

All England Official Transcripts (1997-2008)

## **Oxley v Hiscock**

*Trusts - Constructive trust - Claim to beneficial interest in property - Sale of property - Resulting trust - Fair division of proceeds of sale - Trusts of Land and Appointment of Trustees Act 1996, s 14.*

[2004] EWCA Civ 546, (Transcript: Smith Bernal)

### **COURT OF APPEAL (CIVIL DIVISION)**

**CHADWICK, MANCE, BAKER LJJ**

**6 MAY 2004**

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N Francis QC and C Wagstaffe for the Defendant/Appellant

D Smith for the Claimant/Respondent

The Parry Sharratt Partnership; Clarkson Wright & Jakes

### **CHADWICK LJ:**

[1] This is an appeal from an order made on 20 May 2003 by Her Honour Judge Hallon, sitting in the Bromley County Court, in proceedings brought under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 in relation to the proceeds of sale of property known as 35 Dickens Close, Hartley, Kent. The appeal requires the Court to revisit, once again, the familiar question how the proceeds of property in which an unmarried couple have been living as man and wife should be shared between them when the relationship come to an end.

### *THE UNDERLYING FACTS*

[2] The property at 35 Dickens Close was purchased in April 1991 in the name of the appellant, Mr Allan Hiscock. At that date Mr Hiscock and the respondent, Mrs Elayne Oxley, had known each other for some five or six years. For much of that time his employment had required Mr Hiscock to reside in Kuwait; but, when he was in England on leave, they had lived together at 39 Page Close, Bean, near Dartford. That was a house which Mrs Oxley had formerly occupied as a secure tenant but which she had acquired in September 1987 by the exercise of her rights under Part V of the Housing Act 1985.

[3] In August 1990 Kuwait was invaded by Iraqi troops. In October 1990, Mr Hiscock was captured, taken to Baghdad and held as hostage. He was released in December 1990. The judge found that 35 Dickens Close was purchased as a home for Mr Hiscock, Mrs Oxley and her children by a former marriage, following Mr Hiscock's return to England at the end of 1990.

**[4]** The purchase price for 35 Dickens Close was £127,000. The purchase was funded (i) by a building society advance of £30,000, (ii) by the net proceeds of sale of 39 Page Close (some £61,500) and (iii), as to the balance, £35,500 or thereabouts, by Mr Hiscock from his own savings.

**[5]** Given that part of the monies for the purchase of 35 Dickens Close were provided from the net proceeds of sale of 39 Page Close, it is necessary to have in mind the circumstances in which that property had been acquired by Mrs Oxley. For some years before she met Mr Hiscock she had been a secure tenant in local authority housing in Chatham. In May 1986, at the suggestion of Mr Hiscock, she exchanged her tenancy in Chatham for a tenancy of 39 Page Close, at Bean. In November 1986, again at the suggestion of Mr Hiscock, she exercised her right to buy under Part V of the Housing Act 1985. The open market value of 39 Page Close was assessed at £45,200. Under the 'right to buy' legislation she was entitled to a discount of £20,000; so her acquisition price, when she completed in September 1987, was £25,200. The whole of that sum was provided by Mr Hiscock, out of the proceeds of sale of the house in which he had been living, 49 Hurst Hill, Walderslade, Chatham. It is clear from the documents that he put that house on the market in November 1986, within seven days of Mrs Oxley exercising her right to buy. It is not, I think, in dispute that the two matters were linked; in that Mr Hiscock sold his own house in order to provide monies which would enable Mrs Oxley to take advantage of the favourable terms on which 39 Page Close could be acquired by the exercise of her "right to buy."

**[6]** On 31 July 1987 solicitors, Messrs Bassets, acting in the purchase of 39 Page Close, wrote to Mrs Oxley and Mr Hiscock in these terms:

". . . I note that the property [39 Page Close] is being purchased with the assistance of funds raised by Mr Hiscock and that the property will be purchased in the sole name of Mrs Oxley. It is therefore important to safeguard Mr Hiscock's interests in the property by either evidencing the monies paid by Mr Hiscock for the purchase of the property by means of a mortgage from Mr Hiscock to Mrs Oxley or by some contract between the two parties creating an indemnity or option to Mr Hiscock in respect of an interest in the property.

I am of opinion that a simple mortgage by Mr Hiscock to Mrs Oxley would suffice. Mr Hiscock's capital is then protected and after the three year period, the property can be transferred into joint names and the mortgage declared redeemed."

The reference, there, to "the three year period" is, I think, to the period within which a tenant who had acquired property by the exercise of a "right to buy" could be required, on a subsequent disposal, to repay part of the discount allowed on purchase - see s 155 of the 1985 Act as amended by s 2(3) of the Housing and Planning Act 1986.

**[7]** For whatever reason - perhaps because the relevant period had not expired - the property at 39 Page Close was never transferred into joint names. It remained in Mrs Oxley's name, but subject to a charge to secure the monies provided by Mr Hiscock (£25,200) with interest at five per cent per annum payable half yearly. We have been shown a copy of that charge, which was registered at HM Land Registry. There is no evidence that any interest was, or was not, paid. The probability is that the parties never thought about it.

**[8]** When 39 Page Close was sold, in April 1991, the solicitors acting in the sale, Messrs Wright & Moxham, wrote to Mr Hiscock:

"You have a legal charge registered against 39 Page Close. Please let me know the amount which you will require from us on behalf of Mrs Oxley in order to release your charge from the property (*sic*)."

Mr Hiscock replied, on 18 April 1991:

"Regarding the legal charge on 39 Page Close, please note I require no monies from Mrs Oxley . . ."

The effect, ignoring any liability of Mrs Oxley to interest under the charge, was that out of the proceeds of sale of 39 Page Close, Bean, - some £61,500, as I have said - Mr Hiscock contributed £25,200 to the purchase of 35 Dickens Close and Mrs Oxley contributed the balance, £36,300. So the balance of the monies needed to purchase 35 Dickens Close after borrowing £30,000 from the building society (£127,000 - £30,000 = £97,000) were provided as to £36,300 by Mrs Oxley and as to £60,700 (being £25,200 + £35,500) by Mr Hiscock. The figures are not, of course, precise: they ignore interest (if any) due under the charge, the sale costs of 39 Page Close and the purchase costs of 35 Dickens Close. But they are indicative of the substantial contributions made by both Mr Hiscock and Mrs Oxley to the purchase.

**[9]** The solicitors acting in the sale of 39 Page Close were also acting in the purchase of 35 Dickens Close. They were concerned - and properly concerned - as to the basis upon which Mrs Oxley was contributing to the purchase monies. In March 1991 they had enquired whether the purchase was to be in joint names. Mrs Oxley had replied, on 2 April 1991, that she would not be a joint purchaser of 35 Dickens Close. On 18 April 1991 the solicitor dealing with the sale and purchase wrote to her in these terms:

"Please let me know if you are making any funds available to Mr Hiscock on his purchase of 35 Dickens Close. If so you should let me know if you wish to secure those funds by way of a second mortgage on the property or if you require a Trust Deed to provide for the property to be held on trust, partly for yourself so as to reflect your investment."

Mrs Oxley's reply, on 21 April 1991 was that:

"As we discussed previously, the funds from the sale of 39 Page Close will go towards purchasing 35 Dickens Close, with Mr Hiscock providing the remainder."

The solicitor tried again. On 22 April 1991, in a letter which bears the date 22 October 1991, he wrote:

"It is essential for me to have your written instructions as to how you wish me to deal with the proceeds of sale [of 39 Page Close]. I think you wish me to apply the whole of this sum towards the purchase of 35 Dickens Close by Mr Hiscock. If that is correct then I must have your very clear instructions in writing. You must also give very serious consideration as to whether you do wish to invest all of your net sale proceeds in the purchase of 35 Dickens Close which will be in the sole name of Mr Hiscock.

If any dispute should then arise between yourself and Mr Hiscock in the future then you will have difficulty in establishing any claim in respect of 35 Dickens Close or any claim for a refund of the investment which you have made in that property.

My advice must be that you should be a joint purchaser of 35 Dickens Close or that you should at least require Mr Hiscock to enter into a Trust deed to confirm that the property will be held by him on trust for both of you and such deed should also set out the respective shares to which you will each be entitled. Alternatively you could require a second mortgage to be entered in your favour against 35 Dickens Close. "

Mrs Oxley replied in a letter dated 23 April 1991:

"I . . . confirm that I wish all the proceeds from the sale of 39 Page Close, Bean to be put towards the purchase of 35 Dickens Close by Mr A Hiscock.

Your comments on any claim I might have to 35 Dickens Close have been noted, and I appreciate your concern.

However, I am quite satisfied with the present arrangements, and feel I know Mr Hiscock well enough not to need

written legal protection in this matter."

**[10]** The parties lived at 35 Dickens Close between April 1991 and the beginning of 2001. By the end of that period (if not before) the mortgage debt had been repaid. Mr Hiscock had taken early retirement in October 1999; and it seems clear that, for him at least, the relationship between them had run its course. It was decided to put 35 Dickens Close on the market; and to purchase two other properties. 35 Dickens Close was sold in March 2001 at a price of £232,000. A property in Chatham, 34 Beacon Hill, was purchased by Mrs Oxley at a price of £73,000, of which £40,000 was funded by a mortgage advance. The balance of the purchase monies were provided by Mr Hiscock in part satisfaction of Mrs Oxley's interest in 35 Dickens Close. Mr Hiscock purchased for himself a property in Whitstable, 39 Grassmere Road, at a price of £122,000. He has paid a further £5,000 to Mrs Oxley, and (it is said) has paid an amount of £3,200 in respect of renovations to 34 Beacon Hill; but he has retained the balance of the proceeds of sale of 35 Dickens Close. In these proceedings he has accepted that there is a small part of that balance - amounting to £1,000 or thereabouts - which remains due to her.

### THESE PROCEEDINGS

**[11]** These proceedings were commenced by the issue of a claim form in November 2002. The relief sought, under s 14 of the 1996 Act, was a declaration that the proceeds of sale of 35 Dickens Road were held by Mr Hiscock upon trust for himself and Mrs Oxley, in equal shares; alternatively, in such shares as the court should determine. In the present context, the critical allegations in the particulars of claim are these:

"4. In February 1988 the Defendant asked the Claimant to marry him. The Defendant thereafter learnt that there would be fiscal disadvantages to marriage and persuaded the Claimant that they should remain unmarried. As a consequence the parties remained unmarried: their intention was to live together, subject to the Claimant's work commitments, and to pool their financial and other resources as would a married couple. *It was their joint intention that the beneficial interest in any property, real or otherwise, would be shared by them jointly.*

...

