Meanwhile, Mr and Mrs Rosset had been let into possession of the property by the vendors even before the exchange of contracts. The builder employed by them, a Mr Griffin, commenced work on 7 November 1982. It was originally hoped that the house would be ready for the Rossets to move in before Christmas, but this proved in the event to be impossible. Eventually the Rossets moved in about the middle of February 1983 when the work was substantially complete. By this time Mr Rosset's overdraft had risen to over £18,000 and the bank refused to extend further credit. Most of the additional

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funds drawn from the account had been expended in paying for the renovation works. Both the purchase price of the property and the cost of the works of renovation were paid by Mr Rosset alone and Mrs Rosset made no financial contribution to the acquisition of the property.

The case pleaded and carefully particularised by Mrs Rosset in support of her claim to an equitable interest in the property was that it had been expressly agreed between her and her husband in conversations before November 1982 that the property was to be jointly owned and that in reliance on this agreement she had made a significant contribution in kind to the acquisition of the property by the work she had personally undertaken in the course of the renovation of the property which was sufficient to give rise to a constructive trust in her favour.

There was a conflict of evidence between Mr and Mrs Rosset on the vital issue raised by this pleading. The question the judge had to determine was whether he could find that before the contract to acquire the property was concluded they had entered into an agreement, made an arrangement, reached an understanding or formed a common intention that the beneficial interest in the property would be jointly owned. I do not think it is of importance which of these alternative expressions one uses. Spouses living in amity will not normally think it necessary to formulate or define their respective interests in property in any precise way. The expectation of parties to every happy marriage is that they will share the practical benefits of occupying the matrimonial home whoever owns it. But this is something quite distinct from sharing the beneficial interest in the property asset which the matrimonial home represents. These considerations give rise to special difficulties for judges who are called on to resolve a dispute between spouses who have parted and are at arm's length as to what their common intention or understanding with respect to interests in property was at a time when they were still living as a united family and acquiring a matrimonial home in the expectation of living in it together indefinitely.

Since Mr Rosset was providing the whole purchase price of the property and the whole cost of its renovation, Mrs Rosset would, I think, in any event have encountered formidable difficulty in establishing her claim to joint beneficial ownership. The claim as pleaded and as presented in evidence was, by necessary implication, to an equal share in the equity. But to sustain this it was necessary to show that it was Mr Rosset's intention to make an immediate gift to his wife of half the value of a property acquired for £57,500 and improved at a further cost of some £15,000. What made it doubly difficult for Mrs Rosset to establish her case was the circumstance, which was never in dispute, that Mr Rosset's uncle, who was trustee of his Swiss inheritance, would not release the funds for the purchase of the property except on terms that it was to be acquired in Mr Rosset's sole name. If Mr and Mrs Rosset had ever thought about it, they must have

realised that the creation of a trust giving Mrs Rosset a half share, or indeed any other substantial share, in the beneficial ownership of the property would have been nothing less than a subterfuge to circumvent the stipulation which the Swiss trustee insisted on as a condition of releasing the funds to enable the property to be acquired.

In these circumstances, it would have required very cogent evidence to establish that it was the Rossets' common intention to defeat the evident purpose of the Swiss trustee's restriction by acquiring the property in Mr Rosset's name alone but to treat it nevertheless as beneficially owned jointly by both spouses. I doubt whether the evidence would have sustained a finding to that effect. But the judge made no such finding. On the contrary, his judgment on this point amounts to a clear rejection of Mrs Rosset's pleaded case. He said:

'The decision to transfer the property into the name of [Mr Rosset] alone was a disappointment to [Mrs Rosset], but I am satisfied that she genuinely believed that [Mr Rosset] would hold the property in his name as something which was a joint venture, to be shared between them as the family home and that the reason for it

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being held by [him] alone was to ensure that [his] uncle would sanction the export of trust funds from Switzerland to England for the purchase. As so often happens [Mr and Mrs Rosset] did not pursue their discussion to the extent of defining precisely what their respective interests in the property should be. It was settled that the property should be transferred into the name of [Mr Rosset] alone to achieve the provision of funds from Switzerland, but *in the period from August 1982 to the 23 November 1982 when the contracts were exchanged, [the parties] did not decide whether [Rosset] should have any interest in the property.* On one occasion [Mrs Rosset] heard [her husband] say to her parents that he had put the house in their joint names, but she knew that he could not do that and treated what he said as an expression of what he would like to do. In these circumstances I am satisfied that the outcome of the discussions between the parties as to the name into which the property should be transferred did not exclude the possibility that [Mrs Rosset] should have a beneficial interest in the property.'

