

Single Name Family Home Constructive Trusts: Is *Lloyds Bank v Rosset* Still Good Law?

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Relationship breakdown: who gets what?

The breakdown of a loving relationship can cause both emotional and legal uncertainties. From a property law perspective, the key question is: who gets what? In most cases, the most valuable part of this question is: who gets the house?

In the divorce context, for both marriages and civil partnerships, the answer to this question is resolved by statute: the courts are explicitly given a wide discretion to require one person to transfer property to another, to hold it on trust for another, or to vary the shares of a pre-existing trust.¹

However, the answer to the question “who gets what” is much less regulated where the parties were unmarried but cohabited prior to the breakdown of their relationship. For real property, the answer depends on whether both parties to the relationship were registered legal owners of the property (a “joint name case”) or whether only one party was registered as a legal owner (a “single name case”).

In joint name cases, the law is settled by *Stack v Dowden*² and *Jones v Kernott*.³ The starting presumption is that both parties are entitled to a 50% share of the value of the property as tenants in common, unless this presumption can be displaced by evidence of an express agreement to vary those shares or an agreement inferred from the parties’ conduct in relation to the property. If such an agreement can be proved, then the court must quantify the intended shares by reference to the express or inferred agreement or, in the absence of any evidence as to the size of those shares, by reference to what “the court considers fair having regard to the whole course of dealing between them in relation to the property”.

In single name cases, the approach is different. The starting point is that the non-owner has no rights over the property, so they must establish a beneficial interest in it (“the acquisition question”).⁴ How this should be done is the subject of this article. If the non-owner can establish a beneficial interest in the property, then the court must quantify the size of that share in the same way as in a joint name case.⁵

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¹ Matrimonial Causes Act 1973 ss.21(2), 24 and 25; and Civil Partnership Act 2004 ss.65 and 72 and Sch.5 paras 1–2, 6–14 and 20–21.

² *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432.

³ *Jones v Kernott* [2011] UKSC 53; [2012] 1 A.C. 776.

⁴ *Stack v Dowden* [2007] 2 A.C. 432 at [4] (Lord Hope), at [56] (Baroness Hale).

⁵ *Abbott v Abbott* [2008] 1 F.L.R. 1415 at [19] (Baroness Hale), which may now be considered to be the view of the Supreme Court at that time (*Willers v Joyce* [2016] UKSC 44; [2016] 3 W.L.R. 534 at [19]–[21] (Lord Neuberger)).

This article will argue that *Lloyds Bank v Rosset*⁶ states the binding law on the acquisition question for single name cases, and that key conceptual and practical differences between single name and joint name cases mean that *Stack* and *Jones* cannot be said to govern the issue.

The acquisition question: *Lloyds Bank v Rosset* and the later doubts

In *Lloyds Bank v Rosset*, Mr and Mrs Rosset bought a semi-derelict house with money from Mr Rosset's inheritance, held in a family trust in Switzerland. The trustees required the house to be transferred into Mr Rosset's sole name as a condition of receiving the funds, and the house was so transferred. Mr Rosset mortgaged the house to Lloyds Bank to fund the renovations, but he later defaulted on repayments and Lloyds Bank sought possession. Mrs Rosset claimed that she had a beneficial interest in the home which overrode Lloyds Bank's claim. Mrs Rosset had not financially contributed to the acquisition or renovations of the house, but she had helped with the redecoration and building works. Giving the judgment of the House of Lords, Lord Bridge held that Mrs Rosset's actions were insufficient to infer that the Rossetts intended Mrs Rosset to have a beneficial interest in the house. It is not enough for a spouse to intend jointly to renovate and live in the house,⁷ even if they assist with those renovations to speed up the moving in process.⁸ Instead, the court must look for one of two things:

- Any agreement, arrangement or understanding that the property is to be shared beneficially on which the non-owner relied. This agreement must be based on evidence of express discussions, "however imperfectly remembered and however imprecise their terms may have been".⁹
- If there is no evidence of such an agreement, then the court may infer a common intention to share the property beneficially. The court may only infer this from direct contributions to the purchase price by the non-owner, either initially or by paying later mortgage instalments. It is "extremely doubtful whether anything less will do".¹⁰

For 17 years, *Rosset* remained the final word on this issue from the House of Lords. However, in *Stack v Dowden*, Lord Walker and Baroness Hale made four criticisms of *Rosset*:

- *Rosset* is inconsistent with *Gissing v Gissing*,¹¹ in particular the judgments of Lord Reid and Lord Diplock.¹²
- Lord Bridge's remarks in *Rosset* were obiter.¹³

⁶ *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107; [1990] 2 W.L.R. 867.

⁷ *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 at 130B–C.

⁸ *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 at 131E, although note that the financial value of Mrs Rosset's assistance was held to be de minimis at 131G.

⁹ *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 at 132E–G.

¹⁰ *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 at 132G–133A.

¹¹ *Gissing v Gissing* [1971] A.C. 886; [1970] 3 W.L.R. 255.

¹² *Stack v Dowden* [2007] 2 A.C. 423 at [26] (Lord Walker); and *Abbott v Abbott* [2008] 1 F.L.R. 1415 at [5] (Baroness Hale).

¹³ *Stack v Dowden* [2007] 2 A.C. 423 at [63] (Baroness Hale).

- “[T]he law has moved on” since *Rosset*.¹⁴
- *Rosset* “set [the] hurdle rather too high in certain respects”,¹⁵ so it is “potentially productive of injustice”.¹⁶

The first three criticisms relate to the legal status of *Rosset* as a binding authority; the fourth is a general assertion that the substance of the decision in *Rosset* is unsatisfactory. This article evaluates what the law is—it does not discuss what “should” be the law. Therefore, discussion of the fourth objection, and the extensive relevant literature, is beyond the scope of this article.¹⁷

In light of these criticisms, textbooks are somewhat split. A few textbooks maintain that *Rosset* is still the binding authority,¹⁸ whereas the majority rely on the above four criticisms to suggest that the law now permits a broader, joint-names approach to the acquisition question in single name cases.¹⁹ This latter position is also supported by several commentators.²⁰ However, irrespective of the courts’ and commentators’ views on the appropriateness of the *Rosset* test, this article will argue that *Rosset* is binding law and the first three criticisms listed above are incorrect.

Is *Rosset* inconsistent with *Gissing v Gissing*?

In *Gissing v Gissing*, Mr and Mrs Gissing²¹ purchased a house in Mr Gissing’s sole name for £2,695 with two loans given solely to Mr Gissing. Mrs Gissing spent £220 of her savings on furnishing and laying the lawn, and paid for clothes for herself and their son. Mr Gissing made all of the loan repayments. When they divorced, Mrs Gissing applied for an order declaring her beneficial interest in the house. The House of Lords unanimously held that there was no express agreement, nor evidence from which a common intention could be inferred, that Mrs Gissing should have a beneficial interest in the home. This section will show that not only is *Rosset* perfectly compatible with all five judgments in *Gissing*, but it is arguably supported by large sections of those judgments.

¹⁴ *Stack v Dowden* [2007] 2 A.C. 423 at [26] (Lord Walker), at [60] (Baroness Hale); and *Abbott v Abbott* [2008] 1 F.L.R. 1415 at [19] (Baroness Hale).

¹⁵ *Stack v Dowden* [2007] 2 A.C. 423 at [63] (Baroness Hale).

¹⁶ *Stack v Dowden* [2007] 2 A.C. 423 at [26] (Lord Walker). This is later repeated by Baroness Hale (*Abbott v Abbott* [2008] 1 F.L.R. 1415 at [5]).