8. [In April 1991] [t]he second property [35 Dickens Close] was conveyed into the sole name of the Defendant. The registration into the Defendant's sole name [was] at his insistence and was stated by him to be in order to defeat any claim that the Claimant's former husband might have against the second property. *It was expressly the joint intention of the Claimant and the Defendant at the time of the purchase of the second property that they should share the beneficial ownership of that property equally"*

[emphasis added]

**[12]** By his defence Mr Hiscock denied the joint or common intention alleged in paras 4 and 8 of the particulars of claim. Paragraph 8 of the defence is unequivocal:

". . . The Defendant specifically denies that there were discussions between the parties relating to the possibility of claims by the claimant's first husband. It is specifically denied that it was ever agreed, arranged or understood between the Claimant and Defendant that they would share the property equally beneficially."

**[13]** The action came before Her Honour Judge Hallon in May 2003. She heard evidence from both Mr Hiscock and Mrs Oxley; and she made it clear that, where their evidence differed, she preferred the evidence of Mrs Oxley. In particular, the judge preferred her evidence as to the reason why 35 Dickens Road was registered in the sole name of Mr Hiscock. At para 23 of her judgment the judge said this:

"I find that in relation to the purchase of the Hartley property and the conveyance of it into the defendant's sole name,

despite the advice of the solicitors to the claimant, that that happened because of the discussion which had taken place between the defendant and the claimant in which the defendant raised the possibility of the claimant's former husband making a claim in the event of her death against her share of the Hartley property if it was in part in her name, and that therefore the conveyance into his name, with the claimant's agreement, was on the basis that she trusted the defendant that, despite what was shown on the face of the conveyance, that in no way actually altered the reality of the situation and their sharing of the property."

**[14]** A transfer of the property into the sole name of Mr Hiscock: (i) would not, of itself, alter the beneficial interests in the property to which (in the absence of agreement, arrangement or common intention) the parties were entitled by reason of their respective contributions to the purchase price; (ii) would not affect Mrs Oxley's right to a beneficial joint share (or a beneficial equal share) in the proceeds of sale, if that is what the parties had agreed or intended that she should have; and (iii) would not defeat any claim by Mrs Oxley's former husband in the event of her death to whatever interest in the property she did have unless (which was not alleged) the purpose of transferring the property into the sole name of Mr Hiscock was to enable him (falsely) to deny the existence of that interest. The relevance of the judge's finding, as it seems to me, is not that, in the context of a possible claim by Mrs Oxley's former husband, the property was transferred into the sole name of Mr Hiscock so that it would not appear on the face of the register that Mrs Oxley was likely to have some beneficial interest in it; nor that the fact that the property was transferred into the sole name of Mr Hiscock "in no way actually altered the reality of the situation". Neither party had suggested that it did. The true relevance is that her finding that there was a discussion between the parties as to whose name should appear on the registered title in the context of a possible claim by Mrs Oxley's former husband is only explicable on the basis that they both intended - and expressed that intention to the other - that each should have a beneficial share in the property. It is that feature which, to my mind, provides the foundation for Mrs Oxley's claim in constructive trust or proprietary estoppel; and which distinguishes that claim from one founded on resulting trust alone.

**[15]** Nevertheless, it is significant that the judge did not go on to find that, as alleged in para 8 of the particulars of claim, "it was *expressly* the joint intention of the Claimant and the Defendant at the time of the purchase of the second property that they should share the beneficial ownership of that property *equally*". The reason, perhaps, why the judge made no finding that there was some expression of agreement in April 1991 as to the shares in which 35 Dickens Close should be held was that there was no evidence to support such a finding. None has been shown to this Court. The effect of the judge's findings, as it seems to me, is that that Mr Hiscock and Mrs Oxley were in agreement, before the acquisition of 35 Dickens Close, that the property would be shared; but that there was no express agreement as to what their respective shares should be.

**[16]** The view which the judge took as to the applicable principle of law made it unnecessary for her to make a finding that there had been any expression of agreement as to the extent of the respective shares. After referring to the decision of this Court in *Springette v Defoe* [1992] 2 FLR 388, [1992] 2 FCR 561, the judge held that, notwithstanding that decision, she should follow observations of Waite LJ in *Midland Bank v Cooke and another* [1995] 4 All ER 562, [1995] 2 FLR 915. Waite LJ had said this (*ibid*, 928D):

"I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one"

In the light of that passage, the judge directed herself (at para 17 of her judgment) that:

"It could not be clearer therefore that the proper approach of a court to a dispute of this nature is that when there is no express agreement between the parties the court must look to the whole course of dealings to infer what the agreement between those parties was."

**[17]** The judge gave effect to her understanding of the correct approach in para 26 of her judgment, where she said this:

"I find that the transfer of the tenancy from Chatham to Bean was the beginning of putting into effect a long term plan. That is not simply to live together, but to acquire a property through purchase with the advantageous discount available to a council tenant, with a view subsequently to moving on to better accommodation. Each made substantial contributions to the purchase of the Bean property, and it is clear that the long term plan had been for selling and upgrading, because the sale of Bean and the purchase of Hartley happened very, very soon after the defendant's return from Kuwait; in other words, at a time when the family would in the future be living on a permanent basis all together. Thus, Hartley was as much a joint property as Bean had been, although, perhaps quirkily in this case, the first property had been conveyed into the claimant's sole name, and the second property conveyed into the defendant's sole name. There were reasons for each of those: the first, because the property could only be conveyed to the claimant; the second, because of the discussions that had taken place between the defendant and the claimant, and the concern about the claimant's former husband. But it does not alter the position that, in relation to both of those properties, they were regarded as these two people's home, and indeed each was asked in the course of oral evidence if they had been questioned back at the time what would they have said, for instance, regarding the property, and each gave evidence, "Well, I would have said it was our home."

**[18]** I have no doubt that the judge was right to take the view that each of the parties regarded, first, 39 Page Close, and, latterly, 35 Dickens Close, as their home. It was to 39 Page Close that Mr Hiscock returned when on leave from Iraq; and 35 Dickens Close was the house in which they lived as a family, with Mrs Oxley's children. But I think she was plainly wrong if she thought that 39 Page Close, Bean, was joint property. The true position in relation to that property was that it belonged beneficially to Mrs Oxley, subject to a charge to secure the monies advanced by Mr Hiscock at the time of the purchase. That is what the parties had agreed.

**[19]** Nevertheless, whether or not the judge was right as to the beneficial ownership of 39 Page Close, she was in no doubt as to the position as 35 Dickens Close. At para 27 of her judgment she said this:

"In continuing with the long term plan, and in keeping with the belief that each clearly had at the time that Hartley was purchased, that it was their joint home, the claimant worked almost continuously; the defendant also worked. The defendant made improvements to the property; the claimant helped him. The claimant also decorated substantial parts of the property, and she did the gardening. Each contributed towards the total outgoings. The description given by the claimant, whose evidence I accept, shows that this was a classic pooling of resources, even though there was no joint bank account. . . . All of the evidence which I have heard clearly shows that both were evincing an intention to share the benefit and the burden of this property [35 Dickens Close] jointly and equally."

She expressed her conclusion at para 31 of her judgment:

". . . from the analysis of the law and the facts in this case, it is clear that the order which the claimant sought in her notice of application is the only one that can properly be made, namely to declare that the claimant is equally entitled, with the defendant, to a half share in the proceeds of sale of the Hartley property ..."

The effect was that a further sum was payable to her out of the proceeds of sale of 35 Dickens Close - representing the difference between the amount which Mr Hiscock had paid towards the purchase of her new property, 34 Beacon Hill, Chatham, and the one half share of 35 Dickens Close to which she was held to be entitled. That sum was quantified, in the order of 20 May 2003, at £72,056.

**[20]** The judge refused permission to appeal from her order. Mr Hiscock obtained permission to appeal from this Court (Jonathan Parker LJ) on 5 December 2003.

*THIS APPEAL*

**[21]** The principal ground of appeal is that the judge misdirected herself in law in refusing to follow the decision of this Court in *Springette v Defoe* [1992] 2 FLR 388. The basis of that decision is accurately summarised in the headnote to the report:

"If two or more persons purchased property in their joint names and there was no declaration of trusts on which they were to hold the property, they held the property on a resulting trust for the persons who provided the purchase money in the proportions in which they provided it, unless there was sufficient specific evidence of their common intention that they should be entitled in other proportions, that common intention being a shared intention communicated between them and made manifest at the time of the transaction itself."

It was said that, in the present case as in *Springette v Defoe*, it was clear, notwithstanding any subjective intention each might have had, that there had been no discussion between the parties as to the extent of their respective beneficial interests at the time of the purchase of 35 Dickens Close. So it must follow that the presumption of resulting trust was not displaced and the property was held for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to their contributions.

**[22]** That, it was said, led to the conclusion that Mrs Oxley's share of the proceeds of sale of 35 Dickens Close was 22% or thereabouts - the proportion which her contribution to the purchase of that property (put by the appellant at £31,699, after deducting the costs of sale and interest on the £25,200 advanced from the proceeds of sale of 39 Page Close) bore to the whole of the acquisition cost (put by the appellant at £141,260, after adding the costs of purchase and improvements).

**[23]** There is obvious scope for debate about the figures. The appellant's approach treats Mr Hiscock as having contributed the whole of the monies (£30,000) advanced by the building society - no doubt on the basis that, as the person in whose sole name the property was registered, he was solely responsible for the mortgage debt. But there was no evidence as to how, in fact, the mortgage debt was discharged; and it is (at the least) arguable that, on the judge's findings, the parties should be treated as having contributed equally to the payment off of that debt. But, making all assumptions in Mrs Oxley's favour, the amount of her share (based on financial contributions) could not exceed 40% - (£36,300 + ½ £30,000) / £127,000.

**[24]** The first question on this appeal, therefore, is whether the judge was required, by the decision of this Court in *Springette v Defoe*, to find that, in the absence of some "shared intention [as to the proportions in which they should be entitled] communicated between them and made manifest at the time of the transaction itself", the property was held upon a resulting trust for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to the respective financial contributions which they had made to the acquisition cost. Or was the judge entitled and required - as she plainly thought - to follow the approach adopted by this Court in *Midland Bank v Cooke*.

#### *THE LAW AS UNDERSTOOD BEFORE MIDLAND BANK V COOKE*

**[25]** It is important to have in mind the underlying requirement, imposed by s 53(1) of the Law of Property Act 1925, (a) that no interest in land can be created orally and (b) that no declaration of trust respecting land can have effect if made orally. But s 53(2) excludes from that requirement "the creation or operation of resulting, implied or constructive trusts". It is the requirement in s 53(1) of the 1925 Act - and the saving provision in s 53(2) - which has led to the need, in a case where one former co-habitee asserts against the other (in whose sole name the property is registered) a beneficial interest arising out of some informal arrangement or understanding (not evidenced in writing) or from subsequent conduct, to establish the existence of a constructive trust; or else to rely on a resulting trust arising from contributions.