I have emphasised the critical finding in this passage from the judgment.

Even if there had been the clearest oral agreement between Mr and Mrs Rosset that Mr Rosset was to hold the property in trust for them both as tenants in common, this would, of course, have been ineffective since a valid declaration of trust by way of gift of a beneficial interest in land is required by s 53(1) of the Law of Property Act 1925 to be in writing. But if Mrs Rosset had, as pleaded, altered her position in reliance on the agreement this could have given rise to an enforceable interest in her favour by way either of a constructive trust or of a proprietary estoppel.

Having rejected the contention that there had been any concluded agreement, arrangement or any common intention formed before contracts for the purchase of the property were exchanged on 23 November 1982 that Mrs Rosset should have any beneficial interest, the judge concentrated his attention on Mrs Rosset's activities in connection with the renovation works as a possible basis from which to infer such a common intention. He described what she did up to the date of completion as follows:

'Up to 17 December 1982 [Mrs Rosset's] contribution to the venture was: (1) to urge on the builders and to attempt to co-ordinate their work, until her husband insisted that he alone should give instructions; (2) to go to builders' merchants and obtain material required by the builders ... and to deliver the materials to the site. This was of some importance because Mr Griffin and his employees did not know the Thanet area; (3) to assist her husband in planning the renovation and decoration of the house. In this, she had some skill over and above that acquired by most housewives. She was a skilled painter and decorator who enjoyed wallpapering and decorating, and, as her husband acknowledged, she had good ideas about this work. In connection with this, she advised on the position of electric plugs and radiators and planned the design of the large breakfast room and the small kitchen of the house; (4) to carry out the wallpapering of Natasha's bedroom and her own bedroom, after preparing the surfaces of the walls and clearing up the rooms concerned before the papering began; (5) to begin the preparation of the surfaces of the walls of her son's bedroom, the den, the upstairs lavatory and the downstairs washroom for papering. All this wallpapering was completed after 17 December 1982 but by 31 December 1982 (6) to assist in arranging the insurance of the house by the Minster Insurance Co Ltd home cover policy, in force from 3 November 1982 (7) to assist in arranging a crime prevention survey on 23 November 1982 (8) to assist in arranging the installation of burglar alarms described in a specification dated 3 December 1982.'

Later the judge said:

'I am satisfied that in 1982 the common intention expressed by [Mr and Mrs Rosset] in conversation between themselves was that Vincent Farmhouse should be

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purchased in the name of [Mr Rosset] alone, because funds would not be made available from [his] family trust in Switzerland unless the purchase was made only in his name. In addition, however, it was their common intention that the renovation of the house should be a joint venture, after which the house was to become a family home to be shared by [the parties] and their children.'

I pause to observe that neither a common intention by spouses that a house is to be renovated as a 'joint venture' nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property.

Reverting to Mrs Rosset's activity in connection with the renovation of the property the judge said:

