A Home, Not a House? Hohfeldian and Comparative Lessons for the Common Intention Constructive Trust

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Abstract—This article holds that acquiring and quantifying a beneficial interest in common intention constructive trusts are two distinct judicial exercises. It begins by summarising the current state of the law, exploring the extent of *Stack v Dowden* and challenging its mistaken calls for a 'single legal regime.' Drawing on a Hohfeldian framework, this article shows that acquisition concerns whether a proprietary rights even exists, while quantification concerns only its extent. Error at acquisition illegitimately creates rights ex post, while error at quantification merely mismeasures rights already intended to exist. As each question carries its own risks and considerations, each may admit differing degrees of judicial discretion; pre-legal considerations like fairness may inform quantification but must not affect acquisition. This article concludes with a brief comparative analysis, finding the acquisition and quantification distinction

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crucial in preserving methodological clarity and avoiding incompatible discretionary and remedial frameworks seen in other Commonwealth jurisdictions.

I. Introduction

As so famously illustrated in *Jarndyce and Jarndyce*, equity has long grappled with how best to allocate domestic property when relationships break down. Equity's preoccupation with the question 'who gets the home?' pervades to this day. With more couples choosing to cohabit before marriage, or to opt out of such matrimonial schemes altogether, equity's flexibility is needed to recognise the vast range of domestic arrangements in determining how property interests are distributed. Without recourse to statutory provisions for the allocation of property on divorce, common intention constructive trusts ('CICTs') are increasingly determining what happens to domestic property should those non-marital relationships break down.

The CICT was only concretised in *Stack v Dowden*,[1] following its earlier mention in Lord Diplock's speech in *Gissing v Gissing*.[2] As a relatively recent doctrine, at least in its current developed form, much remains uncertain about the CICT. The extent of its application to cases where only one party has been registered as the legal owner is particularly unclear, while the normative force of its justification is further dubious. The two most recent Supreme Court cases of *Stack* and *Jones,*[3] while seminal, substantively focused on the apportionment of equitable interests held by joint legal owners, leaving much unsaid about the prior establishment of such interests.[4] Both cases broadened the type of evidence capable of adducing a 'common intention'

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[1] [2007] UKHL 17, [2007] 2 AC 432.
[2] [1971] AC 886 (HL).
[3] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[4] Brian Sloan, 'Keeping up with the *Jones* Case: Establishing Constructive Trusts in Sole Legal Owner Scenarios' (2015) 35 LS 226, 229.

that the beneficial interests were to be allocated differently from the registered legal interests. Though commendable in some ways, caution must still be exercised to avoid prejudicing existing property rights.

The CICT and the family home definitionally raise important questions that lie at the intersection of oftentimes competing family and property law. How to best balance these two legal contexts in the *acquisition* and *quantification* of interests in such a home remains uncertain.[5] Judicial discretion must be controlled in this field. While rigid adherence to land law principles might seem inapposite for the deeply personal and varied context of family homes, a purely discretionary approach, one oftentimes linked to family law adjudication, appears antithetical to the 'bright line' certainty and predictability prioritised in the former. Finding a just *via media* seems a Herculean task.

This article argues that English legal orthodoxy demands that proving *acquisition* of a property right be distinguished from how such a right, when acquired, be *quantified*. For the purposes of this article, *acquisition* refers to the stage in CICT cases that determines whether a party has obtained, as the result of the parties' common intention, a beneficial interest in the home upon which a proprietary claim may be founded. *Acquisition* is agnostic to the specific extent of that claim. In the interest of clarity, it must be noted that though the *acquisition* question exists in both single and joint name cases, it is framed differently in practice. In joint name cases, rather than asking whether the non-registered party has obtained an interest in and of itself, as in single name

[5] Rebecca Probert, 'Equality in the Family Home?' (2007) 15 Fem LS 341.

cases, the courts rather ask if both parties continue to intend to each hold a portion of the beneficial interest, or to depart wholly from their registered presumption. *Quantification*, on the other hand, necessarily follows the *acquisition* question and refers to the apportionment of these already-*acquired* rights. The question becomes one of quantum, rather than of existence altogether.