¹⁷ For three different perspectives, see: K. Lees, “Geary v Rankine: money isn’t everything” [2012] Conv. 412; M. Yip, “The rules applying to unmarried cohabitants’ family home: Jones v Kernott” [2012] Conv. 159; and T. Etherton, “Constructive trusts and proprietary estoppel: the search for clarity and principle” [2009] Conv. 104.

¹⁸ e.g. J. Glister and J. Lee, *Hanbury & Martin Modern Equity*, 20th edn (2015), paras 3-014 to 3-015; J. Wilson QC, *Cohabitation Claims: Law, Practice and Procedure*, 2nd edn (2015), paras 4-116 and 4-129; J. Craig and P. Pearson, *Cohabitation: Law and Precedents* (looseleaf, 2017), paras 8-018 to 8-023. However, in all three works, the authors suggest that the law may be slightly broader than *Rosset* strictly stated, but all conclude that the position is too uncertain yet to be definitely stated.

¹⁹ e.g. Y. Liew, *Rationalising Constructive Trusts* (2017), 301–302, 303; H. Wood, *Cohabitation: Law Practice and Precedents*, 7th edn (2017), paras 1.26–1.27; seemingly J. Farrand QC and A. Clarke, *Emmett and Farrand on Title* (looseleaf, 2017), paras 11.114.03 to 11.114.07; J. McGhee QC (ed), *Snell’s Equity*, 33rd edn (2016), 24-041 and 24-053; L. Tucker, *Lewin on Trusts*, 19th edn (2016), paras 9-062 to 9-069, and 9-072 (also relying on several pre-*Rosset* decisions, and three pre-*Stack* cases which actually involve perfectly standard applications of *Rosset*: *Mollo v Mollo* [1999] All E.R. (D) 1048 (Oct); *Buggs v Buggs* [2003] EWHC 1538 (Ch); [2004] W.T.L.R. 799; *Mehra v Shah* [2004] EWCA Civ 632); C. Harpum, *Megarry and Wade the Law of Real Property*, 8th edn (2012), para.11-025.

²⁰ Most forcefully, K. Lees, “Geary v Rankine: money isn’t everything” [2012] Conv. 412, 415–418 (relying on the unsuccessful appeal in *Geary*, on which see below); M. Pawlowski, “Imputing a common intention in single ownership cases” [2015] Trusts Law Intl. 3, 6–10 (ignoring *Rosset* entirely).

²¹ This case occurred before the Matrimonial Causes Act 1973 was passed, so Mrs Gissing had to rely on property law principles.

Lord Reid's judgment

In the part of his judgment relied on in *Stack*, Lord Reid makes two criticisms of the distinction between direct contributions (which give the non-owner a beneficial interest in the home) and indirect contributions (which do not).²² First, there is “no good reason” for this distinction—although he does not elaborate on why this is the case. Secondly, the distinction can be “unworkable”; for example, if all money is pooled into one account then it is impossible to know who paid for what. Instead, Lord Reid suggests that “a more rough a ready evaluation” of indirect contributions may sometimes be appropriate.

However, as Lord Walker himself puts it in *Stack*, Lord Reid’s judgment in *Gissing* is “inconclusive”.²³ In the space of one and a half pages, Lord Reid discusses (in this order): indirect contributions to the purchase price, quantification of shares, agreements to acquire a beneficial interest, and imputation of common intention.²⁴ With great respect, Lord Reid’s judgment does not have an obvious thread or conclusion, and with such brief reasoning it would be a stretch to say that it precludes Lord Bridge’s conclusions in *Rosset*.

Furthermore, Lord Reid’s specific proposal of a more “rough and ready evaluation” concerns the quantification stage, not acquisition. Lord Reid was criticising the idea that parties should *as a rule* get a 50% share in the property once they have acquired a share.²⁵

Finally, Lord Reid states that he maintains the views that he espoused in *Pettitt v Pettitt*.²⁶ Lord Reid only formally decided two points in *Pettitt*: contributions “of an ephemeral character” are not sufficient to acquire a beneficial interest; and an express agreement is not needed to acquire a beneficial interest in a family home.²⁷ These points are not only compatible with Lord Bridge’s conclusions in *Rosset*, they support it.

Lord Diplock's judgment

In the passage that Lord Walker references, Lord Diplock suggests that parties may intend to determine their shares in a house “on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by th[e] date” on which the property is sold or the mortgage is repaid.²⁸

However, Lord Diplock was clear that this is only relevant at the quantification stage.²⁹ Furthermore, the majority of Lord Diplock’s judgment arguably supports *Rosset*. Lord Diplock states that the starting point for the acquisition question is to look for express agreements; if there is no such agreement, then the court may infer a common intention to share the beneficial interest if the non-owner

²² *Gissing v Gissing* [1971] A.C. 886 at 896G–897B.

²³ *Stack v Dowden* [2007] 2 A.C. 432 at [22].

²⁴ *Gissing v Gissing* [1971] A.C. 886 at 896F–897G.

²⁵ *Gissing v Gissing* [1971] A.C. 886 at 897B.

²⁶ *Pettitt v Pettitt* [1970] A.C. 777; [1969] 2 W.L.R. 966.

²⁷ *Pettitt v Pettitt* [1970] A.C. 777 at 796E–H.

²⁸ *Gissing v Gissing* [1971] A.C. 886 at 909D.

²⁹ *Gissing v Gissing* [1971] A.C. 886 at 909E–F (all of 908C–910A concerns quantification of beneficial interests).

contributed to the initial purchase or later mortgage instalments.³⁰ Merely paying for chattels for joint use, or sharing day-to-day expenses, is not sufficient.³¹

In only one respect does Lord Diplock's judgment exceed what was later decided in *Rosset*. Lord Diplock suggests that a non-owner may acquire a beneficial interest by paying for household expenses, which would otherwise be met by the owner, so that the owner can afford the mortgage repayments.³² This would allow a slightly more relaxed approach than was later adopted in *Rosset*, which only accepted direct contributions to the mortgage. However, Lord Diplock is the only judge to discuss this idea in the acquisition context so this cannot form part of the ratio of *Gissing*. Therefore, even if the ratio in *Rosset* is technically narrower than Lord Diplock's judgment, this cannot affect *Rosset*'s status as a binding authority of a unanimous House of Lords.

The other judgments

Lord Morris' short judgment only contains one concrete legal proposition: courts cannot and should not invent intentions which the parties never had unless a statute explicitly permits the court to do this.³³ This is perfectly consistent with Lord Bridge's judgment in *Rosset*.

Lord Pearson also wrote a short judgment in which he states that an individual can only acquire a beneficial interest in a house by making substantial contributions to the purchase price.³⁴ Lord Pearson's discussion of non-owners paying household expenses so that the owner can pay the mortgage instalments was in the quantification context.³⁵ Therefore, Lord Pearson's judgment is also consistent with *Rosset*.

Finally, Viscount Dilhorne's judgment actively supports the position taken in *Rosset*. Viscount Dilhorne states that the court should first look for evidenced agreements that the house was to be shared, even though these may be rare in practice. Hypotheticals about what the parties *would* have agreed are insufficient as the court cannot "ascribe to the parties an intention they never had".³⁶ Furthermore, the court must look for contributions to the purchase price, either initial or subsequent, as mere expenditure for the benefit of the family does not evidence a common intention for the payor to have an interest in the house.³⁷

In summary, all five judgments in *Gissing* are either compatible with *Rosset* or actively support it.