**[26]** The judge described *Springette v Defoe* (*supra*) as an "unusual case" which "quite clearly does not fit

happily into the reported authorities which have developed this area of the law quite considerably from the early days". By "the early days" in that context, she meant, I think, the late 1960's - shortly before the change in the law relating to matrimonial property introduced by the Matrimonial Proceedings and Property Act 1970. When referring to "the reported authorities which have developed this area of the law" she must have had in mind the decisions of this Court and in the House of Lords between, say, 1985 and 1995 - when *Midland Bank v Cooke* (*supra*) was decided.

**[27]** Leaving aside, for the moment, the two decisions of the House of Lords in the late 1960's, *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385 and *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, the approach of this Court during that period is exemplified by the judgments in *Walker v Hall* [1984] FLR 126, [1984] Fam Law 21. In that case *Lawton LJ* set out his understanding of the position in these terms (*ibid*, 135F-136C):

"During the past two decades the courts have had to consider on a number of occasions the division of property between men and women living together without being married. Ever since the Matrimonial Proceedings and Property Act 1970, which has been replaced by the Matrimonial Causes Act 1973, the courts have been able to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. No such jurisdiction exists when the cohabittees are unmarried. When such a relationship comes to an end, just as with many divorced couples, there are likely to be disputes about the distribution of shared property. How are such disputes to be decided? They cannot be decided in the same way as similar disputes are decided when there has been a divorce. The courts have no jurisdiction to do so. They have to be decided in accordance with the law relating to property: see *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.

There is no special law relating to property shared by cohabittees any more than there is any special law relating to property used in common by partners or members of a club. The principles of law to be applied are clear, though sometimes their application to particular facts are difficult. In circumstances such as arose in this case the appropriate law is that of resulting trusts. If there is a resulting trust (and there was one in this case) the beneficiaries acquire by operation of law interests in the trust property. An interest in property which is the consequence of a legal process must be identifiable. It must be more than expectations which at some later date require to be valued by a court. . . ."

*Dillon LJ*, also, rejected the suggestion that, in the absence of evidence as to contrary intention, the court could depart from the shares in which the parties had contributed to the purchase price. At page 133B-D he said this:

"Accordingly, it is not open to this court, in my judgment, in the absence of specific evidence of the parties' intention, to hold that 33 Foxberry Road belongs beneficially to Mr Hall and Mrs Walker in equal shares, notwithstanding their unequal contributions to the purchase price, simply because it was bought to be their family home and they intended that their relationship should last for life. Equally it is not open to this court to 'top up' Mrs Walker's share, beyond what it would be on the mere basis of her financial contribution, on some broad notion of what would be fair simply because the house was bought as the family home; the court could no doubt do this in an appropriate case in proceedings under s.24 of the 1973 Act but the discretion under that section is not available in the present case."

*Kerr LJ* agreed with both judgments.

**[28]** Some four years later, in *Turton v Turton* [1988] Ch 542, [1987] 2 All ER 641, this Court reaffirmed the principle that the beneficial interests had to be ascertained from consideration of the intentions of the parties at the time of the purchase; they were not to be left for determination in the light of subsequent events. *Nourse LJ*, after referring to the passages in the judgments in *Walker v Hall* which I have just set out, said this ([1988] Ch 542, 552C-D):

"It is thus made clear that *Dillon* and *Lawton LJ* were of the opinion that a beneficial interest acquired under an application of the principles stated in *Gissing v Gissing* can only be an absolute and indefeasible interest. It cannot be one which is liable to determine or to be defeated or diminished - either automatically or by the exercise of some discretion - on the happening of some future event, for example the separation of an unmarried couple who were living together at the time of its acquisition. The validity of that proposition is in my judgment beyond doubt.

It must always be remembered that the basis on which the court proceeds is a common intention, usually to be inferred from the conduct of the parties, that the claimant is to have a beneficial interest in the house. In the common case where the intention can be inferred only from the respective contributions, either initial or under a mortgage, to the cost of its acquisition it is held that the house belongs to the parties beneficially in proportions corresponding to those contributions. . . ."

Kerr LJ agreed, (*ibid*, 554G-555D):

". . . once the court had found the existence of a constructive or implied trust whereby the beneficial rights to the property belonged to the parties in whatever shares the court determined, then the necessary consequence was the recognition by the court of rights which are proprietary in their nature and which lie wholly outside the exercise of any discretionary powers. That was made clear, inter alia, in *Gissing v Gissing* [1971] AC 886."

Nevertheless, there is in those judgments some recognition of the possibility that a common intention at the time of purchase, sufficient to give rise to a constructive trust, might be inferred from conduct other than the making of financial contributions. But, in that case, the need to find a common intention from conduct did not arise: the conveyance contained an express declaration that the property was held for the parties as beneficial joint tenants.

[29] *Turton v Turton* (*supra*) was heard in January 1987; judgments were delivered in March of that year. Some twelve months earlier this Court (Sir Nicolas Browne-Wilkinson, Vice-Chancellor, Mustill LJ and Nourse LJ) had decided *Grant v Edwards and another* [1986] Ch 638, [1986] 2 All ER 426. *Grant v Edwards* - which, for reasons which I shall explain, may be seen as a turning point in this area of the law - was not cited in *Turton v Turton*.; and it would not be surprising (given that the conveyance in *Turton* contained an express declaration of trust) if Nourse LJ (who was a member of both constitutions) took the view that there was nothing in the earlier case which bore upon the point for decision in the later. Be that as it may, some three and a half years later, in a passage to which I will need to refer from his judgment in *Stokes v Anderson* [1991] 1 FLR 391, [1991] FCR 539, the same judge addressed the potential impact of *Grant v Edwards* on what may be described as the then accepted view of the law in this area. But, first, I should turn to the judgments in *Grant v Edwards*.

[30] *Grant v Edwards* [1986] Ch 638 was a case in which the plaintiff had made no contribution to the purchase price of the house in which she lived with the defendant as husband and wife. The house was purchased in the names of the defendant and his brother. There was, therefore, no room for the application of principles based on resulting trust - as exemplified in *Walker v Hall* (*supra*). Nevertheless, she was able to succeed in establishing a beneficial interest equal to a one half share on the basis of constructive trust or (*per* Sir Nicolas Browne-Wilkinson, Vice-Chancellor) proprietary estoppel.

[31] The analysis by way of constructive trust can be seen clearly in the judgment of Nourse LJ in *Grant v Edwards*, at [1986] Ch 638, 646H-647D:

" In order to decide whether the plaintiff has a beneficial interest in 96 Hewitt Road we must climb again the familiar ground which slopes down from the twin peaks of *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886. In a case such as the present, where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it.

In most of these cases the fundamental, and invariably the most difficult, question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house: see *Burns v Burns* [1984] Ch 317, at pp. 328H to 329C, *per* Fox LJ. If it is found to have been incurred, such expenditure will perform the two-fold function of establishing the common intention

and showing that the claimant has acted upon it.

There is another and rarer class of case, of which the present may be one, where, although there has been no writing, the parties have orally declared themselves in such a way as to their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to acting upon it by the claimant. And although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so."

Nourse LJ was satisfied that the facts in that case were such as "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; . . ." (*ibid*, 649B); and was satisfied, also, that she "did act to her detriment on the faith of the common intention between her and the defendant that she was to have some sort of proprietary interest in the house" (*ibid*, 650C). Mustill LJ agreed with that analysis - (*ibid*, 654B).

**[32]** Sir Nicolas Browne-Wilkinson, Vice-Chancellor, took the opportunity to restate the principles which had been laid down in the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886. He said this, at [1986] Ch 638, 654C-655B):

"In my judgment, there has been a tendency over the years to distort the principles as laid down in the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886 by concentrating on only part of his reasoning. For present purposes, his speech can be treated as falling into three sections: the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right.

1. *The nature of the substantive right: [1971] AC 886, 905B-G*

If the legal estate in the joint home is vested in only one of the parties ('the legal owner') the other party ('the claimant'), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; and (b) that the claimant has acted to his or her detriment on the basis of that common intention.

2. *The proof of the common intention*

(a) Direct evidence (p 905H). It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention: see pp 907C and p 908C.

(b) Inferred common intention (pp.906A-908D). Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention, viz. contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.

3. *The quantification of the right (pp 908D-909)*

Once it has been established that the parties had a common intention that both should have a beneficial interest *and* that the claimant has acted to his detriment, the question may still remain 'what is the extent of the claimant's beneficial interest?' This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important."

**[33]** The Vice-Chancellor pointed out (*ibid*, 655B-C) that, if his analysis were correct, it led to the conclusion

that contributions made by a claimant who was not named on the title might be relevant both as evidence from which an intention that the claimant was to have some beneficial interest in the property could be inferred and "to quantify the extent of that beneficial interest". It is in that latter context that what he described as "this last section of Lord Diplock's speech [pp 908D-909]" is of particular relevance. It is convenient, therefore to set out the passage which the Vice-Chancellor had in mind. Lord Diplock had said this ([1971] AC 886, 908D-E, 908F-G, 909E):

"Where in any of the circumstances described above contributions, direct or indirect, have been made to the mortgage instalments by the spouse into whose name the matrimonial home has not been conveyed, and the court can infer from their conduct a common intention that the contributing spouse should be entitled to some beneficial interest in the matrimonial home, what effect is to be given to that intention if there is no evidence that they in fact reached any express agreement as to what the respective share of each spouse should be?"

...

"In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. . ."

...

" . . . If the contribution of the wife in the early part of the period of repayment [of a building society mortgage] is substantial but is not an identifiable and uniform proportion of each instalment, because her contributions are indirect or, if direct, are made irregularly, it may well be a reasonable inference that their common intention at the time of acquisition of the matrimonial home was that the beneficial interest should be held by them in equal shares and that each should contribute to the cost of its acquisition whatever amounts each could afford in the varying exigencies of family life to be expected during the period of repayment. In the social conditions of today this would be a natural enough common intention of a young couple who were both earning when the house was acquired but who contemplated having children whose birth and rearing in their infancy would necessarily affect the future earning capacity of the wife.

