



# Rethinking the Common Intention Constructive Trusts in *Stack v Dowden* and *Jones v Kernott* – should the Resulting Trusts be preferred?

by Yee Ching Leung

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## Abstract

Yee Ching Leung takes the two landmark cases, *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53, as starting points to consider the new Common Intention Constructive Trust approach in dealing with the issue of how the beneficial interest of a property is to be shared between two separating cohabitants. The article analyses whether this new approach should be preferred over the traditional Resulting Trust approach. The author explains the two approaches and gives three arguments in support of the Resulting Trust approach. First, it provides a greater degree of certainty, which is crucial in property law. Secondly, the traditional approach is more coherent in principle when comparing to the Common Intention Constructive Trust approach. Thirdly, the author argues that the Resulting Trust approach would not leave the discretion of judges unconfined. Toward the end of the article, the author gives two brief replies to the critics of the Resulting Trust approach. However, the Common Intention Constructive Trust approach is now the law of England and whether the Resulting Trust approach will return remains to be seen.

## I. Introduction

This article concerns the issue of how the beneficial interest of a property is to be shared between two separating cohabitants. Generally, the issue can be resolved by either an express trust or an express agreement. However, in a domestic context, it is common that cohabitants do not make explicit arrangements. Accordingly, the courts have to decide the issue when disputes arise during their separation. Therefore, since the approach adopted by the courts would affect the property interests shared by the cohabitants, which usually involve a significant amount, the issue becomes important for society given that there is a trend of cohabitation.

This article will use *Stack v Dowden*<sup>1</sup> and *Jones v Kernott*<sup>2</sup> as the starting point of analysis. In these cases, the House of Lords adopted the approach of creating a Common Intention Constructive Trust (“CICT”) in resolving the issue. The House ruled that, in the absence of an express agreement, courts may take into account not only financial factors but, *inter alia*, the purpose of acquiring the home, the nature of the parties’ relationship, and their personalities, in deciding the issue by a CICT. In contrast, in his dissenting judgment in *Stack*, Lord Neuberger preferred the traditional Resulting Trust (“RT”) approach, focusing on financial contributions on purchase price. The results of the two approaches can be very different since CICTs are more flexible but produce more unpredictable results, while RTs are less flexible but produce certain and consistent results. This article argues that the RT approach should be preferred because it has several advantages: firstly, it provides certainty; secondly, it is coherent in principle; and thirdly, it limits the discretion of judges within a legitimate boundary.

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<sup>1</sup> [2007] UKHL 17 (HL).

<sup>2</sup> [2011] UKSC 53 (SC).

I shall argue that the CICT approach faces different difficulties in practice and in theory. Accordingly, the RT approach is a better solution. Firstly, RTs provide a certain default position based on the RT presumption that a transferor is presumed not to have transferred a property gratuitously so that a transferee is to be holding the property on trust for the transferor. In contrast, CICTs do not provide such a definite starting point for adjudicating but to resort to a range of factors, making the result uncertain and unpredictable. Secondly, the doctrine of RTs is well-established in trust so applying this approach in resolving the issue does not cause any theoretical problems. However, the CICT approach does not possess the “unconscionability” element which is essential in the traditional constructive trust doctrine without justification. Thirdly, the RT approach respects separation of powers. It limits the discretion of judges so that judicial decisions can be very consistent. It can also provide flexibility since it only lays down a rebuttable presumption against gratuitous transfers. If this presumption is rebutted, a constructive trust can still be called upon to resolve the issue. On the contrary, under CICTs, if the parties have not made explicit arrangements, judges will be able to consider a *wide* range of factors, thus taking a holistic approach to adjudication. As such, the adjudication loses transparency and creates uncertainty and unpredictability. Particularly, judges would be given a strong discretion where they are in some sense free to make *any* decision, violating the separation of powers. At last, I shall reply to two criticisms of RTs raised by Lord Walker and Lady Hale, who said that RTs are imputing a common intention on parties. I argue that inferring an intention and imputing an intention are totally different.

## II. CICTs – The New Approach

In short, CICTs are trusts imposed on a property to uphold the common intention of the parties where they intended that the beneficial interest of the property is to be shared.<sup>3</sup> That property usually is registered in a single name of the couple and is occupied by the couple as a family home. Relying on that intention, the non-legal owner has acted to his or her detriment, so that refusing to honour the common intention and allowing the legal owner to deny the non-legal owner’s interest is unconscionable.<sup>4</sup> CICTs have been used in both *Stack v Dowden* and *Jones v Kernott*.

In *Stack v Dowden*, Lady Hale revised the CICT approach, in determining the proprietary interests of a joint name property between an unmarried couple while there is no “*explicit declaration of their respective beneficial interests*”.<sup>5</sup> Her Ladyship said courts have to respond to social and economic changes<sup>6</sup> and further stated that the law has moved on in response to those changes.<sup>7</sup> The House considered four cases, namely, *Pettitt v Pettitt*,<sup>8</sup> *Gissing v Gissing*,<sup>9</sup> *Lloyds Bank plc v Rosset*,<sup>10</sup> and *Oxley v Hiscock*.<sup>11</sup> The first two are about the approach to ascertain the parties’ intention. The other two are about what triggers a constructive trust and how to assess it.