Were Lord Bridge's remarks obiter in *Rosset*?

The second criticism of *Rosset* was that Lord Bridge's remarks "were strictly obiter dicta".³⁸ Baroness Hale does not explain this claim, but she may have been influenced by Lord Bridge's statement that the case "does not seem to depend on

³⁰ *Gissing v Gissing* [1971] A.C. 886 at 905D, 906A–B, 906H, 907B–C, 907E–G.

³¹ *Gissing v Gissing* [1971] A.C. 886 at 909F–H, 910G.

³² *Gissing v Gissing* [1971] A.C. 886 at 908A–C, 911A.

³³ *Gissing v Gissing* [1971] A.C. 886 at 898C–D.

³⁴ *Gissing v Gissing* [1971] A.C. 886 at 902B–C.

³⁵ *Gissing v Gissing* [1971] A.C. 886 at 903A–C.

³⁶ *Gissing v Gissing* [1971] A.C. 886 at 900B–F.

³⁷ *Gissing v Gissing* [1971] A.C. 886 at 900G–H, 901B–C.

³⁸ *Stack v Dowden* [2007] 2 A.C. 432 at [63].

any nice legal distinction” and his doubts about the usefulness of elaborating an exhaustive analysis of the law.³⁹

However, with respect, Baroness Hale is mistaken. The issue of acquisition was the primary ground of appeal in *Rosset*,⁴⁰ and Lord Bridge explicitly states that a “critical distinction” between express and implied agreements for a beneficial share was being overlooked by judges, including the trial judge in *Rosset*.⁴¹ This distinction is at the heart of Lord Bridge’s elucidation of the law. As Rimer LJ put it some 17 years later: “[w]hat [Lord Bridge] said was advanced by way of express guidance to trial judges”.⁴² Furthermore, Lord Bridge expressly overruled the trial judge’s conclusion that there was an implied agreement for a beneficial interest and instead held that Mrs Rosset’s indirect contributions were insufficient.⁴³ The legal analysis that Lord Bridge then gave was necessary to the outcome of the case as he was overturning the trial judge’s decision.

In short, Lord Bridge’s remarks in *Rosset* were not obiter; they were part of the ratio of the decision and cannot be disregarded lightly. In any event, as the next section will show, countless courts over the last three decades have treated Lord Bridge’s remarks as binding authority.

Has “the law ... moved on” from *Rosset*?

This section will give a brief survey of the numerous cases on the acquisition question and show that, to the author’s knowledge, none of them truly supports the claim that “the law has moved on” from *Rosset*. The next three sub-sections will consider, in turn: (a) the cases that Baroness Hale and Lord Walker cited in their judgments in *Stack* and *Jones*; (b) other cases that have been decided since *Rosset* which adhere to its principles; and (c) the main cases that could be relied upon to support Lord Walker and Baroness Hale’s argument. Each subsection will show that there is no convincing evidence that the law has moved on from *Rosset*.

The cases cited by Baroness Hale and Lord Walker

Not only did Lord Walker and Baroness Hale fail to set out the precise meaning of the phrase “the law has moved on”, they also failed to cite directly any cases in support of that claim. With great respect, this is poor methodology. It has been shown that making general, unsupported doctrinal statements about the law increases the risk of subconscious bias, clouding the conclusions reached, and increases the risk of doctrinal error.⁴⁴ It is respectfully submitted that both risks may have materialised in *Stack*. First, Baroness Hale’s remarks are largely replications of her previously stated, extra-judicial opinions.⁴⁵ While this is obviously not proof of subconscious bias in her criticisms, it does raise the

³⁹ *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107 at 132C–D.

⁴⁰ *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107 at 126E.

⁴¹ *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107 at 132D and 133H–134A.

⁴² *Parris v Williams* [2008] EWCA Civ 1147 at [42]; [2009] B.P.I.R. 96.

⁴³ *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107 at 131D–132B.

⁴⁴ W. Baude, A. S. Chilton and A. Malani, “Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews” [2017] 84 *University of Chicago Law Review* 37, 43–44. I am grateful to Philip Morrison for pointing out this article to me.

⁴⁵ e.g. in B. Hale, “Coupling and Uncoupling in the Modern World” FA Mann Lecture (November 2005); and B. Hale, “Unmarried Couples and *Family Law*” (2004) 34 *Family Law* 419.

possibility of pre-determined reasoning. Secondly, as will be shown in the rest of this section, the argument is not truly supported by any obvious authorities which this author can find.

To try to test Lord Walker and Baroness Hale's claim, we must infer that they believe this is clearly evidenced in the cases which they cite elsewhere in their judgments. Throughout *Jones v Kernott* and *Stack v Dowden*, Baroness Hale and Lord Walker discussed 12 constructive trust cases which were decided post-*Rosset*.⁴⁶ Seven of those were joint name cases so are, at best, obiter on the question of acquisition of a beneficial interest in single name cases.⁴⁷ The other five were single name cases.⁴⁸ However, none of those single name cases derogates from the *Rosset* approach.

In the first single name case, the Court of Appeal expressly cited *Rosset* and the parties were held to have had a common understanding that the property was to be shared beneficially by them both.⁴⁹ The same conclusion was reached in the second single name case.⁵⁰ In the third single name case, the oral bargain for the sale of a property was sufficient to satisfy the first limb of the *Rosset* approach.⁵¹

In the fourth single name case, the Court of Appeal used the claimant's financial contributions to the purchase price to justify finding a beneficial interest in her favour.⁵² The court explicitly justified this by reference to *Rosset*.

The final single name case relied upon is *Abbott v Abbott*, in which Baroness Hale repeated some of her criticisms of *Rosset*.⁵³ However, the sole issue in *Abbott* was the quantification of the claimant's share—the defendant (the claimant's husband) formally conceded in evidence that his wife had a beneficial share in the property.⁵⁴ This case is therefore not relevant to the acquisition question and is not a binding authority against *Rosset*.

In short, Baroness Hale and Lord Walker's statement that "the law has moved on" is simply not supported by any of the cases on which they directly or indirectly rely for their claim. This is perhaps unsurprising in light of the true state of the law, as outlined in the next two sections.

⁴⁶ These cases were not all used to criticise *Rosset*—very little space was devoted to that endeavour—but for thoroughness the full list will be considered.

⁴⁷ *Adekunle v Ritchie* [2007] B.P.I.R. 1177; [2007] W.T.L.R. 1505; *Crossley v Crossley* [2005] EWCA Civ 1581; [2006] 2 F.L.R. 813; *Midland Bank Plc v Cooke* [1995] 4 All E.R. 562; [1997] 6 Bank. L.R. 147; *Huntingford v Hobbs* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652; *Springette v Defoe* [1992] 2 F.L.R. 388; (1992) 24 H.L.R. 552; *Harwood v Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1; *Stokes v Anderson* [1991] 1 F.L.R. 391; [1991] F.C.R. 539.

⁴⁸ *Abbott v Abbott* [2008] 1 F.L.R. 1415; *Oxley v Hiscock* [2004] EWCA Civ 546; [2004] 3 W.L.R. 715; *Yaxley v Gotts* [2000] Ch. 162; [1999] 3 W.L.R. 1217; *Lowson v Coombes* [1999] Ch. 373; [1999] 2 W.L.R. 720; *Drake v Whipp* [1996] 1 F.L.R. 826; [1996] 2 F.C.R. 296.

⁴⁹ *Drake v Whipp* [1996] 1 F.L.R. 826 at 828–829 (Peter Gibson LJ); [1996] 2 F.C.R. 296.