The relative size of their respective contributions to the instalments in the early part of the period of repayment, or later if a subsequent reduction in the wife's contributions is not to be accounted for by a reduction in her earnings due to motherhood or some other cause from which the husband benefits as well, may make it a more probable inference that the wife's share in the beneficial interest was intended to be in some proportion other than one half. And there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect which each spouse had made by that date. *Where this was the most likely inference from their conduct it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share.* [emphasis added]

**[34]** In *Grant v Edwards* the Vice-Chancellor held ([1986] Ch 638, 655G-H, 656E-F) that there was ample evidence to establish a common intention that the claimant was to have a beneficial interest in the house; and that, by making payments which, directly or indirectly, had been used to discharge the mortgage instalments, "the plaintiff has acted to her detriment in reliance on the common intention that she had a beneficial interest in the house and accordingly that she has established such beneficial interest. In a passage which is of importance in the present context, he went on to consider the extent of that interest (*ibid*, 657G-658B):

"What then is the extent of the plaintiff's interest? It is clear from *Gissing v Gissing* (above) that, once the common intention and the actions to the claimant's detriment have been proved from direct or other evidence, in fixing the quantum of the claimant's beneficial interest the court can take into account indirect contributions by the plaintiff such as the plaintiff's contributions to joint household accounts: see *Gissing v Gissing* at p. 909A and D-E. In my judgment, the passage in Lord Diplock's speech at pp.909G-910A is dealing with a case where there is no evidence of the common intention other than contributions to joint expenditure: in such a case there is insufficient evidence to prove any beneficial interest and the question of the extent of that interest cannot arise.

Where, as in this case, the existence of some beneficial interest in the claimant has been shown, prima facie the interest of the claimant will be that which the parties intended: *Gissing v Gissing* at p 908G. In *Eves v Eves*, Brightman J (at p 775A) plainly felt that a common intention that there should be a joint interest pointed to the beneficial interest being equal. However he felt able to find a lesser beneficial interest in that case without explaining the legal basis on which he did so. With diffidence, I suggest that the law of proprietary estoppel may again provide useful guidance. If proprietary estoppel is established, the court gives effect to it by giving effect to the common intention so far as may fairly be done between the parties. For that purpose, equity is displayed at its most flexible: see *Crabb v Arun District Council* [1976] Ch 179. Identifiable contributions to the purchase of the house will of course be an important factor in many cases. But in other cases, contributions by way of the labour or other unquantifiable actions of the claimant will also be relevant.

Taking into account the fact that the house was intended to be the joint property, the contributions to the common expenditure and the payment of the fire insurance moneys into the joint account, I agree that the plaintiff is entitled to a half interest in the house."

**[35]** The suggestion, in that passage of the Vice-Chancellor's judgment, that "proprietary estoppel may *again* provide useful guidance" is a reference back to an earlier passage (*ibid*, 656G-H) in which he had said this:

"I suggest that in other cases of this kind, useful guidance may in the 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* (above). In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both the claimant must have acted to his detriment in reliance on such belief. In both equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilization between them: but they rest on the same foundations and have on all other matters reached the same conclusions."

Nevertheless, he made it clear that the possible analogy with proprietary estoppel had not been fully argued; and that he decided the case on the narrower ground of common intention coupled with acts of detriment in reliance with such intention.

**[36]** As I have said, *Grant v Edwards* (*supra*) was decided in March 1986. Some four years later it was referred to by Lord Bridge of Harwich, with obvious approval, in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111. In a passage (*ibid*, 132E-133C) on which the appellant relies strongly Lord Bridge drew attention "to one critical distinction which any judge required to resolve a dispute between former partners as to the beneficial interest in the home which they formerly shared should always have in the forefront of his mind." The distinction is between (i) those cases in which, prior to the acquisition, there has been some agreement, arrangement or understanding reached between the parties that each is to have a beneficial share in the property and (ii) those cases in which there has been no such agreement, arrangement or understanding prior to the acquisition. Lord Bridge described *Grant v Edwards* as an example of a case within the first of those categories. He said this, (*ibid*, 133B-H):

"The leading cases in Your Lordships' House are *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [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 *McFarlane v McFarlane* [1972] NI 59.

Outstanding examples on the other hand of cases giving rise to situations in the first category are *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch 638. In both those cases, where parties who had cohabited were unmarried, the female partner had been clearly led 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 in 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, at p 649:

'Just as in *Eves v Eves* [1975] 1 WLR 1338, 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 on to 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."

**[37]** In the first paragraph of the passage which I have just set out Lord Bridge described *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886 as cases within the second of his two categories; that is to say, as cases in which there had been no agreement, arrangement or understanding, prior to the acquisition, that the parties would share the property beneficially. It is important to keep in mind that the relevant distinction in Lord Bridge's categorisation is between cases in which there has been some prior agreement, arrangement or understanding that each of the parties would have some beneficial share in the property and cases in which there had been no such prior agreement arrangement or understanding. For a case to fall within the first of Lord Bridge's two categories it is not necessary that the prior agreement extends to defining the extent of the respective shares - as his inclusion in that category of *Eves v Eves* and *Grant v Edwards* makes clear.

**[38]** Lord Bridge, in *Lloyds Bank Plc v Rosset* (*supra*), refers with approval to the analysis of *Pettitt v Pettitt* and *Gissing v Gissing* which is found in the judgment of Lord MacDermott, Lord Chief Justice of Northern Ireland, in *McFarlane v McFarlane* [1972] NI 59. It is unnecessary, therefore, to attempt any further analysis of those decisions in this judgment. I can adopt, with gratitude, the analysis which has been approved, subsequently, in the House of Lords in *Rosset*. In *McFarlane*, after observing that the facts in *Pettitt* and *Gissing* "were not such as to facilitate or encourage a comprehensive statement of this vexed branch of the law" - and that "much remains unsettled" - Lord MacDermott had said this (*ibid*, 66-67):

"But two points were put beyond question. The 'family assets' doctrine was definitely rejected. See *Pettitt* per Lord Reid at p 797, per Lord Hodson at p 810 and per Lord Upjohn at p 817. And, secondly, section 17 of the Act of 1882 was held only to be a procedural provision which did not empower the court to alter the existing rights of the parties. See per Lord Reid at p 793, per Lord Morris of Borth-y-Gest at pp 798-799, per Lord Hodson at p 808, per Lord Upjohn at p 813 and per Lord Diplock at p 820.

These decisions, as I understand them, have also established or affirmed two rather less negative propositions of law to which I must now refer. The first is that, in the absence of proof to the contrary, a spouse who acquired the legal title to property purchased with the aid of a substantial monetary contribution from the other spouse will hold the property subject to a beneficial interest therein belonging to the other spouse; see *Pettitt*, per Lord Reid at page 749B, per Lord Hodson at p 810G, per Lord Upjohn at p 815 G-H; and *Gissing* per Lord Pearson at p 264G-265B. This may be the result of some binding agreement between the spouses; but more usually it will flow from a resulting trust in favour of the contributing spouse who has not the legal title. The extent of the beneficial interests will depend on the circumstances. They will not necessarily be equal, but may be held so where that conclusion accords with the broad merits of the respective claims or with what is fair and reasonable when there is some difficulty or uncertainty in assessing the contributions: see *Rimmer v Rimmer* [1953] 1 QB 63.

The second proposition which I take to be now accepted in *Pettitt* and *Gissing* must be stated in a qualified form. It is that in certain circumstances the first proposition can also apply in favour of the spouse without the legal title where that spouse has contributed to the purchase, not directly by finding a part of the price, but indirectly and in a manner which has added to the resources out of which the property has been acquired as, for example, by work done or services rendered or by relieving the other spouse of some, at any rate, of his or her financial obligations.

It can be seen that Lord McDermott recognised that where property purchased in the name of one party with the aid of a substantial monetary contribution from the other party was held upon trust - so as to give effect to the beneficial interest of that other party - the extent of the respective beneficial interests would not necessarily either (i) be proportionate to the respective contributions or (ii) be equal. The extent of the beneficial interests will depend on the circumstances. But they may be held to be equal where that accords with the broad merits of the respective claims.

**[39]** With that analysis of the effect of *Pettitt v Pettitt* and *Gissing v Gissing*, and Lord Bridge's own observations as to the reasoning in *Grant v Edwards*, in mind, I return to the passage in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 132E-133C, on which the appellant relies:

"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 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 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 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."

**[40]** The appellant seeks support in that passage for two propositions: (i) that cases in the first class are confined to those in which there is evidence of discussions between the parties directed not only to the question whether each should have some beneficial interest in the property but also, expressly, to the extent of their respective interests and (ii) that, in cases which do not fall within that first class, direct contributions to the purchase price by the party who is not the legal owner will both justify the inference of a common intention to share the property beneficially and, necessarily, define the extent of the respective beneficial interests. In my view that passage in *Rosset* supports neither of those propositions. As I have said, a case will not fall within the first class unless there is evidence of some agreement, arrangement or understanding, usually prior to acquisition, that the each party should have some beneficial interest in the property; but it is not necessary that agreement, arrangement or understanding extends to defining the extent of the respective shares. If a case does not fall within the first class it may, nevertheless fall within the second class if common intention can be inferred from conduct; and direct contributions to the purchase price will be conduct from which such common intention can readily be inferred. But the relevant common intention is that each party should have some beneficial interest. Direct contributions to the purchase price may lead to an inference that each party should have some beneficial interest without, necessarily leading to the further inference that their respective shares should be proportionate to the amount of the direct contributions. When the passage in *Rosset* on which the appellant relies is read in the light of Lord Bridge's endorsement of the analysis in *McFarlane* and the reasoning in *Grant v Edwards* it will not bear the construction which the appellant seeks to put upon it.

**[41]** Shortly after the decision of the House of Lords in *Lloyds Bank Plc v Rosset* (*supra*) that decision, and the decision in *Grant v Edwards* (*supra*), were considered by this Court (Lloyd LJ, Nourse LJ and Ralph LJ Gibson) in *Stokes v Anderson* [1991] 1 FLR 391. The factual basis of the claim was, in material respects, similar to that in the present case. The claimant had made two payments, amounting together to £12,000, towards the acquisition of the one half share of the defendant's ex-wife in the net equity (valued at £90,000)

in a house in which the claimant and the respondent lived as husband and wife. As Nourse LJ explained at the outset of his judgment (*ibid*, 392E-F):

"This is a dispute between an unmarried couple as to the beneficial ownership of a house in which they formerly lived together; compare *Gissing v Gissing* [1971] AC 886 and *Grant v Edwards* [1987] 1 FLR 87; [1986] Ch 638. [The judge] decided that the woman was entitled to half the beneficial interest in the house. The man has now appealed to this court, contending that the woman has no beneficial interest, alternatively that it does not exceed 15% at the most.

After setting out the facts, and upholding the judge's finding that the payments made by the claimant were made pursuant to a common intention that she should have a beneficial interest in the property, Nourse LJ turned to the question: what was to be the extent of that interest. It is pertinent to note the evidential similarity with the present case (*ibid*, 397G-H):

". . . Miss Anderson's evidence was that Mr Stokes said that she was to have a beneficial interest in the property, he did not say what the extent of that interest was to be; she assumed that it would be 50%. There is no other evidence to suggest that the extent of Miss Anderson's beneficial interest was ever discussed between herself and Mr Stokes."