*Pettitt* and *Gissing* considered if the intentions of the parties were unclear, whether the court must find a *real bargain*, or such a bargain can be inferred or imputed.<sup>12</sup> There are two points to be noted in *Pettitt*. Firstly, Lord Diplock rejected the RT approach.<sup>13</sup> Secondly, Lord Diplock tried to “impute an intention” but his Lordship was in minority. As a result, the majority clearly preferred searching for a

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3 Steven Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Hong Kong: Sweet & Maxwell, 2017) 421-422.

4 David Hayton et al., *Underhill and Hayton Law of Trusts and Trustees* (London: LexisNexis, 2016) 572.

5 *Stack* (n 1) [40].

6 *ibid* [46].

7 *ibid* [60], concurred by Lord Walker at [26].

8 [1970] A.C. 777 (HL).

9 [1970] UKHL 3 (HL).

10 [1990] UKHL 144 (HL).

11 [2004] EWCA 546 (CA).

12 *Stack* (n 1) [17].

13 *Pettitt* (n 8) [824].

real bargain.<sup>14</sup> Moving on to *Gissing*, which followed *Pettitt*, the same two points should be noted. Firstly, Lord Diplock adopted a constructive trust as a solution.<sup>15</sup> Secondly, the line between inference and imputation was blurred, since the reasoning of *Gissing* was in substance the same as *Pettitt* (where Lord Diplock was trying to impute an intention), notwithstanding that the word “inference” was mainly used in *Gissing*.<sup>16</sup>

*Rosset* and *Oxley* concerned what contribution made to the property would be enough to trigger a constructive trust and how to quantify the beneficial interests under it. In *Rosset*, a wife claimed her beneficial interest regarding the matrimonial home by virtue of contributing to renovation work of the property. The House ruled that the amount of contribution was “almost *de minimis*”.<sup>17</sup> For constructive trusts to operate, there must be a common intention to share the beneficial interests. In the absence of express agreement, the “threshold” of inferring a common intention cannot be *anything less than direct contributions* to the purchase price.<sup>18</sup> In *Oxley*, the dispute was between an *unmarried couple*. The court ruled that where the common intention to share is missing, the court can take a holistic approach to look at the “whole course of dealing between [the parties] in relation to the property” to assess the interests under the trust.<sup>19</sup>

Eventually, this chain of judgments was considered in *Stack*. The majority rejected the RT approach<sup>20</sup> and preferred the CICT approach. The CICT approach is said to be a two-stage approach.<sup>21</sup> The first stage is to ascertain the *existence of a trust*. The second stage is to *quantify the beneficial interests* of each party under the trust. In the first stage, one way to establish a trust is by express agreement prior to the acquisition of property, or exceptionally after acquisition, that the beneficial interest of the property is to be shared. In the absence of express agreement, another way to establish a trust is by determining whether there was a common intention to share the beneficial interest. In this first stage, it is arguable whether the existence of the common intention can be imputed.<sup>22</sup> Turning to the second stage, the courts would stick to parties’ agreement, if any, on the quantities of the beneficial interests to be shared by each. If there is no agreement, the quantification issue can be resolved by imputing an intention as to the quantity to be shared in light of the parties’ conduct.<sup>23</sup> That common intention can be ascertained at any one time notwithstanding that it may change over time, rendering the trust one of “ambulatory” constructive trust.<sup>24</sup> However, the court’s task is still to search for a result reflecting parties’ intention and the court cannot abandon that by a result it considered fair.<sup>25</sup> Since equity follows the law,<sup>26</sup> the starting point is the legal owner owns the property. The heavy burden to prove that “the parties did intend their beneficial interests to be different from their legal interests” is “on the person seeking to show that”.<sup>27</sup>

In summary, Lady Hale did not draw a clear distinction between inferring and imputing a common intention. In discharging the heavy burden to claim that one has beneficial interest regarding a property in one’s partner’s name, “more factors than financial contributions are now apparently

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14 *Stack* (n 1) [22].

15 *Gissing* (n 9) [905].

16 *Stack* (n 1) [20].

17 *Lloyds Bank plc* (n 10) [131].

18 *ibid* [133].

19 *Oxley* (n 11) [69].

20 *Stack* (n 1) [60].

21 Terence Etherton, “Constructive Trusts: A New Model For Equity And Unjust Enrichment” (2008) 67 C.L.J. 265, 274-275.

22 Lady Hale held it is “to ascertain parties’ shared intentions, actual, inferred or imputed”. *Stack* (n 1) [60], emphasis mine. Lord Neuberger in *Stack* (n 1) [143] criticised *Oxley* (n 11) quoted by Lady Hale since it “contemplate an imputed intention”. Lord Collins considered Lady Hale to be using “infer” and “impute” interchangeably, *Jones* (n 2) [59]. It was said that there is no “normative justification” to treat two questions differently, see Brian Sloan, “Keeping up with the *Jones* case: establishing constructive trusts in sole legal owner scenarios” (2015) 35 L.S. 226, 234.

23 *Stack* (n 1) [61].

24 *ibid* [62].

25 *ibid* [61].

26 *ibid* [4], [33], [54].