'It is plain that she made every effort to make the house fit for occupation before Christmas 1982 and spent all the time she could at Vincent Farmhouse in between taking Natasha to school and fetching her from school ... Obviously the extent of the work which [Mrs Rosset] did in preparation, clearing up before painting and decorating, and the painting and decorating itself, was valuable ... In the result, having considered (1) the semi-derelict condition of Vincent Farmhouse in November 1982, (2) the absence of [Mr Rosset] abroad for ten days in November and early December 1982, (3) [Mrs Rosset's] special skills in painting and decorating over and above those of the average housewife and her indirect contribution to reducing the cost of renovation of the farmhouse by carrying out certain painting and decorating herself, (4) the time she spent at the farmhouse from 4 November 1982 attempting to co-ordinate the work of the builders and her work in ordering and delivering materials to the site for the builders, and (5) the conversations between the parties concerning into whose name the property was to be transferred and the nature of the joint venture and the purpose of purchasing Vincent Farmhouse, I am satisfied that prior to 17 December 1982 there was a common intention between [Mr and Mrs Rosset] that [Mrs Rosset] should have a beneficial interest in the property under a constructive trust and that she did act to her detriment on the faith of such a common intention. Some, but not all, of her work at the farmhouse prior to 17 December 1982 falls into the category of work on which she could not reasonably have been expected to embark unless she was to have an interest in the house, namely the work to which she brought the special skills of painting and decorating and her work in ordering and delivering materials to the site for the builders in attempting to co-ordinate her work. These actions by [Mrs Rosset] must have reduced the cost of renovating the farmhouse and thus indirectly contributed to the acquisition of the property, albeit to a small extent.'

At the very end of his judgment the judge pointed out that he had made no finding as to the extent of Mrs Rosset's beneficial interest in the property. He indicated that he would hear counsel as to what directions should be given for the determination of this issue at a later date. He concluded his judgment with the sentence:

'An area which the court would wish to explore is the extent to which the qualifying conduct of [Mrs Rosset] reduced the cost of the renovation of the farmhouse and its buildings.'

It is clear from these passages in the judgment that the judge based his inference of a common intention that Mrs Rosset should have a beneficial interest in the property under a constructive trust essentially on what Mrs Rosset did in and about assisting in the renovation of the property between the beginning of November 1982 and the date of completion on 17 December 1982. Yet by itself this activity, it seems to me, could not possibly justify any such inference. It was common ground that Mrs Rosset was

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extremely anxious that the new matrimonial home should be ready for occupation before Christmas if possible. In these circumstances, it would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property. The judge's

view that some of this work was work 'on which she could not reasonably have been expected to embark unless she was to have an interest in the house' seems to me, with respect, quite untenable. The impression that the judge may have thought that the share of the equity to which he held Mrs Rosset to be entitled had been 'earned' by her work in connection with the renovation is emphasised by his reference in the concluding sentence of his judgment to the extent to which her 'qualifying contribution' reduced the cost of the renovation.

On any view the monetary value of Mrs Rosset's work expressed as a contribution to a property acquired at a cost exceeding £70,000 must have been so trifling as to be almost *de minimis*. I should myself have had considerable doubt whether Mrs Rosset's contribution to the work of renovation was sufficient to support a claim to a constructive trust in the absence of writing to satisfy the requirements of s 51 of the Law of Property Act 1925 even if her husband's intention to make a gift to her of half or any other share in the equity of the property had been clearly established or if he had clearly represented to her that that was what he intended. But here the conversations with her husband on which Mrs Rosset relied, all of which took place before November 1982, were incapable of lending support to the conclusion of a constructive trust in the light of the judge's finding that by that date there had been no decision that she was to have any interest in the property. The finding that the discussions 'did not exclude the possibility' that she should have an interest does not seem to me to add anything of significance.

These considerations lead me to the conclusion that the judge's finding that Mr Rosset held the property as constructive trustee for himself and his wife cannot be supported and it is on this short ground that I would allow the appeal. In the course of the argument your Lordships had the benefit of elaborate submissions as to the test to be applied to determine the circumstances in which the sole legal proprietor of a dwelling house can properly be held to have become a constructive trustee of a share in the beneficial interest in the house for the benefit of the partner with whom he or she has cohabited in the house as their shared home. Having in this case reached a conclusion on the facts which, although at variance with the views of the courts below, does not seem to depend on any nice legal distinction and with which, I understand, all your Lordships agree, I cannot help doubting whether it would contribute anything to the illumination of the law if I were to attempt an elaborate and exhaustive analysis of the relevant law to add to the many already to be found in the authorities to which our attention was directed in the course of the argument. I do, however, draw attention to one critical distinction which any judge required to resolve a dispute between former partners as to the beneficial interest in the home they formerly shared should always have in the forefront of his mind.