[42] Nourse LJ (with whose judgment the other members of the Court agreed) pointed out (*ibid*, 397H) that, although it was open to the judge, if justified by the evidence as a whole, to find a common intention that the property should be shared 50/50, "it is important to emphasise that he could only have done so by inference. Although the parties had orally made plain their common intention that Miss Anderson should have a beneficial interest in the property, the extent of it had never been discussed." In a passage which is directly apposite to the present case, he went on to say this (*ibid*, 398A-399G):

". . . I take this to be a clear example of what in *Grant v Edwards* [1987] 1 FLR 87 at p 93E; [1986] Ch 638 at p 646C, I thought, perhaps wrongly, was the rarer class of case under *Gissing v Gissing* [1971] AC 886, where the parties have orally declared themselves in such a way as to make plain their common intention that the claimant should have a beneficial interest in the property. Moreover, here it is unnecessary to look beyond the two payments of £5000 and £7000 in order to find conduct which amounted to an acting upon the common intention by Miss Anderson. And so the only real question for decision, a difficult one, is what is the extent of her beneficial interest.

...

Before *Grant v Edwards* (above) the distinction between the category of case exemplified by that decision and *Eves v Eves* [1975] 1 WLR 1338 on the one hand, and that exemplified in *Gissing v Gissing* and *Burns v Burns* [1984] FLR 216; [1984] Ch 317 on the other, had not been clearly perceived. The distinction has now been authoritatively recognised in the speech of Lord Bridge of Harwich in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 at pp 132 and 133; [1990] 2 FLR 155 at pp 163 to 164, a passage which is also notable for two references to conduct giving rise to 'a constructive trust or a proprietary estoppel'. Since it is necessary, in order to decide the extent of Miss Anderson's beneficial interest in Stone Cottage, to ascertain the principle on which such a decision ought to be made, a brief diversion into the burgeoning question of the relationship between the *Gissing v Gissing* species of constructive trust and proprietary estoppel is here desirable.

In *Grant v Edwards* [1987] 1 FLR 87 at pp 99H and 100E; [1986] Ch 638 at pp 656G and 657H, the Vice-Chancellor suggested that in cases under *Gissing v Gissing* the principles underlying the law of proprietary estoppel might provide useful guidance both in regard to the conduct necessary to constitute an acting upon the common intention by the claimant and in regard to the quantification of his or her beneficial interest in the property. In *Austin v Keele* [1987] ALJR 605 at p 609; 72 ALR 579 at p 587, Lord Oliver of Aylmerton, in delivering the judgment of the Privy Council, said that in essence the doctrine of *Gissing v Gissing* was an application of proprietary estoppel. The Vice-Chancellor's suggestion was echoed by Nicholls LJ in *Lloyds Bank Plc v Rosset* [1989] 1 FLR 51 at p 72A; [1989] Ch 350 at pp 387 A-B, and it has now been adopted and enlarged upon by Professor Hayton; see *Conveyancer and Property Lawyer* [1990] 370. However, it must be emphasised that this question was only touched on in the arguments in this court in *Grant v Edwards* and *Lloyds Bank Plc v Rosset* and both the Vice-Chancellor and Nicholls LJ were careful to base their decisions on conventional *Gissing v Gissing* principles.

It is possible that the House of Lords will one day decide to solve the problems presented by these cases, either by assimilating the principles of *Gissing v Gissing* and those of proprietary estoppel, or even by following the recent trend in other Commonwealth jurisdictions towards more generalised principles of unconscionability and unjust enrichment.

The Vice-Chancellor has identified two areas where the application of *Gissing v Gissing* might be enlarged through the influence of proprietary estoppel, and there is no real reason for thinking that their assimilation would be unduly hindered by their separate development out of basically different factual situations. But they have not yet been assimilated and we, in this court, must continue to regard cases such as the present as being governed by the principles of *Gissing v Gissing*, at any rate until we come to one where we cannot be confident that their application will produce a just result. I do not lack that confidence in the present case, especially since it has given us the opportunity of putting the quantification of the claimant's beneficial interest on a more satisfactory footing, a footing which incidentally brings it nearer to proprietary estoppel.

In regard to the quantification of Miss Anderson's beneficial interest, we were referred by counsel to *Eves v Eves* and *Grant v Edwards*, in each of which the same question arose. But the starting point must be Lord Diplock's speech in *Gissing v Gissing*, from which it is clear that this question, like the anterior one, depends on the common intention of the parties, either expressed or, more usually, to be inferred from all the circumstances. That does not mean that in the latter case you have to infer a common intention that the extent of the claimant's beneficial interest is to be ascertained once and for all at the date of its acquisition. . . ."

Nourse LJ then referred to Lord Diplock's observations, at [1971] AC 886, 909D-E - which I have already set out - that "there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of" and that "where this was the most likely inference from their conduct, it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share" and continued (*ibid*,400B-C):

"I agree with the Vice-Chancellor in *Grant v Edwards* [1987] 1 FLR 87 at p 100; [1986] Ch 638 at p 657E, that those observations, although made only in reference to contributions to mortgage repayments, support a more general proposition that all payments made and acts done by the claimant are to be treated as illuminating the common intention as to the extent of the beneficial interest. Once you get to that stage, as Lord Diplock recognised, there is no practicable alternative to the determination of a fair share. The court must supply the common intention by reference to that which all the material circumstances have shown to be fair. . . ."

[43] It is important to have in mind that, in that passage, Nourse LJ was addressing the question of quantification. He had already held that the case was one in which there was a common, expressed, intention that the claimant should have a beneficial interest in the property and that she had acted in reliance on that common intention. Four propositions can be identified: (i) that the answer to the question "what is the extent of the claimant's beneficial interest" was to be found by the application of "conventional *Gissing v Gissing* principles", not - or, at least, not yet or not in that case - by direct recourse to the principles underlying proprietary estoppel; (ii) that the answer was to be found in the common intention of the parties at the time of the acquisition which, if not expressed was "to be inferred from all the circumstances"; (iii) that it was open to the court to infer that it was the common intention of the parties at the time of acquisition that the extent of the respective beneficial interests should "be left to be determined when . . . the property [was] disposed of, on the basis of what was fair having regard to the total contributions, direct or indirect, which each . . . had made"; and (iv) that, "once you get to that stage" there is no practicable alternative to the determination of a fair share - "The court must supply the common intention by that which all the material circumstances have shown to be fair." For my part, I find it difficult to reconcile the third and fourth of those propositions with the observations of this Court in *Turton v Turton* - see, in particular, at [1988] Ch 542, 552C-D, 555B - but, as Peter Gibson LJ was to say in *Drake v Whipp* [1996] 1 FLR 826, [1996] 2 FCR 296, 827, "as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law."

[44] The result, in *Stokes v Anderson* (*supra*) was that the claimant's share was reduced from the 50% which she had been awarded by the judge (on the basis, it seems, that that was what she assumed would be her share at the time of the acquisition - *ibid*, 397G-H) to 25%. The reason for that reduction was that, at the time when the claimant made her payments, Mr Stokes was already entitled to a one half share; the payments were made in order to acquire the other one half share from his ex-wife. As Nourse LJ put it, at [1991] 1 FLR 391, 401:

". . . to hold that Miss Anderson was entitled to half the beneficial interest in Stone Cottage . . . would be markedly unfair to Mr Stokes. On a broad approach, the only approach which can be made, I think that the fair view of all the circumstances is that Miss Anderson is entitled to a beneficial interest equivalent to one half of Mrs Stokes' half-share, or one quarter of the whole, subject to the mortgage."

**[45]** *Springette v Defoe* [1992] 2 FLR 388 followed some 15 months later. In that case the property was purchased in the joint names of the parties. They had been living there for a short time as joint tenants of the local authority; but they were able to purchase at a substantial discount from the estimated market value because Miss Springette had, herself, been a tenant of the local authority (in another property) for 11 years or more. The property was purchased with the assistance of a building society mortgage - for the repayment of which they were both liable as covenantors. Treating the mortgage monies as provided in equal shares - and giving Miss Springette credit for the whole of the tenant's discount - her contribution to the purchase was 75% or thereabouts. It was common ground that, at the time of acquisition, they were each intended to have some beneficial interest in the property; and it was found as a fact by the trial judge that they never had any discussion at all, at or before the time of the purchase, about what their respective interests were to be. The judge held that the property was owned in equal shares; not on the basis of his finding that, although uncommunicated to each other, that was, in fact, the intention of each at the time, but because (as he put it, at [1992] 2 FLR 388, 392B-C): "It is my judgment that there is sufficient evidence on the facts of inference of common intention or arrangement between the parties that the property should be owned in equal shares."

**[46]** In the light of the judge's findings of fact, it might have been thought that the case fell squarely within the second of the two categories of case identified by Lord Bridge in *Lloyds Bank Plc v Rosset* (*supra*, 132H-133B). There was a common intention that each should have some beneficial interest in the property; there was no evidence of express agreement as to what the extent of those interests should be; the court had to ask whether there was sufficient evidence from which a common intention on that latter point could be inferred - *Grant v Edwards* (*supra*, 651A, 654A, 657H), *Stokes v Anderson* (*supra*, 400C). That is the question which the judge asked in *Springette v Defoe* (*supra*); and to which he gave the answer which he did. But the Court of Appeal reached a different conclusion.

**[47]** It is, I think, important to an understanding of the reasoning in the judgments in *Springette v Defoe* that each member of this Court seems to have thought that when Lord Bridge referred, in *Lloyds Bank Plc v Rosset* (*supra*, 132F), to the need to base a "finding of an agreement or arrangement to share in this sense" on "evidence of express discussions between the partners" he was addressing the secondary, or consequential, question "what was the common intention of the parties as to extent of their respective beneficial interests" rather than the primary, or threshold, question "was there a common intention that each should have a beneficial interest in the property". That that was the basis of the reasoning in *Springette v Defoe* appears clearly from the judgments of Dillon LJ ([1992] 2 FLR 388, 393E-F) and Steyn LJ (*ibid*, 395B). The third member of the Court, Sir Christopher Slade, agreed with that reasoning (*ibid*, 397G).

**[48]** For the reasons which I have sought to explain, I think that the better view is that, in the passage in *Rosset*, at [1991] 1 AC 107, 135F, to which both Dillon LJ and Steyn LJ referred in *Springette*, Lord Bridge was addressing only the primary question - "was there a common intention that each should have a beneficial interest in the property": he was not addressing the secondary question - "what was the common intention of the parties as to extent of their respective beneficial interests". As this Court had pointed out in *Grant v Edwards* and *Stokes v Anderson*, the court may well have to supply the answer to that secondary question by inference from their subsequent conduct - see, in particular, the reference in the judgment of Sir Nicholas Browne-Wilkinson, Vice-Chancellor, ([1986] Ch 638, 657E-F) to the passages in the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886, at 909A and D-E. And it may be, as Nourse LJ observed in *Stokes v Anderson* ([1991] 1 FLR 391, 400C), that "once you get to that stage . . . there is no practicable alternative to the determination of a fair share. The court must supply the common intention by reference to that which all the material circumstances have shown to be fair."