⁵⁰ *Lowson v Coombes* [1999] Ch. 373 at 378, 382 (Nourse LJ); [1999] 2 W.L.R. 720.

⁵¹ *Yaxley v Gotts* [2000] Ch. 162 at 177 (Robert Walker LJ), 181 (Clarke LJ), 193 (Beldam LJ); [1999] 3 W.L.R. 1217.

⁵² *Oxley v Hiscock* [2004] EWCA Civ 546; [2005] Fam. 211 at [68] (Chadwick LJ).

⁵³ *Abbott v Abbott* [2008] 1 F.L.R. 1451.

⁵⁴ *Abbott v Abbott* [2008] 1 F.L.R. 1451 at [8], [19] (Baroness Hale).

Support for Rosset from other cases

As expected, prior to the decision in *Stack*, there are numerous decisions of the High Court⁵⁵ and Court of Appeal⁵⁶ which followed *Rosset* principles, or are consistent with them, in single name cases. Even after *Stack* was decided, in the four years before *Jones* was handed down, there are several examples of the High Court⁵⁷ and Court of Appeal⁵⁸ still reaching decisions that comply with *Rosset* principles in single name cases, even if they purport to take a broader approach. Similarly, Dr Brian Sloan has found that in the first two years after *Jones v Kernott* was decided virtually all single name cases at High Court and Court of Appeal level followed *Rosset* or reached conclusions consistent with it.⁵⁹ Since Dr Sloan's survey, the High Court⁶⁰ and the Court of Appeal⁶¹ has continued to decide single name cases consistently with *Rosset* principles.

Potentially problematic cases post-Rosset

In the 27 years since *Rosset* was decided, across well over 150 cases, there only seem to be four cases in which the courts have expressly applied a broader approach

⁵⁵ e.g. *Mollo v Mollo* [1999] All E.R. (D) 1048 (Oct) at [23]–[30] (*Rosset* cited, claim failed); *Trowbridge v Trowbridge* unreported 10 July 2002 High Court at [116]–[118] (direction mortgage contributions); *Kuiangha v Ekpenyong* [2002] EWHC 1567 (Ch) at [15], [27]–[28]; [2002] 2 B.C.L.C. 597 (actual agreement; direct mortgage contributions); *Chan Pui Chun v Leung Kam Ho* [2002] EWCA Civ 1075; [2003] 1 F.L.R. 23 at [68] (actual agreement); *Winsper v Perrett* unreported 13 February 2002 High Court Chancery Division at [29]–[32] (deposit paid); *Pratt v Medwin* unreported 20 September 2002 High Court Chancery Division (*Rosset* cited, claim failed); *Buggs v Buggs* [2003] EWHC 1538 (Ch); [2004] W.T.L.R. 799 (*Rosset* cited, claim failed); *Mehra v Shah* [2003] All E.R. (D) 15 (Aug) at [50]–[51] (*Rosset* cited, claim failed); *Cox v Jones* [2004] EWHC 1486 (Ch) at [77]–[78]; [2004] 2 F.L.R. 1010 (actual agreement); *Hosking v Michaelides* [2004] All E.R. (D) 147 (May) at [36]–[48] (*Rosset* cited, claim failed); *Keondjian v Kay* [2004] EWHC 2820 (Ch) at [2]; [2005] 1 P. & C.R. DG20 (*Rosset* cited, claim failed); *Turner v Jacob* [2006] EWHC 1317 (Ch) at [76]–[79]; [2008] W.T.L.R. 307 (direct mortgage contributions); *Re Purseglove* [2006] EWHC 1762 (Admin) at [8]–[11] (direct mortgage contributions for property A, the sale proceeds of which were used to purchase property B); *Parrott v Parkin* [2007] EWHC 210 (Admlty) at [12], [46]–[50], [55]; [2007] 1 Lloyd's Rep. 719 (direct contributions).

⁵⁶ e.g. *Ivin v Blake* [1995] 1 F.L.R. 70; (1994) 67 P. & C.R. 263 at 276 (*Rosset* cited, claim failed); *McHardy & Sons v Warren* [1994] 2 F.L.R. 338 at 340; [1994] 2 F.C.R. 1247 (deposit paid); *Halfax Building Society v Brown* [1996] 1 F.L.R. 103; (1995) 27 H.L.R. 511 at 516–518 (*Rosset* cited, claim failed); *Clough v Killey* [1996] N.P.C. 38; (1996) 72 P. & C.R. D22 (actual agreement); *Hyett v Stanley* [2003] EWCA Civ 942 at [8]; [2004] 1 F.L.R. 394 (actual agreement); *Lightfoot v Lightfoot-Brown* [2005] EWCA Civ 201; [2005] 2 P. & C.R. 22 at [24]–[25] (direct mortgage contributions); *Crossley v Crossley* [2005] EWCA Civ 1581 at [23]; [2006] 2 F.L.R. 813 (actual agreement); *Vinaver v Milton Ashbury Ltd* [2006] EWCA Civ 363 at [30]–[35]; [2006] W.T.L.R. 1675 (actual agreement); *Revenue and Customs v Depince* [2007] EWHC 512 at [17], [20]–[25] (*Rosset* cited, claim failed).

⁵⁷ *Griffiths v Cork* [2007] EWHC 1827 (Ch) at [26]–[28]; [2009] W.T.L.R. 95 (*Rosset* cited, claim failed); *Barrett v Barrett* [2008] EWHC 1061 (Ch); [2008] 2 P. & C.R. 17 at [11], [23]–[24] (*Rosset* cited, claim failed for illegality); *Q v Q* [2008] EWHC 1874 (Fam) at [115]; [2009] 1 F.L.R. 935 (actual agreement); *Amin v Amin* [2009] EWHC 3356 (Ch) at [273]–[280] (*Rosset* cited, claim failed); *Hapeshi v Allnatt* [2010] EWHC 392 (Ch) at [42]; [2010] W.T.L.R. 987 (payment of mortgage arrears; in any event, the law appears not to have been fully argued, see [18] and [51]); *HSBC Bank plc v Dyche* [2009] EWHC 2954 (Ch); [2010] 2 P. & C.R. 4 at [15] (actual agreement); *Gledhill's Trustee v Gledhill* [2011] B.P.I.R. 918 at [94] (direct mortgage contributions).

⁵⁸ *Williamson v Sheikh* [2008] EWCA Civ 990 at [16] (actual agreement) and *Parris v Williams* [2008] EWCA Civ 1147; [2009] 1 P. & C.R. 9 at [24], [37]–[50] (actual agreement).

⁵⁹ B. Sloan, "Keeping up with the Jones case: establishing constructive trusts in 'sole legal owner' scenarios" (2015) 35 L.S. 226, 235–250. The one possible exception is *Aspden v Elvy* [2012] EWHC 1837 (Ch); [2012] 2 F.L.R. 807, although Sloan concludes that that case's "internal incoherence" means it is not a truly novel case.

⁶⁰ *Ullah v Ullah* [2013] EWHC 2296 (Ch); [2013] B.P.I.R. 928 at [6], [21] (deposit paid), albeit using the language of resulting trusts; *Bank of Scotland plc v Forrester* [2014] EWHC 2036 (Ch) at [34]–[38], [66]; [2014] 2 P. & C.R. DG19 (actual agreement); *Singh v Singh* [2014] EWHC 2762 (Ch) at [13]–[14]; [2015] 1 P. & C.R. DG4 (direct mortgage contributions); *NR v AB* [2016] EWHC 277 (Fam); [2017] 1 F.L.R. 1030 at [84]–[98] (*Rosset* cited, claim failed); *McGuinness v Preece* [2016] EWHC 1518 (Ch) at [64], [66], [79], [85], [87], [88] (*Rosset* cited, claim failed); *Culliford v Thorpe* [2018] EWHC 426 (Ch) at [50]–[51], [66]; [2018] B.P.I.R. 685 (*Rosset* cited, actual agreement).