27 *ibid* [68].

relevant”.<sup>28</sup> The courts can now take into account a wide range of factors not only the purchase price of the property but, *inter alia*, whether the parties “had children for whom they both had responsibility to provide a home”, the purpose of acquiring the home, the nature of the parties’ relationship, and their characters and personalities.<sup>29</sup> Hence, *Stack* has loosened the law, making financial contribution inessential for finding a common intention, revising the restrictive approach in *Rosset* which require direct financial contribution.<sup>30</sup> As such, the main theme of *Stack* is about “context”.<sup>31</sup>

The CICT approach was developed in *Jones*. Lord Walker and Lady Hale explicitly abandoned the reasoning of RTs in Lord Neuberger’s judgment in *Stack*.<sup>32</sup> They took the chance to re-state the law more clearly as their Lordships realised the difficulties faced by lower courts when applying the new CICT approach.<sup>33</sup> Lord Walker and Lady Hale made clear that the starting points of a sole name property and a joint name property should be different. For the former, the person whose name is not in proprietorship register should bear the burden of establishing a CICT. For the latter, the person whose name is on the register should start with “the presumption of a beneficial joint tenancy” where the burden to discharge it is a heavy one.<sup>34</sup> This presumption can be rebutted either at the time of acquisition or post-acquisition<sup>35</sup> where the common intention should be “deduced objectively from their conduct”.<sup>36</sup>

Their Lordships re-confirmed that when there is an intention to share the beneficial interests but the proportions are unclear, an intention could be *imputed* regarding the proportions “which the court considers fair having regard to the whole course of dealing”.<sup>37</sup> It was said that *Jones* attempts to play down the distinction between inference and imputation.<sup>38</sup> Although it was said that theoretically the yardstick of the search of intention is not fairness, it is difficult, if not impossible, to infer an unfair common intention.<sup>39</sup> When it comes to imputation, fairness nonetheless serves as a *de facto* yardstick.<sup>40</sup> Therefore, the main theme of *Jones* is “fairness”.<sup>41</sup>

### III. RTs – The Well-Established Doctrine

In his powerful dissenting judgment in *Stack*, Lord Neuberger took a very different view where he adopted “presumed resulting trusts”.<sup>42</sup> It can be summarised as trusts imposed in cases where there is a property gratuitously transferred but there is no evidence showing that the transfer is intended to be a gift. As such, there is a rebuttable presumption in favor of the transferor that the transferee holds the property under a trust for the transferor.<sup>43</sup> I will follow Lord Neuberger to refer to it as RT for simplicity.

28 A. J. Cloherty and D. M. Fox, “Proving a trust of a shared home” (2007) 66 C.L.J. 517, 519.

29 *Stack* (n 1) [68].

30 Professor Gardner commented that *Stack* (n 1) has revised *Burns v Burns* [1984] Ch. 317 (CA) (particularly at [345]) where the court accepted indirect financial contribution, notwithstanding that *Burns* was not considered in *Stack*. See Simon Gardner, “Problems in family property” (2008) 72 C.L.J. 301, 305.

31 Nigel Gravells et al., *The Landmark Cases in Land Law* (Oxford: Hart Publishing 2013) 230; *Stack* (n 1) [69].

32 *Jones* (n 2) [25] and [53].

33 *ibid* [13].

34 *ibid* [17] and [22].

35 *ibid* [51].

36 *ibid* [51].

37 *ibid* [31]-[32].

38 Ying Khai Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) 306.

39 *Jones* (n 2) [65] (Lord Collins).

40 *ibid* [74]. Lord Wilson said, per Lord Diplock, “reasonable spouses will intend only what is fair” ([83]) and his Lordship disagreed with Lady Hale, who denied fairness as yardstick ([61]), since the court can only resort to fairness ([85] and [87]).

41 Gravells (n 31) 230.

42 Kevin Gray and Susan Francis Gray, *Elements of Land Law*, 5th edn (Oxford: Oxford University Press, 2009) 842-843.

43 *Hayton et al.* (n 4), 433.

Lord Neuberger held that the first step of applying the RT approach is “to consider how the beneficial interest is owned at the date of acquisition” involving the identification of “the nature and effect of the relevant features”.<sup>44</sup> The second step is to look at the post-acquisition events to see if there is anything justifying a change of beneficial ownership at the date of the hearing. However, in the second step, the evidence to rebut the presumption has to be “compelling”.<sup>45</sup> For example, a significant improvement to the home may do, but not decoration or repairs.<sup>46</sup> Also, subsequent discussions between the parties which “implied a positive intention to depart from [the original] apportionment” would justify a change.<sup>47</sup> He relied on the rebuttable RT presumption under which a person is presumed not to make a gift unless there is evidence proving the contrary.<sup>48</sup> He also recognised the situation when the presumption has been rebutted, the courts would have to determine the beneficial interests of each cohabitant by a constructive trust.<sup>49</sup> He emphasized the importance of drawing a clear distinction between inferring an intention and imputing an intention, notwithstanding that that may be a fine line.<sup>50</sup> In his judgment, imputing an intention to parties is undesirable.<sup>51</sup>

#### IV. The Main Advantages of RTs

The first advantage of Lord Neuberger’s RT approach is that it consolidates the fundamental values of land law<sup>52</sup> – *certainty* and *consistency*. For any cases, judges need a *starting point* to commence the task of adjudication. A RT provides a basis of a *default position* with regard to any allocation of beneficial interests. With such a default position, several values could be achieved, including transparency, simplicity,<sup>53</sup> consistency, certainty, and predictability. Since the rule has been set clearly, logically parties would not be tempted to forcibly proceed their case to courts just to “test” the decision, or resort to “luck” to hope that courts may rule for them, since everyone knows where they stand<sup>54</sup> as RTs have presumed there is no intention to gifts, unless evidence is strong enough to rebut that presumption. Also, the rule is simple as it initially only focuses on one factor – the *financial* contribution. Had the RT presumption not been rebutted, every case would be decided *exactly the same*, achieving a high degree of consistency and the result would be certain and predictable.