[49] There are, of course, passages in the judgments of this Court in *Springette v Defoe* [1992] 2 FLR 388 which, at first sight, provide support for the appellant's contentions in the present appeal. In particular, there are the passages in the judgment of Dillon LJ at pages 392E-G and 393D and G-H:

"In *Walker v Hall* [1984] FLR 126 I expressed the view at p. 134C that it was not open to this court, in the absence of specific evidence of the parties' intentions, to hold that the property there in question belonged beneficially to the two parties in equal shares, notwithstanding their unequal contributions to the purchase price, simply because it was bought to be their family home and they intended - or possibly one should say 'hoped' - that their relationship should last for life. The effect is that, in the absence of an express declaration of the beneficial interests, the court will hold that the joint purchasers hold the property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly to the purchase price, unless there is sufficient specific evidence of their common intention that they should be entitled in other proportions - eg in equal shares notwithstanding unequal contributions - to rebut the presumption of a resulting trust."

...

"The common intention must be founded on evidence such as would support a finding that there is an implied or constructive trust for the parties in proportions to the purchase price. The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair."

...

"Since, therefore it is clear in the present case that there never was any discussion between the parties about what their respective beneficial interests were to be, they cannot, in my judgment, have had in any relevant sense any common intention as to the beneficial ownership of the property . . . The presumption of resulting trust is not displaced."

And there is further support in the judgment of Steyn LJ who - after referring to the finding of the trial judge that "looking at the facts surrounding the parties at the time of the acquisition and the plaintiff's evidence, that after the purchase the mortgage was paid in equal shares" there was sufficient evidence, on those facts to infer "common intention or arrangement between the parties that the property should be owned in equal shares" - said this (*ibid*, 395F-G):

"But these factors could not support such an inference because the assistant recorder had already found as a matter of fact that no such common intention was communicated between the parties. The simple answer to the man's case is that there was no communicated common intention.

Given that no actual common intention to share the property in equal beneficial shares was established, one is driven back to the equitable principle that the shares are presumed to be in proportion to the contributions."

But, for the reasons which I have sought to explain, it is (at the least) open to serious doubt whether those passages did reflect the state of the law as it had developed in this area by the time that *Springette v Defoe* (*supra*) was decided in March 1992.

[50] On the same day as judgments were handed down in *Springette v Defoe*, the same court (Dillon LJ, Steyn LJ and Sir Christopher Slade) handed down their judgments in *Huntingford v Hobbs* (reported, a year later, at [1993] 1 FLR 736). Unsurprisingly, the decision in *Huntingford v Hobbs* is consistent with the approach in *Springette v Defoe*; to which Dillon LJ refers (at [1993] 1 FLR 736, 753B) in explaining why a point not taken in the court below was not open on the appeal. But, save for an observation of Steyn LJ at page 750A-B which suggests that he was less of an enthusiast for that approach than might have been thought from his judgment in *Springette v Defoe* - the decision in *Huntingford v Hobbs* is of no real assistance in the present context: the appeal turned on a different point.

[51] *Springette v Defoe* and *Huntingford v Hobbs* were considered by this Court (Dillon LJ and Staughton LJ) a few months later in *Evans v Hayward* (judgments delivered in June 1992, but reported at [1995] 2 FLR 511. That, like *Springette v Defoe*, was a case in which the property had been bought in joint names at a discounted price under a "right to buy" conferred by the Housing Act 1985; but where the discount was substantially attributable to the plaintiff's former occupation as local authority tenant. Dillon LJ referred to the decision in *Springette v Defoe* in the following passage, (*ibid*, 513E-F):

"In *Springette v Defoe* the primary issue which arose for decision was whether, as the judge at first instance had held, it was permissible to reach the conclusion that the two parties were to share the beneficial interests in the property equally without regard to their contributions, on the ground that, though neither of them ever said anything about it to the other, each of them had in fact in his or her own mind an uncommunicated belief or intention that they were to share the property equally beneficially. But that view was rejected by this court . . ."

For my part, I think that the identification of the issue in those terms does less than justice to the trial judge in *Springette v Defoe*, who had made it clear, in a passage to which I have already referred (cited by Dillon LJ himself at [1992] 2 FLR 388, 392A-C) that, although he did find that that was the actual (but uncommunicated) intention of each at the time, he had not based his conclusion on that finding. He had gone on to find that there was "sufficient evidence on the facts of inference of common intention or arrangement between the parties that the property should be owned in equal shares". But, be that as it may, Staughton LJ, following the approach taken by Bush J in *Marsh v von Sternberg* [1986] 1 FLR 526, [1986] Fam Law 160, treated the point as turning on intention rather than contribution - or, to put the point another way, as turning on constructive rather than resulting trust. At [1995] 2 FLR 511, 516H, he said this:

"For my part I find it difficult to say that a discount is, strictly speaking, purchase money provided by either party. It is money which is not provided by anybody. But I do consider that the facts as to the existence of a discount and the source from which it is derived must be taken into account, and are capable of leading to the inference that the parties have made an agreement as to how the purchase price is provided."

[52] Later in the same year (1992) the judgments in *Springette v Defoe* were cited to this Court (Nourse LJ and Evans LJ) in *Saville v Goodall* [1993] 1 FLR 755, [1994] 1 FCR 325. Nourse LJ observed (*ibid*, 760D):

"[Counsel] referred us to a recent decision of this court in *Springette v Defoe* [1992] 2 FLR 388, which recognises that the common intention must be communicated between the parties. I think all the authorities on first category cases will be found to be consistent with that proposition."

In that context, the reference to "first category cases" is to cases within the first of Lord Bridge's two categories in *Lloyds Bank Plc v Rosset (supra)* - as appears from a passage earlier in the judgment ([1993] 1 FLR 755, 758F-H). But, as I have sought to explain, in making that categorisation, Lord Bridge was addressing the primary question - "was there a common intention that each should have a beneficial interest in the property": he was not addressing the secondary question - "what was the common intention of the parties as to extent of their respective beneficial interests". And Nourse LJ, to whose judgments in both *Grant v Edwards* and *Stokes v Anderson* I have already referred, may be taken to have had that well in mind. The difference in approach to the primary and secondary questions - illustrated by the decisions in *Grant v Edwards* and *Stokes v Anderson* - was not material to the decision in *Saville v Goodall*. In that case this Court was satisfied, on the evidence, that the parties had discussed and agreed joint ownership.

#### THE DECISION IN MIDLAND BANK V COOKE

[53] I have set out, at some length, the law in this area as it appears to have been understood in this Court before the decision in *Midland Bank v Cooke* [1995] 2 FLR 915 because that decision must be examined in that context. The issue in that case - as to the extent of the wife's beneficial interest in the former matrimonial home - arose in proceedings brought by the bank to enforce a charge given by the husband to secure a

business loan. The property had been purchased with the assistance of a mortgage advance (£6,450); the balance being found out of a wedding gift from the husband's parents (£1,100) and the husband's own monies (£1,000 or thereabouts). The property was conveyed into the husband's sole name. There had been no discussion or agreement between husband and wife at the time of the acquisition as to the basis upon which the property was held by the husband, or as to the extent of their respective beneficial interests. Treating the wedding gift as made to husband and wife equally, it had been held in the county court that the wife was entitled to a beneficial interest on the basis of her contribution to the purchase price. But, following the approach in *Springette v Defoe*, the judge had held that the extent of that beneficial interest was limited to the proportion (6.47%) which her contribution (equal to one half of the wedding gift) bore to the whole. This Court (Stuart LJ-Smith, Waite LJ and Schiemann LJ) took a different view, holding that the wife was entitled to half share in the property.

**[54]** The leading judgment (with which the other two members of the Court agreed) was given by Waite LJ. At [1995] 2 FLR 915, 921A, he endorsed the view of the county court judge that, in the absence of any discussion or agreement at the time of the purchase, the wife's claim to have a beneficial interest in the property depended on her being held to have made a monetary contribution. But if she had made a contribution equal to one half of the wedding gift - as the judge had been entitled to hold on the evidence - then this was a case within the second of the categories identified by Lord Bridge in *Lloyd's Bank v Rosset* (*supra*). Waite LJ then addressed the question:

"(B) Is the proportion of Mrs Cooke's beneficial interest to be fixed solely by reference to the percentage of the purchase price which she contributed directly, so as to make all other conduct irrelevant?"

He accepted the submission on behalf of the bank that "in determining (in the absence of evidence of express agreement) whether a party unnamed in the deeds has any beneficial interest in the property at all the test is the stringent one stated by Lord Bridge of Harwich in *Lloyds Bank Plc v Rosset and another* [1991] 1 AC 107"; that is to say that (for a case to fall within the second of Lord Bridge's categories) it was, at the least, extremely doubtful whether anything less than direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will "justify the inference necessary to the creation of a constructive trust." He summarised the further submission advanced on behalf of the bank in these terms (*ibid*, 923A-B):

"By parity of reasoning, in cases where a direct contribution has been duly proved by the partner who is not the legal owner (thus establishing a resulting trust in his or her favour of some part of the beneficial interest) the proportion of that share will be fixed at the proportion it bears to the overall price of the property. Although the proportion may be enlarged by subsequent contribution to the purchase price, such contributions must be direct - ie further cash payments or contribution to the capital element in instalment repayments of any mortgage under which the unpaid proportion of the purchase remains secured. Nothing less will do."

As he pointed out that submission was based on the decision of this Court in *Springette v Defoe*.

**[55]** After referring to the observations of Dillon LJ in *Springette v Defoe* at [1992] 2 FLR 388,393D-H which I have already set out earlier in this judgment, and having compared the approach of the same judge in *McHardy & Sons v Warren and another* [1994] 2 FLR 338, [1994] Fam Law 567 - in which Dillon LJ had said this (*ibid*, 340E):

"To my mind it is irresistible conclusion that where a parent pays the deposit, either directly to the solicitors or to the bride and groom, it matters not which, on the purchase of their first matrimonial home, it is the intention of all three of them that the bride and groom should have equal interests in the matrimonial home, not interests measured by reference to the percentage half the deposit [bears] to the full price."

- Waite LJ went on to observe ([1995] 2 FLR 915, 924C-D):

"I confess that I find the differences of approach in these two cases mystifying. In the one a strict resulting trust geared to mathematical calculation of the proportion of the purchase price provided by cash contribution is treated as virtually immutable in the absence of express agreement; in the other a displacement of the cash-related trust by inferred agreement is not only permitted but treated as obligatory."