The first and fundamental question which must always be resolved 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, I think, 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

[1990] 1 All ER 1111 at 1119

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 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 each 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 justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.

The leading cases in your Lordships' House are *Pettitt v Pettitt* [1969] 2 All ER 385, [1970] AC 777 and *Gissing v Gissing* [1970] 2 All ER 780, [1971] AC 886. Both demonstrate situations in the second category to which I have referred and their Lordships discuss at great length the difficulties to which these situations give rise. The effect of these two decisions is very helpfully analysed in the judgment of Lord MacDermott LCJ in *MacFarlane v MacFarlane* [1972] NI 59.

Outstanding examples on the other hand of cases giving rise to situations in the first category are *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338 and *Grant v Edwards* [1986] 2 All ER 426, [1986] Ch 638. In both these cases, where the parties who had cohabited were unmarried, the female partner had been clearly led by the male partner to believe, when they set up home together, that the property would belong to them jointly. In *Eves v Eves* the male partner had told the female partner that the only reason why the property was to be acquired in his name alone was because she was under 21 and that, but for her age, he would have had the house put into their joint names. He admitted in evidence that this was simply an 'excuse'. Similarly, in *Grant v Edwards* the female partner was told by the male partner that the only reason for not acquiring the property in joint names was because she was involved in divorce proceedings and that, if the property were acquired jointly, this might operate to her prejudice in those proceedings. As Nourse LJ put it ([1986] 2 All ER 426 at 433, [1986] Ch 638 at 649):

'Just as in *Eves v Eves*, these facts appear to me to raise a clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house otherwise no excuse for not putting her name onto the title would have been needed.'

The subsequent conduct of the female partner in each of these cases, which the court rightly held sufficient to give rise to a constructive trust or proprietary estoppel supporting her claim to an interest in the property, fell far short of such conduct as would by itself have supported the claim in the absence of an express representation by the male partner that she was to have such an interest. It is significant to note that the share to which the female partners in *Eves v Eves* and *Grant v Edwards* were held entitled were one-quarter and one-half respectively. In no sense could these shares have been regarded as proportionate to what the judge in the instant case described as a 'qualifying contribution' in terms of the indirect contributions to the acquisition or enhancement of the value of the houses made by the female partners.

I cannot help thinking that the judge in the instant case would not have fallen into error if he had kept clearly in mind the distinction between the effect of evidence on the one hand which was capable of establishing an express agreement or an express representation that Mrs Rosset was to have an interest in the property and evidence on the other hand of conduct alone as a basis for an inference of the necessary common intention.

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If Mrs Rosset had become entitled to a beneficial interest in the property prior to completion it might have been necessary to examine a variant of the question regarding priorities which your Lordships have just considered in *Abbey National Building Society v Cann* [1990] 1 All ER 1085 and, subject to that question, to decide whether, as a matter of fact, she was in 'actual occupation' of the property on 17 December 1982. Since these questions have now become academic, I do not think any useful purpose would be served by going into them.

For the reasons I have indicated, I would allow the appeal, set aside the order of the Court of Appeal and, as between Mrs Rosset and the bank, restore the order of the trial judge.

LORD GRIFFITHS.

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge. I agree with it and, for the reasons he gives, I would allow the appeal.

LORD ACKNER.

My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge. I agree with it and would allow the appeal for the reasons which he has given.

LORD OLIVER OF AYLMEYTON.

My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge. I agree with it and would allow the appeal for the reasons which he has given.

LORD JAUNCEY OF TULLICHETTLE.

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it, and for the reasons which he has given I too would allow the appeal.

Appeal allowed.

Solicitors: Collyer-Bristow agents for Walmsley & Barnes, Cliftonville (for the bank); Gregory Rowcliffe & Milners agents for Daniel & Edwards, Ramsgate (for Mrs Rosset).

Mary Rose Plummer Barrister.

[1990] 1 All ER 1111 at 1121