The second advantage is that, Lord Neuberger’s approach fits into the existing law. Looking at the rule itself, RTs are well-established in trust law, having a historical origin going back to *Dyer v Dyer* in 1788<sup>55</sup> or Sir Edward Coke in 1639.<sup>56</sup> The rule has been developed by judges along the judicial history, and the rationales behind it have been well explained by scholars and judges.<sup>57</sup> Using this approach, the court is still ruling within the boundary of the existing body of trust law. This reinforces the legitimacy of any decisions made under RT.

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44 *Stack* (n 1) [108].

45 *ibid* [138].

46 *ibid* [139].

47 *ibid* [145].

48 *ibid* [114].

49 *ibid* [124].

50 *ibid* [125]; supported in *Jones* (n 2) [67] (Lord Kerr) and [89] (Lord Wilson) notwithstanding that they later respectively said that imputation of an intention can be used as a “backup” of inference (*Jones* (n 2) [72]) or more realistically inference is impossible so imputation should be used (*Jones* (n 2) [89]).

51 *Stack* (n 1) [127].

52 I shall use the terms land law and property law interchangeably since the main focus is on the proprietary interest.

53 *Stack* (n 1) [3], [108].

54 *ibid* [5].

55 (1788) 2 Cox Eq Cas 92 (KB). Quoted by Lord Neuberger together with *Pettitt* (n 8), *Gissing* (n 9), and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669 (HL) in supporting a RT approach, in *Stack* (n 1) [111].

56 John Mee, “Presumed Resulting Trusts, Intention and Declaration” (2014) 73 C.L.J. 86, 94.

57 James Penner, “Resulting Trusts and Unjust Enrichment: Three Controversies” in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2009) 237.

The third advantage is that, as a matter of policy, the RT approach preserves the flexibility of law without widening the discretion of judges unjustifiably. The RT approach firstly sets a rebuttable presumption<sup>58</sup> while at the same time provides a *back-up* position for the court to exercise its discretion appropriately had the presumption been rebutted.<sup>59</sup> While the RT approach has flexibility, it also constrains judges by confining their discretion within the limit of the rule of law, respecting separation of powers, since judges have little room to depart from the settled principle of RTs. It frees the judges from the suspicion of “legislating”.

## V. Certainty as King

In land law, certainty is always a main concern, evidenced by our land registration system. It has a signaling function to “tell everyone exactly where they stand”.<sup>60</sup> One way to preserve its certainty is to develop the law toward a *rules-based* system rather than a *principles-based* system. There is a distinction between rules and principles. Rules apply in an all-or-nothing manner<sup>61</sup> while principles apply with weights.<sup>62</sup> Rules are confined by the “law of excluded middle” so any legal rule cannot be at the same time applied and not applied. However, each legal principle carries its weight and they may conflict with rules or other principles. Although a legal rule may be trumped by a legal principle,<sup>63</sup> it is another thing to prioritise abstract principles over a clear-cut legal rule in the context of land law. Lord Neuberger’s approach is going in a rule-based direction, providing greater certainty. RTs are either applied or not applied. The court may only have to resort to constructive trusts as a back-up when the RT presumption is rebutted.<sup>64</sup> However, in CICTs judges give up a *certain* default position and directly go to *discretion* as the default position is to consider the context and fairness, where the result is directed by principles, not rules. Everyone has to guess what facts would be considered, and accordingly how much weight would be given to each of them where ambiguities arise. We should be reminded that certainty is closely related to predictability.

Applying CICTs may produce unpredictable results. For example, should the housework done by the husband or wife, for some years, be counted? To what extent should the effort and time they paid to the family be relevant? What if for 20 years the husband bought the food but the wife was the cook?<sup>65</sup> How can we weigh *each* of them? What if some factors are conflicting? Ultimately, we have to bear in mind that we are dealing with the *proprietary right of a property*. We have to accept some factors are “incommensurable” and we cannot weight them precisely.<sup>66</sup> How are we going to link all the surrounding circumstances, for 20 years in *Stack*, back to the case to allocate the proprietary interest? It makes any decision subject to “Palm-tree justice”,<sup>67</sup> which is arbitrary and unstructured. To use those incommensurable factors to rule on a *financial issue* seems unpractical and unworkable.

As Professor Fuller said, a legal system fails when issues are decided on an *ad hoc* basis or the rules cannot be understood.<sup>68</sup> CICTs apply in a manner that every case “turn on its own facts” which is to certain extent *ad hoc*, and no one seems to understand what factors to consider and how much weight to be given to them. Therefore, by considering so many factors, a CICT:

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58 *Stack* (n 1) [123].