He found the guidance out of that dilemma which he sought in the passage in the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886, 908D-909E, which I have set out earlier in this judgment. As he said, it is in that section of Lord Diplock's speech that the approach to be adopted by the court when evaluating the proportionate shares of the parties - once it has been duly established, through the direct contributions of the party without legal title, that some beneficial interest was intended for both - is to be found. That, of course, had been the view of Sir Nicolas Browne-Wilkinson, Vice-Chancellor, in *Grant v Edwards* at [1986] Ch 638, 655C-D.

**[56]** It was to the decision in *Grant v Edwards* that Waite LJ then turned. He said this ([1995] 2 FLR 915, 925H-926B):

"The decision of this court in *Grant v Edwards and Edwards* [1986] 1 Ch 638, [1987] 1 FLR 87 also affords helpful guidance. The context was different, in that the court was there dealing with a legal owner who had made representations to the occupier on which the latter had relied to her detriment so as to introduce equities in the nature of estoppel. Once a beneficial interest had been established by that route, however, the court then proceeded - as I read the judgments - to fix the proportions of the beneficial interests on general grounds which were regarded as applying in all cases. That appears from the judgments of Nourse LJ at pp 650 and 96-97 respectively and of Sir Nicholas Browne-Wilkinson V-C at pp 657G and 100G respectively . . ."

**[57]** Waite LJ then cited the passage from the judgment of the Vice-Chancellor which I have already set out, and continued (*ibid*, 926F-H):

"The general principle to be derived from *Gissing v Gissing* and *Grant v Edwards* can in my judgment be summarised in this way. When the court is proceeding, in cases like the present where the partner without legal title has successfully asserted an equitable interest through direct contribution, to determine (in the absence of express evidence of intention) what proportions the parties must be assumed to have intended for their beneficial ownership, the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity.'"

**[58]** On the basis of that analysis he concluded that the question posed under (B) should be answered in the negative. The court is not bound to deal with the matter on the strict basis of the trust resulting from the cash contribution to the purchase price, and is free to attribute to the parties an intention to share the beneficial interest in some different proportions. He then addressed a further submission advanced on behalf of the bank in that case, which he put as question (C):

"(C) Can an agreement be attributed by inference of law to parties who have expressly stated that they reached no agreement?"

After referring, again, to the passage from the judgment of Dillon LJ in *Springette v Defoe* ([1992] 2 FLR 388, 393D-H) which I have set out earlier in this judgment and to the passage in the judgment of Steyn LJ (*ibid*, 395F-G) - also set out earlier in this judgment - Waite LJ concluded that that question, also, should be answered in the negative ([1995] 2 FLR 915, 928D):

"I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one."

As I have said, it was on that passage that Her Honour Judge Hallon relied in the present case.

**[59]** In reaching that conclusion Waite LJ had rejected the submission that, if the parties themselves had testified on oath that they made no agreement, there was no scope for equity to make one for them. At [1995] 2 FLR 915, 927D-G, he had said this:

"That is a submission which, if it fell to be considered without assistance from authority, I would reject instinctively on the ground that it runs counter to the very system of law - equity - on which it seeks to rely. Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time. The present case is typical of hundreds, perhaps even thousands, of others. When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit they never gave ownership a thought or reached any agreement about it."

**[60]** I return, therefore, to the first question on this appeal - whether the judge was required by the decision of this Court in *Springette v Defoe* [1992] 2 FLR 388 to find that, in the absence of some shared intention as to the proportions in which they should be entitled to the property communicated between them at the time of the purchase, the property was held upon a resulting trust for Mr Hiscock and Mrs Oxley in beneficial shares proportionate to the respective financial contributions which they had made to the acquisition cost. In my view the judge was not so required. For my part, I doubt whether the observations in *Springette v Defoe* upon which the appellant relies did, in truth, reflect the state of the law at the time when that appeal was decided. Be that as it may, they have not done so since the decision of this Court in *Midland Bank v Cooke*. I reject the submission, in so far as it was pursued in argument, that *Midland Bank v Cooke* was wrongly decided. But I think that the law has moved on since that decision.

#### *DEVELOPMENTS SINCE THE DECISION IN MIDLAND BANK V COOKE*

**[61]** The judgments of this Court in *Midland Bank v Cooke* were handed down in July 1995. Within a few months the familiar question "what is the interest of one unmarried cohabitee in the house purchased in the name of the other as a home in which they intend to live as man and wife" was before this Court, again, in *Drake v Whipp* [1996] 1 FLR 826. Peter Gibson LJ identified the point in the opening paragraph of his judgment (*ibid*, 827):

"Yet again this court is asked to rule on a dispute between a man and a woman, who cohabited but were not married to each other, as to their respective beneficial interests in a property which they purchased to be their home but which was put into the man's name only. The usual lengthy litany of authorities as well as more recent additions have been recited to us and, as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law. A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates on a presumed intention of the contributing party in the absence of rebutting evidence of actual intention."

**[62]** In that case - as in *Midland Bank v Cooke* and the present case - each party had made a financial contribution to the acquisition of the property. Mrs Drake had provided £25,000 towards the purchase price of £61,254. The property (which had been a barn) was conveyed into the sole name of Mr Whipp. There was no declaration of trust. The property required substantial work to convert it to a dwelling. That work cost

£129,536; of which Mrs Drake contributed £13,000. The remainder of the cost of conversion was provided by Mr Whipp from his own resources. After they had lived together in the property as man and wife for a few years the relationship came to an end; Mrs Drake moved out of the property; and commenced proceedings in the county court for a declaration that she and Mr Whipp were entitled to the property in equal shares or in such shares as the court might think fit. On the basis of their respective financial contributions, the county court judge held that Mrs Drake was entitled to share to the extent of 19.4% - that being the proportion which her aggregate contributions (£38,000) bore to the whole cost of acquisition and conversion (£195,790). On appeal Mrs Drake contended for a share of 40.1% - that being the proportion which her contribution to the purchase price (£25,000) bore to the cost of acquisition (£61,250). The Court of Appeal held that a "fair share" would be one third; and varied the county court order accordingly. It is material, in the context of the present appeal, to analyse the reasoning which led the Court to that conclusion.

**[63]** The leading judgment (with which the other members of the Court, Hirst LJ and Forbes J, agreed) was delivered by Peter Gibson LJ. After setting out the facts, he cited the familiar passage in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 132E-133B, in which Lord Bridge had explained the distinction between those cases in which, at the time of the acquisition, there has been some agreement, arrangement or understanding between the parties that the property was to be shared beneficially (albeit, not an agreement or understanding as to the extent of their respective beneficial shares) and those cases in which there had been no such agreement or arrangement to share. He went on to say this, ([1996] 1 FLR 826, 828G- 829A):

"This passage was read twice to the judge. But nevertheless it was the submission of [counsel] for Mrs Drake that Mr Whipp held the property not on a constructive trust but as trustee on a resulting trust, both parties having made contributions to the purchase price, on the application of the principle of *Dyer v Dyer* (1788) 2 Cox Eq Cas 92. However, that principle could not apply if (1) there was a common intention to share the property beneficially found to exist on the application of the guidance given by Lord Bridge, whether by dint of a finding of an agreement, arrangement or understanding on evidence of express discussions between the partners or by ready inference from direct contributions to the purchase price by the partner who is not the legal owner, and (2) that partner has acted to his or her detriment in reliance on the common intention.

In the present case it seems to me that the judge made findings and there was undisputed evidence which amounted to there being a common understanding between the parties that they were to share beneficially. . . ."

Peter Gibson LJ observed that he found it "all the more remarkable" that, given that evidence of common understanding, the debate in the court below had been based solely on the existence of a resulting trust; and had turned on whether it was permissible, in that context, to take account of the respective contributions to the costs of conversion as well as the contributions to the cost of acquisition. The county court judge had found that it was. Peter Gibson LJ said this (*ibid*, 829H-830B):

"Mrs Drake now appeals to this court. [Counsel] submits that the judge wrongly conflated the separate doctrines of constructive trust and resulting trust, whereas he was only concerned with a resulting trust. That, he submitted, required attention to be paid only to the cost of acquisition of the property, the cost of its subsequent enhancement being irrelevant. When it was put to him that this was a case of a constructive trust by reason of a common understanding or intention acted on by his client to her detriment, he submitted that there had to be a common understanding or intention as to the respective shares to be taken by the beneficial owners. That is an impossible argument in the light of the authorities (see, for example, the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886, 907-909. All that is required for the creation of a constructive trust is that there should be a common intention that the party who is not the legal owner should have a beneficial interest and that that party should act to his or her detriment in reliance thereon."

**[64]** As I have indicated, this Court, in *Drake v Whipp*, was in no doubt that it had been the common understanding and intention of the parties, at the time that the property was acquired, that each should have some beneficial interest. In those circumstances - notwithstanding a concession by counsel for Mr Drake that there had been no common intention - the Court held that "it would be artificial in the extreme to proceed to decide this appeal on the false footing that the parties' shares are to be determined in accordance with the law on resulting trusts" (*ibid*, 830C). The case was plainly one of a constructive trust. So it was to be

approached on the basis explained by this Court in *Grant v Edwards (supra)* - the judgments in which Peter Gibson LJ described as "particularly helpful and illuminating". After setting out the passage in the judgment of Sir Nicolas Browne-Wilkinson, Vice-Chancellor, at [1986] 1 Ch 638, 657G-658A, which I have cited earlier in this judgment, and having referred again to the speech of Lord Bridge in *Lloyds Bank Plc v Rosset* - in particular, to the passage at [1991] 1 AC 107, 133G-H, where Lord Bridge observed that the shares to which the female partners in *Eves v Eves* [1975] 3 All ER 768, [1975] 1 WLR 1338 and *Grant v Edwards (supra)* were held entitled were in no sense proportionate to their actual contributions to the acquisition or enhancement costs - Peter Gibson LJ went on to say this ([1996] FLR 826, 831D-G):

"In the present case the judge has found what was the common intention of the parties as to their beneficial shares, but the only direct evidence in support of that finding was Mr Whipp's evidence as to his own intention. The judge appears to have imputed the like intention to Mrs Drake although there is nothing in her evidence to support it. Further, the judge refused to take into account the contributions of the parties by way of their labour, being unquantified in monetary terms, and similarly Mrs Drake's other contributions to the household were ignored. No doubt this was because he was not invited to consider the matter on the basis of a constructive trust.

In my judgment the judge's finding on common intention cannot stand in the absence of any evidence that Mrs Drake intended her share to be limited to her direct contributions to the acquisition and conversion costs. I would approach the matter more broadly, looking at the parties' entire course of conduct together. I would take into account not only those direct contributions but also the fact that Mr Whipp and Mrs Drake together purchased the property with the intention that it should be their home, that they both contributed their labour in 70/30% proportions, that they had a joint account out of which the costs of conversion were met, but that that account was largely fed by his earnings, and that she paid for the food and some other household expenses and took care of the housekeeping for them both. I note that whilst it was open to Mrs Drake to argue at the trial for a constructive trust and for a 50% share, she opted to rely solely on a resulting trust and a 40.1% share. In all the circumstances, I would hold that her fair share should be one-third."