Due to these differing exercises, cases where only one party has been registered ('single name cases') and cases where both parties have been registered ('joint name cases') necessitate different standards of proof and, by extension, allow for different degrees of judicial discretion. Legal registration of a given party provides a rebuttable presumption that such a party has, in fact, acquired a proprietary interest. Ignoring this distinction risks collapsing the English constructive trust beyond its origins into a remedial instrument, where courts adduce proprietary rights retrospectively as they deem just and fair. This latter approach has been favoured by the Canadian courts' endorsement of the Remedial Constructive Trust ('RCT'), a corrective mechanism that must be rejected as inconsistent with English orthodoxy and tradition.

The Basic Rule

In joint name cases where both A and B are registered as joint legal owners and single name cases where only A is registered as a legal owner, the basic rule provides that beneficial interests *prima facie* mirror the legal interests per the maxim — 'equity follows the law'.[6] In joint name cases, A and B are presumed to hold the beneficial interests as joint tenants in equity. In single name cases,

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[6] *Stack* (n 1) [33] (Lord Walker), [109] (Lord Neuberger).

A is presumed to hold the whole beneficial interest as the 'less' of his 'greater' legal estate.[7] As the sole registered party, A is the only one with a legal interest and is similarly presumed to be the only one with the corollary beneficial interest. These different starting points necessitate different burdens of proof.[8]

Joint registration itself ought to constitute evidence that 'both parties were intended to have some beneficial interest.'[9] Regardless of whether the intention in practice was to hold the property in equity as a joint tenancy (as presumed) or a tenancy in common in equity, no further evidence is required to prove that both parties had *acquired* some beneficial interest. As such, the *acquisition* question is already *prima facie* answered in such cases. At this *acquisition* stage, a court need only further query whether sufficient evidence exists to displace the joint tenancy presumption. The issue only then lies in deciding in what proportions the beneficial interests are to be held — equally or in some other ratio. Therefore, without evidence of an alternative agreement, the only outstanding concern for B in joint name cases lies in the *quantification* of his interest.[10] On the contrary, in single name cases, A's sole legal registration proves the very opposite of any claim that B (the unregistered party) was intended to have an

[7] *Vandervell v IRC* [1967] 2 AC 291 (HL) 311 (Lord Upjohn). Note other incompatible views suggesting that once A is found to be the absolute owner, both at law and in equity, he is considered to hold no equitable interest in that property altogether (*Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 706 (Lord Browne-Wilkinson)).

[8] *Stack* (n 1) [4] (Lord Hope), [56] (Lady Hale).

[9] ibid [116] (Lord Neuberger).

[10] nb Establishing a CICT also requires proof of detrimental reliance prior to the second *quantification* stage (*Hudson v Hathaway* [2022] EWCA Civ 1648, [2023] KB 345 [90] (Lewison LJ)). This article does not dispute this separate requirement and instead focuses on common intention as the main element in finding a CICT.

equitable interest. Given that the presumption is that A holds the entire beneficial interest, the onus is on B to adduce evidence from which an intention — that B was to have acquired some beneficial interest — may be inferred.

These different standards of proof belie a conceptual distinction between *acquisition* and *quantification*. It is uncontested that the paragraph [69] factors of *Stack* may be used to answer the *quantification* question. These factors include *inter alia* 'any advice or discussions at the time of the transfer', 'the purpose for which the home was acquired', the financing of the purchase, and the presence of children to whom the parties were responsible to provide a home.[11] However, given that *Stack* was itself only a joint name case, it remains unclear whether the paragraph [69] factors may also be capable of answering the *acquisition* question in single name cases.

II. The Scope of *Stack v Dowden*

Prior to *Stack*, the type of evidence capable of meeting the *acquisition* question in single name cases was settled in *Lloyd's Bank v Rosset*: only direct contributions to the purchase price (whether initially or in mortgage instalments) would suffice to allow an unregistered party to prove that they had acquired a beneficial interest;[12] it was 'at least extremely doubtful whether anything less [would] do.'[13]

[11] *Stack* (n 1) [69] (Lady Hale).

[12] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL) 133 (Lord Bridge).

[13] ibid 133. Note further that Lord Bridge's analysis continues to find a constructive trust in cases of express agreements, no matter how imperfectly or imprecisely remembered, that had been detrimentally relied on, ibid 132.