59 *ibid* [124].

60 Carol Rose, “Crystals and Mud in Property Law” (1987-88) 40 *Stanford Law Review* 577, 577.

61 Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) 24.

62 *ibid* 26.

63 *Riggs v Palmer* 115 N.Y. 506 (1889) (CA) where the legal principle “a wrongdoer cannot be benefited from his wrongdoing” trumps the legislation entitling the defendant, who killed his grandmother, to the estates of his grandmother.

64 *Stack* (n 1) [124].

65 “[M]anual labour” could be counted if significant, *Stack* (n 1) [36].

66 *ibid* [100] and [130].

67 Gray and Gray (n 42) 908.

68 Lon Fuller, *The Morality of Law*, Rev. edn (London: Yale University Press, 1969) 39.

largely devalues the principle of consistency, by relegating it to the status of one of a number of evaluative factors, entitled to no more weight than the judge chooses to give it in the particular case... *there would appear to be no principle whatever to guide the evaluation other than the judge's gut instinct.*<sup>69</sup>

The adjudicating exercise becomes a “black-box” where parties seem to know “the law”, but no one seems to understand how it operates and how the decision is arrived at. It is ironic that Lady Hale noted how difficult it was for the lower courts to apply the rule.<sup>70</sup>

Besides, CICTs blur the concept of property. It is hard to reconcile how other expenses<sup>71</sup> could be “converted” into the interest of property. Lord Millett said “[p]roperty rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is fair, just and reasonable”.<sup>72</sup> As such, there is no reason to suppose that proprietary interests could be “transferred” to another cohabitant simply because they have lived together for years where they have respectively done something to sustain their livings.<sup>73</sup> The problem of the “ownership of the beneficial interest” should be separated from the “day-to-day financial affairs”.<sup>74</sup> “Agreeing to share the obligations of cohabitation is very different from agreeing to share ownership of property”.<sup>75</sup> There is no logical connection between them.

To consider non-financial factors may amount to “familialisation of property law”, making any situation more complicated. It was identified by John Dewar “as a judicial process...whereby relationship neutral property law principles affecting ownership of the family home are reinterpreted and recalibrated to accommodate the specific needs of family members.”<sup>76</sup> It blurred the line between family law and land law, hence should not be encouraged. The reasons have been profoundly put by Professor Eekelaar:

[R]elationship can be very complex, and disputes and problems that can arise difficult to resolve by legal means. We may not need a unifying concept such as that of the ‘family’... since ‘families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change.’<sup>77</sup>

The *concept* of family has many *conceptions* so that introducing this concept would create chaos by adding uncertainties and debates. Under the principle of *Occam's Razor*, it seems redundant to use a family concept if we could settle the issue by existing land law. If familialisation of property law is used, there may be cases where we may “individualise” family law. Any further subdivision of laws confuses both judges, litigators, and laymen. As Lord Neuberger said, “[a] change in the law, however sensible and just it seems, always carries a real risk of new and unforeseen uncertainties and unfairnesses”.<sup>78</sup> This is why we should leave the issue to property law.

69 *Patel v Mirza* [2016] UKSC 42 (SC), [262] (Lord Sumption). Emphasis mine. His criticism pointed to “range of factors” test used to determine the illegality of contracts. However, the same criticism applies to CICTs, as both consider a range of factors, diminishing consistency and certainty.

70 *Jones* (n 2) [13].

71 *Stack* (n 1) [34]-[35].

72 *Foskett v McKeown* [2001] A.C. 102 (HL) [127].

73 *Stack* (n 1) [132] and [134]. Lord Neuberger stressed the difference between outgoings and the home, as a capital asset, in terms of financial value and also the categorisation in terms of nature. I agree this distinction should be clear as the two kinds of “expenses” are different. The former cannot be capitalised. It is in line with the distinction in tax law.

74 *Stack* (n 1) at [141] (Lord Neuberger).

75 Per Lord Bridge in *Abbey National Building Society v Cann* [1990] 2 W.L.R. 832 (HL). Martin Dixon, “Acquiring an Interest in Another's Property” (1991) 50 C.L.J. 38, 39-40.

76 Andy Hayward, “Family Property and the Process of Familialisation of Property Law” (2012) 24 Child & Fam. L.Q. 284, 284.

77 John Eekelaar, *Family Law and Personal Life*, 2nd edn (New York: Oxford University Press, 2017) 28.

78 *Stack* (n 1) [102].

## VI. A Confusing Principle

The law should be developed *incrementally*.<sup>79</sup> Judges go through “a chain of judgments”<sup>80</sup> to preserve the “integrity of law”.<sup>81</sup> Each step a judge takes must be bound by the frontier set by previous decisions. As Lord Sumption said, “[a] system of customary law like the common law may *within broad limits* be updated and reformulated by the courts”.<sup>82</sup> It is particularly the case, when it is “a matter of general public interest”<sup>83</sup>. However, CICTs do not conform with these limits. If CICTs are claimed to be constructive trusts, the basis for application must be clear. It is well established that unconscionability<sup>84</sup> triggers constructive trusts. Lord Browne-Wilkinson explained in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:<sup>85</sup>

Equity operates on the *conscience* of the owner of the legal interest...[T]he *conscience* of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his *unconscionable conduct* (constructive trust).