⁶¹ *Davies v O'Kelly* [2014] EWCA Civ 1606; [2015] 1 W.L.R. 2725 at [9], [29]–[30] (direct mortgage contributions for property A, the sale proceeds of which were used to purchase property B); *Capehorn v Harris* [2015] EWCA Civ 955; [2016] H.L.R. 1 at [19]–[24] (claim failed; 'holistic' approach rejected).

than *Rosset* and reached a conclusion that *Rosset* would not permit.⁶² However, it will be shown that the outcome in the first case is in reality an application of *Rosset* principles. The reasoning in the latter three cases is more difficult but is ultimately the product of unique and deserving factual circumstances.

The first supposed exception to the strict *Rosset* approach is *Le Foe v Le Foe*.⁶³ There, HH Judge Nicholas Mostyn QC expressly cited *Rosset* yet held that the wife's indirect contributions to the purchase price (by paying for the household expenses so the husband could pay the mortgage) were sufficient for her to acquire a 50% beneficial interest in the former matrimonial home.⁶⁴ Although the conclusion was perfectly understandable on the facts,⁶⁵ the expansive reading of *Rosset* to support the finding of an acquisition was unnecessary on the facts. In 1971, the parties had initially purchased their home using a mortgage from the Provincial Building Society. This had been redeemed by re-mortgaging the property with Halifax in 1983.⁶⁶ In 1995, the wife inherited a large sum from her mother and she used it, amongst other things, to pay off the Halifax mortgage (£55,628) and a second loan charged on the house (£36,448).⁶⁷ It is submitted that the Halifax re-mortgage should be viewed as a conversion of the original purchase debt, so repaying that later mortgage constitutes payment of the purchase price. Furthermore, possibly in light of this idea, the husband did not dispute that the wife's contributions amounted to a fresh common intention to give her a beneficial interest in the home.⁶⁸ Therefore, it is submitted that the judge's conclusions on *Rosset* should be seen as obiter because the discussion was simply unnecessary—the matter of acquisition was agreed.

More difficult is the case of *Webster v Webster*.⁶⁹ Mr and Mrs Webster were an unmarried couple who had cohabited for 27 years before Mr Webster's sudden death. The family home was registered in Mr Webster's sole name. Mr Webster made all of the mortgage repayments until his death and Mrs Webster paid for the home furnishings, utility bills, children's clothes, and food.⁷⁰ HH Judge Behrens held that it was impossible to find an agreement between Mr and Mrs Webster that she should have a beneficial interest in the property.⁷¹ However, the judge "readily accept[ed] that the indirect contributions that [Mrs] Webster made to the family budget are such that the Court would infer that [Mrs] Webster had some interest in [the property] under the second of Lord Bridge's categories in *Lloyds*

⁶² Some decisions suggest that *Rosset* is no longer the governing authority, but ultimately conclude that the facts still do not give rise to a constructive trust, e.g. *Morris v Morris* [2008] EWCA Civ 257 at [19]–[27]; [2008] Fam. Law 521 (Sir Peter Gibson); *Thompson v Humphrey* [2009] EWHC 3576 (Ch) at [94]; [2010] 2 F.L.R. 107 (Warren J); *Geary v Rankine* [2012] EWCA Civ 555; [2012] 2 F.L.R. 1409 at [22]–[24] (Lewison LJ); *Singh v Singh* [2014] EWHC 1060 (Ch) at [117], [215] (Sir William Blackburne); *S v J* [2016] EWHC 586 (Fam) at [101]; [2016] Fam. Law 811 (Roberts J); *Dobson v Griffey* [2018] EWHC 1117 (Ch), [84], [87]–[88] (HH Judge Matthews, sitting as a High Court Judge); and *In re Bhusate* [2018] EWHC 2362 (Ch), [49]–[50], [64]–[69] (Chief Master Marsh). It is submitted that these cases are not reliable departures from *Rosset* because it seems that on any test the court would not have found a constructive trust on the facts.

⁶³ *Le Foe v Le Foe* [2001] 2 F.L.R. 970; [2002] 1 F.C.R. 107.

⁶⁴ *Le Foe v Le Foe* [2001] 2 F.L.R. 970 at [10], [49]–[53].

⁶⁵ The husband "embarked on a low, deceitful and ruthless subterfuge to strip the majority of the equity out of the former matrimonial home": see *Le Foe v Le Foe* [2001] 2 F.L.R. 970 at [25]–[39].

⁶⁶ *Le Foe v Le Foe* [2001] 2 F.L.R. 970 at [6].

⁶⁷ *Le Foe v Le Foe* [2001] 2 F.L.R. 970 at [19], [23].

⁶⁸ *Le Foe v Le Foe* [2001] 2 F.L.R. 970 at [45].

⁶⁹ *Webster v Webster* [2008] EWHC 31 (Ch); [2009] 1 F.L.R. 1240.

⁷⁰ *Webster v Webster* [2008] EWHC 31 (Ch) at [11].

⁷¹ *Webster v Webster* [2008] EWHC 31 (Ch) at [32].

*Bank v Rosset*⁷². With respect, this is not what *Rosset* suggested: Lord Bridge held that only direct contributions to the purchase price are sufficient to acquire a beneficial interest. However, the broader approach taken in *Webster* can be explained on the facts. Mrs Webster was clearly a deserving applicant: she had cohabited with Mr Webster in the house for 25 years, longer than many marriages,⁷³ and four of the five defendants (Mr Webster's five adult children) were content to agree that Mrs Webster had a beneficial interest in the property.⁷⁴ According to Mrs Webster, she and Mr Webster regarded the properties as joint and had access to each other's cash and credit cards,⁷⁵ so when Mr Webster passed away she continued to spend substantial amounts of money paying the mortgage instalments and renovating parts of the property.⁷⁶ The defendants did not wish to sell the property and even the judge stressed the need for Mrs Webster to have "a roof over her head".⁷⁷ Despite all of these factors pointing towards a classic common intention by agreement, or even estoppel claim for a beneficial interest, the judge ultimately could not rely on standard *Rosset* principles for one simple reason: the lack of evidence. Mr Webster had died so was unable to give any evidence, and it would be a stretch to say that Mrs Webster's mortgage payments after his death could establish a common intention. Furthermore, Mrs Webster found it difficult to adduce formal evidence to support her claims of what took place 20 to 30 years previously.⁷⁸ The distinct lack of evidence meant the judge was essentially forced into finding a more indirect route to the same result, hence his manipulation of *Rosset*. Therefore, it is submitted that *Webster v Webster* should be viewed as an understandable per incuriam decision.