In fact, the *Rosset* direct contributions requirement was consistent with prior case law. Lord Reid's judgment in *Pettitt v Pettit* first admitted the possibility of such contributions supporting an unregistered party's claim. He ruled that while greater weight would still be given to an express agreement, contributions beyond that 'of an ephemeral character' were also capable of sustaining an inference of intention that the unregistered party would acquire a beneficial interest.[14] Lord Reid would later explicitly reaffirm this view in *Gissing*.[15]

The only suggestion that *Rosset* took too narrow an approach as to the type of evidence relevant to the *acquisition* question was in Lord Diplock's speech in *Gissing*. In his view, contributions to household expenses which *causally allowed* for the registered party to meet the mortgage payments could also be relied upon by an unregistered party.[16] Lord Diplock's extension was only obiter as the point went undiscussed in the other speeches but, in any event, this article rejects the suggestion. As will be later argued, looking to such subsequent factors risks imputing an intention to the parties that they did not hold at the time.

The charge levied by Lady Hale and Lord Walker in *Stack* that *Rosset* was so conservative as to even be inconsistent with the earlier *Gissing* case thus appears somewhat misplaced.[17] It would seem that they had conflated the distinction between *acquisition* and *quantification,* collapsing the two stages into one overarching

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[14] *Pettitt v Pettitt* [1970] AC 777 (HL) 796 (Lord Reid).
[15] *Gissing* (n 2) 895 (Lord Reid).
[16] ibid 908 (Lord Diplock).
[17] *Stack* (n 1) [26] (Lord Walker), [42] (Lady Hale).

analysis. *Stack,* perhaps unintentionally,[18] focused almost exclusively on the process of adducing intentions contrary to the joint tenancy presumption when determining the *extent* of each party's shares—an inherently allocative exercise.[19] As in *Stack*, Lord Reid's espousal of 'a more rough and ready evaluation' in *Gissing* to recognise a party's indirect contributions should also be better understood as directed at the *quantification* stage. Lord Reid specifically mentions that 'a more rough and ready evaluation' should only be undertaken when 'it is less easy to evaluate [an unregistered party's] share' due to a lack of direct payments. His analysis assumes that the unregistered party has acquired a share to begin with to refute the presumption that such a share should not 'as a rule [be quantified] as a half-share'.[20]

This article aligns with the academic view that single name cases remain governed by *Rosset* while only joint name cases are bound by *Stack*.[21] Earlier statements in *Rosset* were never explicitly overruled by the Supreme Court, with later decisions merely asserting that the law has 'moved on'.[22] Further in support of this, a survey of all the single name cases heard at the High Court and Court of Appeal in the two years post-*Jones* found that almost all abided by *Rosset*; very few correctly adopted the *Jones* methodology; others mistakenly applied the latter in form only.[23]

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18 eg ibid [56] (Lady Hale).
19 ibid [58] (Lady Hale).
20 *Gissing* (n 2), 897 (Lord Reid).
21 Matthew Mills, 'Single Name Family Home Constructive Trusts: Is *Lloyds Bank v Rosset* Still Good Law?' [2018] Conv 350.
22 *Stack* (n 1) [26] (Lord Walker); Simon Gardner, 'Family Property Today' (2008) 124 LQR 422, 425. See also *Abbott v Abbott* [2007] UKPC 53, [2008] 1 FLR 1451 [4]–[6] (Lady Hale).
23 Sloan (n 4).

Direct contributions thus appear to be the only evidence capable of reliably satisfying the *acquisition* stage of a claim.

III. A Unitary Approach to *Acquisition* and *Quantification*

Still, the Supreme Court has explicitly stated its preference for a 'single legal regime' in both single name and joint name cases.[24] Under the CICT model, that would mean paragraph [69] factors ought to cover both the *acquisition* and *quantification* stages such that the same type of evidence used to determine the ratio in which the beneficial interests were intended to be held may also be used to defeat the presumption that the legal registration reflects the parties' intention of how the beneficial interests are truly held.

Lord Neuberger's dissent in *Stack* also advocates for a unitary model. His purchase money resulting trust ('PMRT') approach is consonant with *Rosset* and makes clear that direct contributions are to be the sole measure of the *quantification* stage too. On his PMRT approach, an unregistered party may only prove that they had acquired a beneficial interest if they made a direct contribution to the purchase price and that such a share is coterminous with the relative proportion of said direct contribution. This somewhat myopic focus on superficial coherence misses that *acquisition* and *quantification* are fundamentally different exercises. While indirect contributions

[24] *Jones* (n 3) [16] (Lord Walker and Lady Hale).

are inappropriate to admit for the former, they need not be excluded from the latter.