Therefore, unconscionability is essential.<sup>86</sup> However, for the CICT approach, the basis to trigger its application is unclear. Neither cohabitant does anything unconscionable. If CICTs stand as constructive trusts, it can only claim its legitimacy from two domains, either from the existing “catalysts”, which is unconscionability, *within* constructive trust, *or* create a new type of “catalysts” *independent* from constructive trust.

With due respect, Lady Hale seems to have confused a justification of a rule with a justification of a particular action falling under that rule.<sup>87</sup> When we justify a new rule, we ask for a justification, in a *normative* sense, *independent* from the rule. When we justify a particular decision *within* the rule, we are fitting the decision into the existing rule. If Lady Hale wants to justify a decision by using the constructive trust doctrine, that decision has to have the features of a traditional constructive trust, i.e. unconscionability. Otherwise, if her Ladyship wants to extend the boundary of the constructive trust, be it “to ascertain parties’ shared intentions”, she has to declare a reason *independent* from constructive with a *normative* effect for that constructive trust to operate.

It is undisputed that courts have the power to make new laws.<sup>88</sup> To illustrate, consider *Donoghue v Stevenson*.<sup>89</sup> Lord Atkin made use of the “neighbor principle”, a principle stressing on proximity, to justify his decision of *widening* the existing “duty of care”. He created a wider version of duty of care (a new rule) by using neighbor principle, which is an *independent normative reason* fell *outside* tort law since this principle he was using was *not the law*. However, Lord Atkin was still bound by his precedents, so he attributed the principle to precedents “to convince his audience that the principle he articulates was already in the law”.<sup>90</sup> Lord Atkin was using the existing tort law while simultaneously using a non-legally binding principle to widen an existing tort law to create a new law. It

79 Particularly in the context of property law, Stephen Gilmore et al., *The Landmark Cases in Family Law* (Oxford: Hart Publishing 2011) 187.

80 Ronald Dworkin, *Law’s Empire* (Oxford: Hart Publishing, 1998) 240-244, 246-247.

81 *ibid* 226.

82 Barber Nicholas et al. (ed) *Lord Sumption and The Limits of The Law* (Oxford: Hart Publishing Ltd, 2016) 20. Emphasis mine.

83 *Stack* (n 1) [2].

84 Quoting Lord Diplock in *Gissing, Stack* [19].

85 *Westdeutsche* (n 55) at [705], emphasis mine. Also *Stack* (n 1) [128].

86 *Hayton et al.* (n 4) 574.

87 John Rawls, “Two Concepts of Rules”, (1955) 64 *The Philosophical Review* 3, 3.

88 “Judges have a legitimate law-making function...For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations” per Lord Nicholls in *Re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 A.C. 680 (HL) [32].

89 *Donoghue v Stevenson* [1932] UKHL 100 (HL).

90 Mi Zhou, *Thinking Like a Lawyer* (Hong Kong: Sweet & Maxwell, 2015) 29. It touches upon the problem of exercising discretion as we shall see.

cannot be a case where a judge creates a new law that neither have all features of the existing rule nor justified by an *independent normative* reason. Similarly, what Lady Hale cannot do is to say that a CICT applies while it does not have the features of constructive trusts of the same kind, but at the same time extending the scope of it without giving any *independent normative* justification. Her Ladyship failed to provide a justification.

Judiciary should take up the role of revising the existing law to catch up with the changing social environments.<sup>91</sup> However, it is desirable to do so *only when* a “Hard Case”<sup>92</sup> appears before the court where no existing rules could settle the issue, such as *Donoghue*. We now have an existing proprietary estoppel doctrine (“PE”) and it is arguably unnecessary to create a new doctrine overlapping with it.<sup>93</sup> It is noteworthy to compare CICTs with PE which has 3 elements:<sup>94</sup>

- 1) a *representation* or assurance given by A to B that B will acquire A’s interest in land;
- 2) reasonable *reliance* by B *on the expectation* created by that representation or assurance;
- 3) *detriment* to B caused by that reliance making it unconscionable for A not to give effect to B’s expectation.

When we compare the above three elements with CICTs, we can see the similarities between two doctrines. A representation under PE creates an expectation. That “expectation” is very much the same as a “common intention” between the parties in CICTs. In CICTs, it is the common intention of the parties who are *expecting* that the right of the land is to be shared. Both doctrines point to the reliance of the non-legal owner and both try to prevent a legal owner from unconscionably denying the interest of the non-legal owner, who suffered detriment. Traditionally, a constructive trust *already* requires reliance and unconscionability.<sup>95</sup> It was therefore said that “in any case where the elements necessary to found a [CICT] are present so are the elements necessary to found a [PE]”.<sup>96</sup> It is too early to abandon a well-established legal rule, and resort to a new rule which does not have the features of a particular set of rules. Lady Hale failed to provide a new basis for CICTs when revising constructive trusts.

## VII. A Strong Discretion

Any discretion should be within a limit. Lord Bingham stated, “[q]uestions of legal rights and liability should ordinarily be resolved by the application of the law and *not the exercise of discretion*”.<sup>97</sup> As a general principle of rule of law, the boundary between adjudication and legislation must be clear. This is the well-established separation of powers. The judge cannot take up the task from the legislative branch and conduct the task of adjudication in an *ad hoc* manner. In adjudication “there is no input from the democratically elected legislature”.<sup>98</sup> Lord Neuberger said “[i]n the absence of statutory provisions to the contrary, the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship”.<sup>99</sup> As in *Stack* and *Jones*, the *discretion* of judges has been widened to the extent that

91 *Stack* (n 1) [46], [101].