The third case is *De Bruyne v De Bruyne*.⁷⁹ Mr De Bruyne, his mother and his sister were beneficiaries of a family trust that held properties and high-value shares. Mr De Bruyne persuaded his mother and sister to dissolve the trust on the basis that he would do three things: (a) convey the shares to a newly-created trust in favour of his five young children; (b) transfer a property to his sister outright; and (c) set up a pension for his mother using income from the shares. Instead of doing this, Mr De Bruyne transferred the shares to his wife, who later sold them for £5.43 million. This money was invested in two properties on Anstey Farm. In this case, the now-adult children claimed a beneficial interest in Anstey Farm under a constructive trust. The Court of Appeal upheld the children's claim. As part of that reasoning, the court suggested that common intention constructive trusts arise because it would be unconscionable for the owner to deny the non-owner the interests that it was agreed or understood he would have.⁸⁰ This is a very different, much broader, version of the law than set out in *Rosset*. However, this decision should not be seen as a fundamental attack on *Rosset* because, in essence, the court was forced to "fudge" its reasoning. Clearly, Mr De Bruyne had acted poorly, and the likely outcome of the case was a finding in favour of the children. The only

⁷² *Webster v Webster* [2008] EWHC 31 (Ch) at [33].

⁷³ *Webster v Webster* [2008] EWHC 31 (Ch) at [39(1)].

⁷⁴ *Webster v Webster* [2008] EWHC 31 (Ch) at [3].

⁷⁵ *Webster v Webster* [2008] EWHC 31 (Ch) at [11], [13].

⁷⁶ *Webster v Webster* [2008] EWHC 31 (Ch) at [18], [22].

⁷⁷ *Webster v Webster* [2008] EWHC 31 (Ch) at [25(3)], [40].

⁷⁸ *Webster v Webster* [2008] EWHC 31 (Ch) at [6(3)].

⁷⁹ *De Bruyne v De Bruyne* [2010] EWCA Civ 519; [2010] 2 F.L.R. 1240.

⁸⁰ *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [50] (Patten LJ).

question was how the court was to get there. Unfortunately, standard *Rosset* principles did not easily apply to the facts: there could be no meaningful common intention between minors and their father to acquire beneficial interests,⁸¹ and, as minors, the children did not and could contribute to the purchase price as Astley Farm was purchased outright with the proceeds from the sale of the shares. Remedial constructive trusts were also explicitly ruled out as an option,⁸² and the factual basis for a proprietary estoppel claim was not explored at trial so could not be discussed on appeal.⁸³ Therefore, the court attempted to extract a sufficiently general basis for finding a constructive trust, the prevention of unconscionability, to be able to apply it to the determined facts.⁸⁴ Mr De Bruyne had clearly acted unconscionably so a constructive trust could be found. Therefore, it is submitted that *De Bruyne v De Bruyne* is also, at best, an understandable per incuriam decision.⁸⁵

The most recent difficult case is *Wodzicki v Wodzicki*.⁸⁶ In 1988, Mr Wodzicki purchased a house in London with the express intention of it being “occupied as a primary residence of [his] daughter”, Juliette.⁸⁷ The property was registered in the joint names of Mr Wodzicki and his wife, Monique (Juliette’s stepmother) who both lived in France. For 22 years, Juliette lived in the property, paying outgoings and for improvements; Mr Wodzicki and, possibly, Monique paid off in full the mortgage instalments.⁸⁸ Mr Wodzicki would occasionally visit but never stayed; Monique never visited. Mr Wodzicki had said that he would transfer the freehold to Juliette when he thought she was “ready”. Mr Wodzicki died intestate and, three years later, Monique claimed possession of the house. The Court of Appeal upheld the trial judge’s decision that all three parties intended the property to be Juliette’s long-term,⁸⁹ and that Monique and Juliette had beneficial shares in the property in proportion to their contributions to the purchase price, maintenance and outgoings.⁹⁰ This contradicts Lord Bridge’s general statement that a non-owner must directly contribute to the purchase price to acquire a beneficial interest. However, again the Court of Appeal’s decision should be seen as understandable but per incuriam. Normally, this case, based on Juliette’s reliance on Mr Wodzicki’s representations, could have been run as a proprietary estoppel claim.⁹¹ Unfortunately, this was a three-party situation and there was no evidence that Monique ever knew about Mr Wodzicki’s representations, so Juliette could not claim against her.⁹² Furthermore, there was no evidence that Juliette and Monique had seen each other since 1988 and Mr Wodzicki had passed away so could not

⁸¹ *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [43]–[44] (Patten LJ).

⁸² *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [48] (Patten LJ), although this is arguably what the court ultimately imposed.

⁸³ *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [55] (Patten LJ).

⁸⁴ *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [49]–[51] (Patten LJ).

⁸⁵ J. Farrand QC and A. Clarke, *Emmett and Farrand on Title* (looseleaf, 2017), para.11.114.01 goes further and argues that the trust in *De Bruyne* was a different kind of constructive trust to the common intention constructive trust. If true, this would further support the argument advanced here that *De Bruyne* is not fundamentally at odds with *Rosset*.

⁸⁶ *Wodzicki v Wodzicki* [2017] EWCA Civ 95; [2018] 1 F.L.R. 473.

⁸⁷ As stated in the mortgage: *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [6] (David Richards LJ).

⁸⁸ Monique had given no evidence that she was responsible for any contributions: *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [33] (David Richards LJ).

⁸⁹ *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [14] (David Richards LJ).

⁹⁰ *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [16] (David Richards LJ).

⁹¹ *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [11] (David Richards LJ).

⁹² *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [20], [31] (David Richards LJ).

give evidence. Despite this, Juliette clearly deserved to have an interest, not least because Monique had behaved poorly by refusing to submit evidence of her contributions to the purchase or maintenance of the property and refusing to appear for any of the court hearings.⁹³ Therefore, the Court of Appeal was driven on the unique facts to permit a wider range of factors to be considered in establishing a beneficial interest. Crucially, however, the court held that this was not a family home constructive trust case as the parties were essentially estranged.⁹⁴ Instead, the Court of Appeal upheld the trial judge's decision that Mr Wodzicki's beneficial interest in the property passed to Juliette when he died. Although this unusual decision was not explained, neither Juliette nor Monique challenged it so, technically, Juliette did not need to prove how she acquired a beneficial interest.⁹⁵

The law of precedent

The paragraphs above showed that Lord Bridge's statements in *Rosset* are not obiter and are consistent with *Gissing v Gissing*. Therefore, the doctrine of precedent tells us two things. First, *Rosset* was certainly binding authority on all courts when it was decided.⁹⁶ Secondly, High Court and Court of Appeal decisions could not overrule *Rosset*, no matter how many purport to derogate from it⁹⁷; only a subsequent House of Lords or Supreme Court decision could overrule *Rosset*.⁹⁸ As it turns out, as shown above, there is no convincing evidence that "the law ... moved on" between *Rosset* and *Stack* as claimed by Baroness Hale and Lord Walker. Therefore, any potential change to the authoritative status of *Rosset* must have been introduced by *Stack v Dowden* and/or *Jones v Kernott*.

So: did *Stack* and/or *Jones* overrule *Rosset*? In short, no. Since 1966, the House of Lords/Supreme Court has been able to overrule its own decisions.⁹⁹ Overruling is usually express, for example, the Supreme Court could hold that a specific case and "any subsequent decisions ... in so far as they relied on [it] ... should be treated as overruled".¹⁰⁰ Neither *Stack* nor *Jones* contains anything like an express overruling of *Rosset*.

However, could *Stack* and/or *Jones* have impliedly overruled *Rosset*? It is well established that the Supreme Court should not depart from a previous decision simply because the current bench of Lords would have decided it differently,¹⁰¹ and that the Supreme Court will be "very circumspect" before overruling itself.¹⁰² Despite this, there is no obvious judicial guidance on what constitutes an implied

⁹³ *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at headnote, [11]–[13], [32] (David Richards LJ).

⁹⁴ *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [25] (David Richards LJ).