Indeed, while both the CICT and PMRT purport to give effect to intention, they do so in fundamentally different ways. The CICT claims to be able to infer intention from the paragraph [69] factors, while the PMRT rigidly adheres to the notion that intention can only be soundly inferred from direct contributions to the purchase price. Lord Neuberger justifies inferring intention from direct contributions alone, however, by validly identifying the dangers of attempting to infer an intention from the paragraph [69] factors at the *acquisition* stage: given the variability of reasons why the parties might not have formed an express agreement on the beneficial interests, they may also genuinely not have formed a common intention.[25]

Interestingly, however, Lord Neuberger's caution remains strictly related to the *acquisition* stage, rather than more broadly to *quantification*, and rather rightfully so. Research has raised doubts as to whether couples who *do* complete a declaration of trust understand its implications and much less can still be said for those couples that *do not*.[26] That this is the case squares with the very nature of close relationships. In the throes of cohabitating intimacy, parties are hardly inclined to engage in unromantic discussions as to beneficial ownership.[27] After all, such discussions would only be consequential if the relationship

[25] *Stack* (n 1) [146] (Lord Neuberger), [113]–[114] (Lord Neuberger).
[26] Gillian Douglas, Julia Pearce and Hilary Woodward, 'Dealing with Property Issues on Cohabitation Breakdown' [2007] Fam Law 36.
[27] *Pettitt* (n 14) 810 (Lord Hodson).

failed or ended for another reason; most parties are unlikely to have concluded *any* agreement at all.

In sole name cases, similar indifference is often observed regarding the implications of single registration. In *Sandhu v Sandhu*, for example, the parties decided to register property in one party's sole name as the other was too old to take out a mortgage,[28] while in *O'Neill v Holland*,[29] the poor credit history of one of the parties made it necessary to opt for such an arrangement. In these cases, however, sole name registration was almost always paired with concomitant understandings and agreements that the beneficial interest should be shared. Sole registration was entirely instrumental and did not conclusively prove the beneficial exclusion of the other unregistered party.

As such, when evaluating evidence of similar agreements and understandings, judges should avoid making hasty inferences, or worse, imputing the intention of the parties. Unlike the contractarian analysis suggests, it is perfectly plausible and perhaps even probable, that the parties did not reach any such agreement or, that if they did, did not understand the impact it could have.[30] In the absence of such an agreement and where only one party is registered, judges would be imputing, rather than inferring, an intention to share beneficial ownership. The unregistered party would thereby *acquire* an interest from the registered party even if there was no such intention on the part of the latter. This risk does not exist at the *quantification* level, as will be explained below.

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[28] *Sandhu v Sandhu* [2016] EWCA Civ 1050, [2016] 10 WLUK 79 [7] (Floyd LJ).
[29] *O'Neill v Holland* [2020] EWCA Civ 1583, [2021] 2 FLR 1016.
[30] *Gissing* (n 2) 896 (Lord Reid); *Stack* (n 1) [18] (Lord Walker).

IV. Hohfeldian Analysis

Imputing intention, especially at the *acquisition* stage is wholly illegitimate. That much has been said. Hohfeld's rights-based theory of jural relations, applied to a series of examples, clarifies the conceptual basis for distinguishing *acquisition* from *quantification*.[31]

> *Example 1*:
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> A and B have purchased Whiteacre from C; A is the sole legal owner of Whiteacre having contributed £900,000 to the purchase price while B contributed the remaining £100,000; despite cohabiting, A and B never discussed how the beneficial interest of Whiteacre was to be held; B is now claiming for a 10% share in equity of Whiteacre on the basis of his direct contribution of £100,000.

In *Example 1*, were the law to only recognise registered legal interests, A would have obtained the entire beneficial interest. B would be left with nothing despite having contributed £100,000 of his own money. Hohfeldian analysis rationalises the intuitive unfairness of such an outcome.

Assuming that A and B had £900,000 and £100,000 in their respective bank accounts, they would both have a claim-right to their relevant monies against their bank; the correlate of these claim-rights being the duties of their bank to pay the

[31] *Stack* (n 1) [127] (Lord Neuberger).

relevant account balance to A or B when demanded.[32] Annexed to these claim-rights is a multital immunity against the rest of the world that the claim-right not be destroyed.[33] Only A and B, through the exercise of a power, are able to extinguish or alter the extent of their claim-right.