**[65]** It is very difficult, if not impossible, to find anything in the facts in *Drake v Whipp* to suggest that either of the parties ever gave thought to an arrangement under which the property should be shared in the proportions two-thirds and one-third; let alone that that was ever their common intention. Nor do I think that Peter Gibson LJ approached the matter on that basis. As he said (*ibid*, 830D) "in constructive trust cases, the court can adopt a broad brush approach to determining the parties' respective shares". And that is what he did, as he acknowledged in the passage which I have just set out (*ibid*, 831F) - "I would approach the matter more broadly, looking at the parties' entire course of conduct together". That approach, as it seems to me, had received the approval of the House of Lords some 35 years earlier, in *Gissing v Gissing (per Lord Diplock* at [1971] AC 886, 909E); had been endorsed (at least by Sir Nicolas Browne-Wilkinson, Vice-Chancellor, at [1986] Ch 638, 657H) in *Grant v Edwards*; and had been acknowledged and accepted by Nourse LJ in *Stokes v Anderson* [1991] 1 FLR 391, 399F. If these problems are to be solved by an analysis based on constructive trust, which requires the imputation of some common intention at the time of acquisition, then, as Nourse LJ observed in *Stokes v Anderson (ibid*, 399F), "the court must supply the common intention by reference to that which all the material circumstances have shown to be fair." That is, I think, what Waite LJ had in mind when he referred, in *Midland Bank v Cooke* [1995] 2 FLR 915, 927G, to "equity's assistance in formulating a fair presumed basis for the sharing of the beneficial title" in a case where the parties "had been honest enough to admit they never gave ownership a thought . . ."

**[66]** Once it is recognised 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, it seems to me very difficult to avoid the conclusion that an analysis in terms of proprietary estoppel will, necessarily, lead to the same result; and that 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 clear that Sir Nicolas Browne-Wilkinson, Vice-Chancellor, in *Grant v Edwards* thought that there was much to be said for that view. In *Stokes v Anderson*, Nourse LJ seems to have thought the same. More recently, in *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, Robert Walker LJ observed (*ibid*, 176E) that "in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts [estoppel and constructive trust] coincide"; and (*ibid*, 180C) that "the species of constructive trust based on 'common intention' . . . is closely akin to, if not

indistinguishable form, proprietary estoppel". He found support for those observations in the three cases to which much reference has been made in this judgment - *Gissing v Gissing*, *Grant v Edwards* and *Lloyds Bank Plc v Rosset*.

**[67]** For completeness, I should mention that we were referred to the recent decision of this Court in *Carlton v Goodman* [2002] EWCA Civ 545 (unreported, 29 April 2002). The question, in that case, was described by Mummery LJ (at para 2 of his judgment) as "an interesting point on resulting trusts in a case where the purchase of property acquired for the sole use and occupation of one party is partly financed by a joint mortgage on the property". It is important to have in mind that the appellant had paid nothing towards the purchase price; that it was never intended that she should do so; and that there was nothing in the circumstances to lead to the inference that it was the common intention that she should have any beneficial interest in the house - para 22(vii) and (ix). On its facts *Carlton v Goodman* was the inverse of the present case; and it provides little, if any, direct assistance on the principles to be applied in cases of the nature with which we are now concerned. But it is of interest to note the observation of Ward LJ, at para 32, that:

*"Midland Bank v Cooke* itself can only be properly understood when it is appreciated that the court was satisfied that by the making of a direct contribution a resulting trust had been established in the wife's favour of some part of the beneficial interest and the real question for the court in that case was to determine what proportions the parties must have been assumed to have intended for their beneficial ownership."

Save that I would omit from that statement the word "resulting", I respectfully agree.

#### SUMMARY

**[68]** I have referred, in the immediately preceding paragraphs, to "cases of this nature". By that, I mean cases in which the common features are: (i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust. In those circumstances the first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In many such cases - of which the present is an example - there will have been some discussion between the parties at the time of the purchase which provides the answer to that question. Those are cases within the first of Lord Bridge's categories in *Lloyds Bank Plc v Rosset*. In other cases - where the evidence is that the matter was not discussed at all - an affirmative answer will readily be inferred from the fact that each has made a financial contribution. Those are cases within Lord Bridge's second category. And, if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention.

**[69]** In those circumstances, the second question to be answered in cases of this nature is "what is the extent of the parties' respective beneficial interests in the property?" Again, in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have - and even in a case where the evidence is that there was no discussion on that point - the question still requires an answer. It must now be accepted that (at least in this Court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, "the whole course of dealing between them in relation to the property" includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.

[70] As the cases show, the courts have not found it easy to reconcile that final step with a traditional, property-based, approach. It was rejected, in unequivocal terms, by Dillon LJ in *Springette v Defoe* when he said ([1992] 2 FLR 388, 393D-H) that "The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair". Three strands of reasoning can be identified. (1) That suggested by Lord Diplock in *Gissing v Gissing* ([1971] AC 886, at 909D) and adopted by Nourse LJ in *Stokes v Anderson* ([1991] 1 FLR 391, at 399G, 400B-C). The parties are taken to have agreed at the time of the acquisition of the property that their respective shares are not to be quantified then, but are left to be determined when their relationship comes to an end or the property is sold on the basis of what is then fair having regard to the whole course of dealing between them. The court steps in to determine what is fair because, when the time came for that determination, the parties were unable to agree. (2) That suggested by Waite LJ in *Midland Bank v Cooke* ([1995] 2 FLR 915, at 926F-H). The court undertakes a survey of the whole course of dealing between the parties "relevant to their ownership and occupation of the property and their sharing of its burdens and advantages" in order to determine "what proportions the parties must be assumed to have intended [from the outset] for their beneficial ownership". On that basis the court treats what has taken place while the parties have been living together in the property as evidence of what they intended at the time of the acquisition. (3) That suggested by Sir Nicolas Browne-Wilkinson, Vice Chancellor, in *Grant v Edwards* ([1986] 1 Ch 638, at 656G-H, 657H) and approved by Robert Walker LJ in *Yaxley v Gotts* ([2000] Ch 162, 177C-E). The court makes such order as the circumstances require in order to give effect to the beneficial interest in the property of the one party, the existence of which the other party (having the legal title) is estopped from denying. That, I think, is the analysis which underlies the decision of this Court in *Drake v Whipp* - see [1996] 1 FLR 826, at 831E-G.

[71] For my part, I find the reasoning adopted by this Court in *Midland Bank v Cooke* to be the least satisfactory of the three strands. It seems to me artificial - and an unnecessary fiction - to attribute to the parties a common intention that the extent of their respective beneficial interests in the property should be fixed as from the time of the acquisition, in circumstances in which all the evidence points to the conclusion that, at the time of the acquisition, they had given no thought to the matter. The same point can be made - although with less force - in relation to the reasoning that, at the time of the acquisition, their common intention was that the amount of the respective shares should be left for later determination. But it can be said that, if it were their common intention that each should have some beneficial interest in the property - which is the hypothesis upon which it becomes necessary to answer the second question - then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair. But, as I have said, I think that the time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel.

#### *DETERMINATION OF THE PRESENT APPEAL*

[72] Her Honour Judge Hallon, directed herself that, in the light of *Midland Bank v Cooke*, her task was to "look to the whole course of dealings to infer what the agreement between these parties was". She found that "all the evidence . . . clearly shows that both were evincing an intention to share the benefit and the burden of this property [35 Dickens Close] jointly and equally". But, in reaching that conclusion, she had held that that was the continuation of a "long term plan" which had begun before 39 Page Close, Bean, had been purchased. In my view, although the judge may have been right to identify a long term plan, in general terms, that the parties would acquire a property "through purchase with the advantageous discount available to a council tenant, with a view subsequently to moving on to better accommodation"; she was plainly wrong to take the view that it was a necessary incident of that plan that each property would be owned jointly or "jointly and equally". The grant of a charge over 39 Page Close to secure Mr Hiscock's advance towards the purchase price of that property is inconsistent with an intention that that property should be owned jointly or in equal shares. And it is difficult to avoid the conclusion that the judge placed undue weight on the fact that (as she found) the parties regarded both 39 Page Close and 35 Dickens Close "as their [joint] home". It does not follow from the fact that parties live together in a house that they both regard as their home that they share the ownership of that house equally.

**[73]** If the judge had found, as was alleged by Mrs Oxley in para 8 of her particulars of claim, that "it was expressly the joint intention of the Claimant and the Defendant at the time of [35 Dickens Close] that they should share the beneficial ownership of that property equally" I would taken the view that it would be wrong for this Court to go behind that finding of fact. But, as I have said, she did not make that finding of fact; and we have seen no evidence upon which she could have done so. This must, I think, be seen as a case where there is no evidence of any discussion between the parties as to the amount of the share which each was to have. And, on that basis, the judge asked herself the wrong question. She should not have sought, by reference to the conduct of the parties while they were living together at 35 Dickens Close, to determine what intention both were then "evincing" - unless, by that, she was able to find a common intention, communicated to each other, to determine, definitively, the shares which had been left undetermined at the time of acquisition. She might have asked herself whether their subsequent conduct, while living together at 35 Dickens Close, was consistent only with a common intention, at the time of the acquisition, that their shares should be equal; but she did not. The right question, in the circumstances of this case, was "what would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?"

**[74]** I think that that is a question to which this Court can, and should, give an answer. I do not think it necessary to remit the matter to the county court. In my view to declare that the parties were entitled in equal shares would be unfair to Mr Hiscock. It would give insufficient weight to the fact that his direct contribution to the purchase price (£60,700) was substantially greater than that of Mrs Oxley (£36,300). On the basis of the judge's finding that there was in this case "a classic pooling of resources" and conduct consistent with an intention to share the burden of the property (by which she must, I think, have meant the outgoings referable to ownership and cohabitation), it would be fair to treat them as having made approximately equal contributions to the balance of the purchase price (£30,000). Taking that into account with their direct contributions at the time of the purchase, I would hold that a fair division of the proceeds of sale of the property would be 60% to Mr Hiscock and 40% to Mrs Oxley.

**[75]** I would set aside the order of 20 May 2003; declare that Mrs Oxley is entitled to 40% of the proceeds of sale of 35 Dickens Close; and adjust the sum payable to her by Mr Hiscock accordingly.

**MANCE LJ:**

**[76]** I agree.

**BAKER LJ:**

**[77]** I also agree.

*Appeal allowed. (Order does not form part of the approved judgment)*