92 Dworkin (n 61) Chapter 4.

93 Observed by Robert Walker LJ in *Yaxley v Gotts* [1999] EWCA Civ 3006 (CA), PE and CICTs seem to be two doctrines without difference. Paul Matthews, “The Words Which Are Not There: A Partial History of The Constructive Trust” in Mitchell (ed) (n 57) 50-51.

94 From *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133 (Ch).

95 *Hayton et al.* (n 4) 572.

96 *ibid* 588.

97 Tom Bingham, *The Rule of Law* (London: Penguin, 2011) 48. Emphasis mine.

98 *Stack* (n 1) [102].

99 *Stack* (n 1) [107]. Emphasis mine.

subject to the suspicion of blurring the line between adjudicating and legislating<sup>100</sup>, which is inappropriate. The new rule delegates a strong discretion to judges in a way that the decision would become whatever judges see fit, regardless of the context. Courts are therefore in a very powerful position.

There are two senses of discretion, namely, weak discretion and strong discretion.<sup>101</sup> For the former, it means that a judge has a discretion to *supplement* a rule because a rule cannot be applied mechanically; however, for the latter, in Professor Dworkin's words would be "simply not bound by standards set by authority in question".<sup>102</sup> CICT approach tends to give judges the strong discretion, as we have seen, since judges have a wide scope to consider whether a common intention existed. Moreover, they have the strong discretion to consider a "range of factors" under a holistic approach<sup>103</sup> where they could assign whatever weight to each factor as they see fit, based on fairness.<sup>104</sup> This manner of adjudication amounts to legislation since the judges are making the rules of "picking the facts", which involves judicial discretion,<sup>105</sup> and "weighting" them at the same time. There is no principle guiding the task except we know that judges *can* consider a range of factors. Particularly, the factors listed in *Stack* and *Jones* are not exhaustive. Formal justice should be achieved where judges "make use of *established rule* as grounds of judgment" where "[l]egal assessment must be structured, bounded, closed to all but a *specific subset of possible considerations*".<sup>106</sup> Since CICT approach is highly fact-sensitive,<sup>107</sup> it may accordingly create many "exceptional cases",<sup>108</sup> making a lot of fragmental decisions. The existence of a strong discretion is not solving the problem but causing more problems.

A distinction should be made between an *internal* interpretation and *external* interpretation of conduct. The interpretation of conduct from the eyes of cohabitants and judges must be different to a great extent.<sup>109</sup> The courts are in no better position to give weight to the factors than the cohabitants. The discretion should not be exercised *externally* regarding the conduct to which the parties involved should have seen *internally*. The conduct throughout the time the parties lived together is the product of what they have *agreed for some reason*. It makes very little sense to attribute to those conduct how much it is worth financially. If the overarching principle of CICT approach is fairness, it is exactly unfair to look at the conduct of the parties from an external perspective and accordingly value how much a particular conduct or series of conduct is worth. Two individuals, regardless of whether they have children, living together for so long must have made a lot of compromises<sup>110</sup> regarding the relationship. It is not the court's duty to evaluate how good a quasi-husband or quasi-wife should be. The line between the "morality of duty" and "morality of aspiration" must be clear.<sup>111</sup> The courts' duty is the former, which is to provide a minimal protection to the parties by providing a feasible legal solution to them for defining their legal duties. The courts should not push the parties to do *their best* and impose on them such an image of an ideal quasi-husband or ideal quasi-wife.<sup>112</sup> Accordingly, the courts should not evaluate their conduct and to judge how much is a specific conduct worth *in their relationship* and

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100 Michael Lower, "Marriage and acquisition of a beneficial interest in the family home in Hong Kong" (2016) Conv. 453, 458-459.

101 Dworkin (n 61) 31-33.

102 *ibid* 32.

103 *Stack* (n 1) [61].

104 Gravells (n 31) 230; *Jones* (n 2) [61], [74], [83], [85], [87].

105 Aharon Barak, *Discretionary Justice* (London, Yale University Press, 1989) 13.

106 Lewis Sargentich, *Liberal Legality: A Unified Theory of Our Law* (Cambridge: Cambridge University Press, 2018) 45, 60. Emphasis mine.

107 *Jones* (n 2) [51].

108 Gravells (n 31) 243.

109 There are apparent difficulties of "disentangling intention from personality and the nature of the relationship", Sarah Greer and Mark Pawlowski, "Imputation, fairness and the family home" [2015] Conv. 512, 516, emphasis mine.

110 "Living together is an exercise in give and take, mutual co-operation and compromise", *Stack* (n 1) [3].

111 Fuller (n 68) 5.

112 "[T]hey have both put their all into doing the best for themselves and their family as they could", *Stack* (n 1) [83], emphasis mine.

accordingly punish the one who “did not do enough” by depriving his or her beneficial interest. The courts should not make use of their discretion to trespass the private life of individuals.