When A and B contract with C to transfer their account balances to purchase Whiteacre, A and B exercise powers to assign their choses in action (bank balances totalling £1,000,000) to C. As part of performing the same contract, C exercises powers to transfer all Hohfeldian prerogatives (claim-rights, liberties, powers, and immunities) appertaining to ownership of Whiteacre to A as the newly registered legal owner. Focusing on A's and B's powers and immunities, it becomes clear that the normative effect of any assignment of their bank balances depends solely on their intention in exercising such a power. Being bound by the same multital immunity, A is unable to vary the extent of B's claim-right through any of her own actions and *vice versa*. Therefore, looking at the intentions B could have possibly had in exercising his power to assign his bank account balance, two options emerge.

Firstly, B could either have intended to assist A in the purchase of Whiteacre as a gift, thereby leading to no resulting

[32] Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 30–32.

[33] Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710. A multital legal relation refers to one relation of within a class of fundamentally similar relations between the right-holder and a very large class of persons. In practice, a multital right is a right *in rem*. A multital immunity similarly avails against a large class of persons, preventing them from altering the legal position of the right-holder.

trust in B's favour for *any* share of the beneficial interest.[34] Or, secondly, B could have intended to burden A's new Hohfeldian prerogatives over Whiteacre with an obligation to use these prerogatives in B's favour to a particular extent—a trust obligation owed to B as a beneficiary by A *qua* common intention constructive trustee.[35] The first suggestion must be rejected. While the legal registration *prima facie* suggests that B intended to assign his account balance to C so that A receives legal ownership and the entire beneficial interest of Whiteacre as a gift, the court has demonstrated an aversion to recognising such a presumption of advancement in cases of married couples, much less between unmarried cohabitors where the presumption never applied.[36]

Instead, while the sole registration of A definitively settles the matter of who is to hold the legal interest, it is not novel for English law to look beyond legal ownership where no consideration was given for a transfer of property. The PMRT has historically presumed the second possible intention of B—for A to hold interests at law subject to an equitable obligation to B—where A provides no consideration to B. In exercising his power to assign his bank balance to C so that A would acquire the Hohfeldian prerogatives relating to ownership of Whiteacre, B is presumed to have intended for A's new Hohfeldian prerogatives to be held subject to trust duties in B's favour. A's trust duties are owed to the extent of B's beneficial interest which is

[34] *Fowkes v Pascoe* (1875) LR 10 Ch App 343.

[35] Ben McFarlane, 'Avoiding Anarchy? Common Law v. Equity and Maitland v. Hohfeld' in John CP Goldberg,
Henry E Smith and PG Turner (eds), *Equity and Law* (CUP 2019) 336–39.

[36] *Stack* (n 1) [16] (Lord Walker), [112] (Lord Neuberger).

proportionate to B's direct financial contributions to the purchase price.[37]

However, *Example 2* reveals the flaws of the PMRT in only looking to direct contributions:

Example 2:

D purchased Blackacre from F for £900,000, registering D and E as the joint legal owners of Blackacre. D paid the entirety of the purchase price of £900,000. Over the course of cohabiting with D at Blackacre, E contributed £100,000 to meet all household expenses. Despite cohabiting, D and E never discussed how the beneficial interest of Blackacre was to be held; E is now claiming for a 10% share in equity of Blackacre on the basis of his indirect contribution of £100,000.

Despite being a joint name case, the PMRT approach would not give E a 10% share as E failed to make any direct contributions to the purchase price. However, unlike in *Example 1*, the legal registration of E as a joint legal owner supports an inference that D intended to exercise her power such that E has some of the beneficial interest. With the question of *acquisition* answered, the paragraph [69] factors may be considered to *quantify* the exact extent of E's beneficial interest.

Example 3:

G purchased Greyacre from I for £900,000 as a home for herself and her partner H. Only G was registered as

[37] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 30 ER 42.

> the sole legal owner of Greyacre. G contributed the entirety of the purchase price with her own money. Over the course of cohabiting with G at Greyacre, H contributed £100,000 to meet all household expenses. Despite cohabiting, G and H never discussed how the beneficial interest of Greyacre was to be held; H is now claiming for a 10% share in equity of Greyacre on the basis of his indirect contribution of £100,000.