⁹⁵ *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [28] (David Richards LJ).

⁹⁶ *Beamish v Beamish* 11 E.R. 735; (1861) 9 H.L. Cas. 274 at 339.

⁹⁷ Decisions of lower courts are only persuasive on higher courts, e.g. the Divorce and Matrimonial Causes Court decision of *Simonin v Mallac* 164 E.R. 917; (1860) 2 Sw. & Tr. 67 was followed for nearly a century by numerous subsequent courts; but, as Lord Reid put it, "that is not in itself sufficient ... to require that your Lordships should hold that it must now be followed" (*Ross-Smith v Ross-Smith* [1963] A.C. 280 at 293; [1962] 2 W.L.R. 388. See also Lord Reid at 303 and Lord Guest, with whom Lord Hodson agreed, at 346).

⁹⁸ *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443 at 459 (Lord Wilberforce), 496 (Lord Cross); *Willers v Joyce* [2016] UKSC 44; [2016] 3 W.L.R. 534 at [7] (Lord Neuberger).

⁹⁹ *Practice Statement* [1966] 3 All E.R. 77.

¹⁰⁰ e.g. *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] A.C. 250 at [50] (Lord Neuberger).

¹⁰¹ *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] A.C. 908 at [22] (Lord Neuberger).

¹⁰² *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] A.C. 908 at [23] (Lord Neuberger).

overruling,¹⁰³ so we must work from first principles. It is submitted that there are only two ways that the Supreme Court could impliedly overrule itself:

- The Supreme Court could rule, as part of its ratio, that the crucial reasons which supported the earlier decision are incorrect or no longer valid.
- The Supreme Court could hear a case which has the same essential facts but reach a totally different conclusion such that it is obvious that the first case was meant to be overruled.¹⁰⁴

These are purposefully high thresholds: anything lower and the law would risk allowing inconsistency and unpredictability, ideas which would fundamentally undermine the rule of law.¹⁰⁵

The brief criticisms levelled against *Rosset in Stack*, as outlined above, were explored and undermined in the paragraphs above. Therefore, it is safe to conclude that *Rosset* was not impliedly overruled on the first proposed basis. But what about the second ground: are single name cases and joint name cases sufficiently similar to require essentially identical treatment in the law? The penultimate section in this article will argue that the answer is ‘no’, for conceptual and practical reasons.

Justifications for treating single name cases differently to joint name cases

There is one simple factual distinction between single name and joint name cases: the number of registered legal owners. However, this makes all the difference. If courts too readily infer or impute the acquisition of a beneficial interest to a non-owner in a single name case, this can cause both conceptual and practical difficulties. Neither of these difficulties are relevant to joint name cases. Therefore, while there may be reasons to treat the two situations alike, there are more fundamental differences between the two situations, so it would be wrong to assume that the law could *unthinkingly* be transposed from one to another.¹⁰⁶ Whether the law should be the same in both situations, even despite these differences, is a separate issue not tackled in this article.¹⁰⁷

Conceptual differences between single name and joint name cases

In joint name cases, both parties automatically have a beneficial interest in the home,¹⁰⁸ so the court is simply being asked to quantify the value of the two existing shares. However, in single name cases, the court is being asked to find that a beneficial interest was created in favour of the non-owner and *then* quantify the value of the two shares. In other words, joint name cases solely concern the valuation of existing property rights—but single name cases concern the creation

¹⁰³ R. Cross and J. W. Harris, *Precedent in English Law*, 4th edn (1991), 137–138.

¹⁰⁴ This second limb is based on the test which Lord Goddard CJ proposed for implied overruling of Court of Appeal judgments by House of Lord judgments (*R. v Porter* [1949] 2 K.B. 128 at 132; [1949] 1 All E.R. 646).

¹⁰⁵ *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] A.C. 908 at [21] (Lord Neuberger).

¹⁰⁶ J. Lee rightly questions the legitimacy of attempting to undermine previous House of Lords authorities without expressly overruling them in this context in “The Supreme Court and the doctrine of precedent”, Inner Temple Academic Fellow’s Lecture (originally given 23 April 2011), p.15.

¹⁰⁷ For three different approaches to this question, see above.

¹⁰⁸ Law of Property Act 1925 s.36.

(and then valuation) of property rights. Conceptually, these are two very different enterprises, even if the aim in both contexts is to discern the parties' "common intention".¹⁰⁹

The key feature of property rights is that they can bind third parties; other people are prohibited from interfering in particular ways with the thing(s) in which the right-holder holds a property right.¹¹⁰ Crucially, the value of a property right does not affect its ability to bind a third party: a beneficial share worth £7 can bind a third party just as much as a beneficial share worth £7 million.¹¹¹ Therefore, the more readily the law creates property rights of any value, the more readily the court allows the holders of those rights to gain some power, direct or indirect, over other people by forbidding them from using the property without the consent of the right-holder.¹¹² This problem is particularly acute for scarce resources like land.¹¹³

To ensure that third-party duties are not created too readily, the law sets high standards for the creation of property rights: creation of new property (if planning and other public laws permit),¹¹⁴ discovery of new property,¹¹⁵ long use of unclaimed property,¹¹⁶ or genuine consensual arrangements with those who hold a superior right (e.g. sales or leases).¹¹⁷ Once property rights have been created, land law generally follows the principle of static security that owners are not without good reason to be deprived of their property against their will.¹¹⁸

When the courts decide the test for acquiring a beneficial interest, a property right, in a family home, they must consider what actions satisfy one or more of these high standards. The higher courts must also bear in mind that an attenuation of these standards in one context could have an impact in other contexts; for example, for the creation of trusts generally. Conversely, none of these issues are relevant to joint name family home cases because the sole issue is one of valuation, something which does not affect the nature of the property right being valued. Therefore, the conceptual basis and analytical approach to single name and joint

¹⁰⁹ This argument is relied upon by Pawlowski (M. Pawlowski, "Imputed intention and joint ownership—a return to common sense: *Jones v Kernott*" [2012] Conv. 149, 158) and Sloan (B. Sloan, "Keeping up with the *Jones* case: establishing constructive trusts in 'sole legal owner' scenarios" (2015) 35 L.S. 226, 234). With respect, this is an inadequate argument: just because two situations depend on common intention does not mean they are the same (e.g. contracts and constructive trusts).

¹¹⁰ W. Swadling, "Property: General Principles" in A. Burrows (ed), *English Private Law* (2013), para.4.03; *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1 at [309] (Baroness Hale).

¹¹¹ e.g. in *Bridges v Mees* [1957] Ch. 475; [1957] 3 W.L.R. 215, where the claimant successfully bound a third party with his beneficial interest in a parcel of land worth £7.

¹¹² J. W. Harris, *Property and Justice* (1996), 165, 264. *Dobson v Griffey* [2018] EWHC 1117 (Ch) at [6] (HH Judge Matthews, sitting as a High Court Judge).

¹¹³ J. W. Harris, *Property and Justice* (1996), 265. Examples of how this works in practice in the single name context are discussed in below.

¹¹⁴ e.g. in the creation of patents (Patents Act 1977 s.7). This doctrine possibly also applies to slow and incidental accretions to land (*Brighton and Hove General Gas Co v Hove Bungalows Ltd* [1924] 1 Ch. 372 at 390–391 (Romer J)).