We cannot be confused about the concepts of what *should have been intended* and what *was actually intended*.<sup>113</sup> To illustrate, assume that a couple comes to the court demanding a division of beneficial interests like *Stack* and *Jones*. Without an express trust, the court may have to impute an intention to them, as per *Stack* and *Jones*. However, imputing an intention *because of the absence* of a clear intention is *not* an argument supporting the exercise of discretion *but* an argument against it. It is because the failure to express their intention, either by express trust or subsequent discussion, is not a fact supporting what they should have intended, but a fact reflecting they *did not intend* to deviate from the original position, which is the RT presumption, or even if that had come to their minds they *would have excluded* that. The courts, from an external perspective, is in no better position to exercise a discretion to conjecture what they should have intended by imputation. The true question is always what the parties intended where no discretion would be required.

## VIII. Replies to critics

### A. Does inference equal to imputation?

Lady Hale made an assertion in *Jones* that inference is in some sense imputation since “subjective intentions can never be accessed directly” so it can only be done on an objective basis.<sup>114</sup> However, it simply touches upon an unresolved problem in philosophy of mind which has troubled philosophers for thousands of years, in Gilbert Ryle’s words:

The working of one mind are *not witnessable by other observers*; its career is private. *Only I can take direct cognizance* of the states and processes of my own mind.<sup>115</sup>

It is of little doubt that we can never truly know what a person is really thinking of. However, it is one thing to say that we cannot *be sure of* what a person is really thinking while it is another to observe that, from either the conduct or the surrounding circumstance, what a person is *most likely* to be thinking about *without any alternative explanations*. The intention is not defined *a priori* but could be determined *a posteriori*, by looking at the circumstances and parties’ conduct. It is not true to say that because there is no way to overcome the insurmountable barrier between the internal mind of a person and the external world, there is no way to ascertain the parties’ intention, at least in a practical sense. Lady Hale’s assertion blurred the line between a subjective test and an objective test, two tests which have existed for a long time in the Common Law and operate well along the judicial history. If her assertion is right, there would no longer be a distinction between a subjective test and an objective test because even under a subjective test an intention is imputed to some extent. To take a broader view, it even destroyed the whole basis of *mens rea* in criminal law. Therefore, this argument should not stand.

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113 Ronald Dworkin, *A Matter of Principle* (Cambridge: Oxford University Press, 2001) 20-21.

114 Quoting Nicole Piska, “Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*” (2008) 71 M.L.R. 120, 127-128 in *Stack* (n 1) [34].

115 Gilbert Ryle, *The Concept of Mind* (New York: University of Chicago Press, 2002) 11. Emphasis mine.

## B. Is the RT approach imputing an intention?

Lord Walker and Lady Hale made a challenge directly to the RT approach that it is also imputing an intention to the parties, in *Jones*. Their Lordship said RTs are “based on a very broad generalization about human motivation”.<sup>116</sup> This is supported by Lord Collins who said “what is one person’s inference will be another person’s imputation”.<sup>117</sup> However, it could be explained from a legal perspective where scholars have made a distinction between a positive intention and “lack of intention”<sup>118,119</sup>. It is one thing to say that a party *has* the intention not to make a gift but it is quite another to say that there is *no apparent reason* for a party to transfer an asset. The latter calls for evidence to *fill in the gap* of that apparent reason. Therefore, it is a misunderstanding to say that inferring an intention is equal to imputing an intention, for at least there is a logical gap in between.

## IX. Conclusion

In this article, I have considered CICT and RT approaches respectively. Generally, CICTs are more flexible but they create uncertainties, while RTs produce certain and consistent results but are less flexible than CICTs. By considering them from different perspectives, it seems that the RT approach is better because of several reasons. Firstly, the RT approach preserves the core value in land law – certainty. Under CICTs, certainty is diminished since adjudication is not transparent given the consideration of non-financial factors. Also, CICTs may amount to “familialisation of property law”, which is not preferred as it subdivides the area of law. Secondly, the RT approach follows traditional RT doctrine, gaining legitimacy from it. On the contrary, the CICT approach is trying to develop a new type of constructive trusts but it seems to have failed in principle, since it does not possess an unconscionability element as a traditional constructive trust does. Besides, theoretically, the CICT approach is not justified by an independent normative reason when the scope of applicability is widened. Also, it overlaps with PE, making it less useful. Thirdly, the CICT approach should not be preferred since judges get a strong discretion from it, while RT approach limits judges’ discretion. Given that CICTs are very fact-sensitive, judges seem not to be bound by any precedents and CICTs would produce fragmental decisions as there would be many “exceptional cases”.

As a final remark, it should be noted that the CICT approach is *the law at present*. The RT approach was in minority in *Stack v Dowden* and was explicitly rejected by the Court in *Jones v Kernott*. Whether the RT approach will be considered again by the Supreme Court remains to be seen in the future.

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<sup>116</sup> *Jones* (n 2) [29].

<sup>117</sup> *ibid* [65].

<sup>118</sup> Robert Chambers, “Is There a Presumption of Resulting Trust” in Mitchell (ed) (n 57) 285-286. Adopted in *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36 (CA).

<sup>119</sup> Rachel Leow and Timothy Liau, “Resulting Trusts - A Victory For Unjust Enrichment?” (2014) 73 C.L.J. 500, 501.