¹¹⁵ e.g., for chattels, *Parker v British Airways Board* [1982] Q.B. 1004 at 1017; [1982] 2 W.L.R. 503 (Donaldson L.J.). Generally, this is likely no longer applicable to land as the whole world is known, however historically (and controversially) this idea was used to justify the taking of indigenous property: see *Johnson v M'Intosh* 21 U.S. 543 (1823) at 587 (Marshall C.J.). Newly formed islands are likely to be owned by the country within whose exclusive economic area it appears (United Nations Convention on the Law of the Sea art.57).

¹¹⁶ For real property: Land Registration Act 2002 ss.96–98 and Sch.6. For personal property: Limitation Act 1980 s.3.

¹¹⁷ cf. *Swift v Gifford* (1872) 23 F. Cas. 558.

¹¹⁸ E. Cooke, *The New Law of Land Registration* (2003), 100. This term was coined in R. Demogue, "Security" in A. Fouillee (ed), *Modern French Legal Philosophy* (1916), Ch.XIII.

name cases is fundamentally different, and it cannot simply be assumed that the approach taken in a joint name case should equally govern single name cases.

A possible counter-argument to the above might run as follows.¹¹⁹ In single name cases, the land is already encumbered by the rights of the sole owner—whose rights are automatic and obvious as they are the owner. Allowing a cohabiter to acquire a beneficial interest in that property is simply doubling the number of people who have those *same* rights. This simply doubles the possibility of enforcement of existing rights; it is not a change in the *content* of existing rights or the *number* of existing duties on third parties. The practical effect on third parties is therefore minimal at a conceptual level—existing duties are simply owed to one more person. On this argument, the law need not have any special concern to restrict the situations in which duplicate property rights in cohabiters are created, as there is no substantial alteration in the status quo. In short, the conceptual difference advanced here between single name and joint name cases would fall away.

However, this argument overlooks that the rights which the non-owner acquires are *not* identical to the owner's rights, and the creation of a beneficial interest is *not* simply a matter of enforcement. Before the constructive trust arises, the owner has legal rights (with no separate beneficial rights¹²⁰) and the non-owner has no rights at all. When the constructive trust arises, the non-owner only acquires equitable rights—they do not acquire any legal rights. A beneficial interest under a trust of land and legal title to that land are different in important respects. For example, the non-owner cannot sell or mortgage the legal estate whereas the registered owner can.¹²¹ Similarly, the registered owner can sue third parties for trespassing on the land,¹²² whereas the non-owner cannot rely on their beneficial interest to do this.¹²³

Furthermore, in virtually all single name cases, the owner and non-owner will end up as tenants in common in equity.¹²⁴ This means they can deal with the shares individually—for example, the non-owner could sell their share to a third party, and the owner would have limited powers to stop them. Even if the owner's and non-owner's rights are similar in content, they need not be exercised in an identical way. This is not simply an issue of enforceability because third parties may be affected differently by the different ways in which the owner and non-owner deal with their property rights. Therefore, it is submitted that the owner's and non-owner's rights should be seen as conceptually distinct, and the conceptual argument advanced in this sub-section can be maintained.

¹¹⁹ I am grateful to Philip Morrison for suggesting this point.

¹²⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 706; [1996] 2 W.L.R. 802 (Lord Browne-Wilkinson).

¹²¹ Land Registration Act 2002 s.23(1).

¹²² *Leigh and Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] 1 A.C. 785 at 812 (Lord Brandon).

¹²³ Although they could rely on their common law right to possession, if they occupy the property (L. Tucker, *Lewin on Trusts*, 19th edn (2016), para.40-070).

¹²⁴ Baroness Hale did not know of any single name cases in which the result was a joint tenancy with the non-owner: *Stack v Dowden* [2007] 2 A.C. 432 at [66].

Practical differences between single name and joint name cases

As stated, the key feature of property rights is that they can bind third parties.¹²⁵ In the single name family home context, this can happen via the doctrine of overriding interests. The non-owner gains a property right, a beneficial interest under a trust, which can bind mortgagees and purchasers if the non-owner is in actual occupation that would be obvious on a reasonably careful inspection of the land.¹²⁶

In a joint name case, mortgagees and purchasers can overreach overriding interests by paying money to two trustees of the property—i.e. the two legal owners—so they can secure vacant possession.¹²⁷ However, overreaching cannot occur if there is only one trustee. Therefore, a non-owner's beneficial interest in an owner's property makes that property much less marketable because purchasers may fear that their rights could be subject to an unregistered non-owner's overriding interest.¹²⁸ In practice, then, the owner may be unable to sell the property without the consent of the non-owner beneficiary, which may not be forthcoming, and would have to resort to appointing a new trustee and potentially securing a court order for sale.¹²⁹ This process is time-consuming, costly, and further stifles the property's marketability. The more readily that a court infers or imputes the acquisition of a beneficial interest to a non-owner, the more often the court will create what are in practice¹³⁰ un-overreachable and undetectable rights.¹³¹ This actively undermines another of land law's key principles—market confidence in transactions (“dynamic security”¹³²).

Finally, it should be noted that it is “almost always” a conscious choice for parties to put their property in joint names.¹³³ Although this is often done because their bank requires them to undertake joint and several liability for a large mortgage, people generally understand the implications of the choice between joint legal ownership and sole legal ownership.¹³⁴ Therefore, at least where cohabiting couples bought the property during the cohabiting part of their relationship, courts should not too readily create more (equitable) owners or they risk undermining people's choices. Again, this practical consideration does not apply to joint name cases.

¹²⁵ See above.

¹²⁶ For unregistered land which is being registered by the purchaser see Land Registration Act 2002 ss11(4)(b), 12(4)(c), Sch.1 para.2. For registered land, see Land Registration Act 2002 ss.28, 29(1), 29(2)(a)(ii), 30(1), 30(2)(a)(ii), Sch.3 para.2. e.g. *Williams & Glynns Bank v Boland* [1981] A.C. 487; [1980] 3 W.L.R. 138.

¹²⁷ Law of Property Act 1925 ss.2(1)(ii), 27(2); e.g. *City of London Building Society v Flegg* [1988] A.C. 54; [1987] 2 W.L.R. 1266.

¹²⁸ Even if a purchaser could ultimately resist an overriding interest claim, the mere possibility of being bound by a third party will impact marketability and price.

¹²⁹ *Bull v Bull* [1955] 1 Q.B. 234 at 237–239; [1955] 2 W.L.R. 78 (Denning L.J.); Trusts of Land and Appointment of Trustees Act 1996 ss.10–15, 19–21.

¹³⁰ Of course, purchasers could require all existing cohabitants to agree to give up their rights as part of the sale, but this could be an unnecessary additional cost in many cases and will not prevent dedicated fraudster sole owners, as happened in *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 W.L.R. 783; [1986] 2 All E.R. 54.

¹³¹ C. Harpum, “Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation” [1990] 49 C.L.J. 277, 301.

¹³² See above.

¹³³ *Stack v Dowden* [2007] 2 A.C. 432 at [66] (Baroness Hale); M. Yip, “The rules applying to unmarried cohabitants’ family home: Jones v Kernott” [2012] Conv. 159, 162–163.

¹³⁴ *Stack v Dowden* [2007] 2 A.C. 432 at [67] (Baroness Hale), [115] (Lord Neuberger); although see the results of a small survey of cohabitants and family lawyers on this issue: G. Douglas, J. Pearce and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (2007), 5.9 to 5.21, 5.29 to 5.33, and 5.37.

Conclusion

In short, the criticisms levelled at *Lloyds Bank v Rosset* by Baroness Hale and Lord Walker are, with respect, mistaken, *Rosset* is still binding law and joint name cases should not be allowed to govern single name cases.