In *Example 3*, the CICT approach (*viz*, the approach in *Stack*) would rule that H's contributions would be sufficient to ground a claim to 10% of the beneficial interest in Greyacre. Such a result would nonetheless be contrary to the requirement that there be some evidence from which it can be inferred that G intended to exercise her power in transferring her £900,000 bank balance to I and vest some beneficial interest in H. Without answering the *acquisition* question, there is nothing for the paragraph [69] factors to bite on. The CICT approach errs in imputing an intention where there is none. There is no presumption of advancement, in the case of unmarried couples, such that G cannot be taken to have intended to have gratuitously exercised a power to create an interest in H. Nonetheless, per the CICT approach, G's Hohfeldian prerogatives over Greyacre are subjected to trust duties owed to H. In this way, G's multital immunity against having her claim-right to the property exchanged for her £900,000 is violated by the courts.

The PMRT is thus overly restrictive in only granting B an interest in *Example 1*; the CICT is overly generous in even granting H an interest in *Example 3*. Focusing on the possible inferences of intention relating to A, D, and G's powers and associated multital immunities in the absence of other evidence,

only legal registration of B, E, and H will suffice to answer the *acquisition* question in the affirmative. Failure to do so would violate their existing legal interests.

All this is not to overstate Hohfeld's ability to provide answers. Hohfeldian analysis is agnostic to what might be called *pre-legal* reasons which justify a particular legal relationship. For example, one's right to be treated fairly is *pre-legal* in the sense that it justifies more concrete legal rights like a claim-right against unjust imprisonment. Nonetheless, Hohfeldian analysis clarifies what it means for someone to have a 'right' once the *pre-legal* has so crystallised—*what* is the content of the correlative duty and *who* is the duty-bearer.[38] This section has identified that *acquisition* concerns whether a power has been exercised at all where *quantification* seeks to ascertain, when exercised, the precise normative effect of such a power. It would be a mistake to conclude that English law solely admits static legal rights and is incapable of giving effect to dynamic *pre-legal* reasons.[39] But judges should be cautious when purporting to protect the latter under the aegis of legal orthodoxy. Hohfeld reveals that the CICT approach *creates* a property right in the unregistered party *ex post*, rather than *recognises* a pre-existing one. If legal decisions may be likened to astronavigation, Lord Wilberforce's words in *National Provincial Bank v Ainsworth* are still the cynosure:[40]

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[38] Charlie Webb, 'Three Concepts of Right, Two of Property' (2018) 38 OJLS 246, 248–49.
[39] Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 1.
[40] *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) 1242 (Lord Wilberforce).

> 'The ultimate question must be whether such persons can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property law.'

V. Conflicts of Judicial Discretion in the Search for Intention

The foregoing Hohfeldian analysis identifies the different stakes for the *acquisition* and *quantification* of beneficial interests in the family home. Wrongly finding *acquisition* creates a property right that was never intended whereas an error at *quantification* miscalculates the size of a share that both parties already intended to exist. The exercise of judicial discretion to give effect to *pre-legal* notions such as 'fairness' should be attentive of and reflect these different underlying risks.

Trusts of the family home, while firmly anchored in property law, fall within a specific sub-species of land law which interacts with important family-related *pre-legal* considerations.[41] *Stack* ushered the explicit separation between 'domestic' and 'commercial' CICT arrangements[42] to promote 'avowedly family-centric legal principles', the distinctive nature of the home, and a

[41] John Dewar, 'Land, Law, and the Family Home' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 327, cited in Andrew Hayward, '*Stack v Dowden*, *Jones v Kernott*' in Nigel Gravells (ed), *Landmark Cases in Land Law* (Bloomsbury 2013) 241, 246.
[42] *Stack* (n 1) [68]–[69] (Lady Hale).

more nuanced appraisal of non-commercial scenarios where parties might be more impacted by emotional considerations.[43]

The significance of the CICT lies in this very intersection between family and property law. Though the nuances of familial disputes should not be overlooked, the instinctive urge to secure 'fairness' must be mediated by the well-worked orthodoxy of property law. This article argues that the courts have not been sufficiently attentive to the latter, leading many to decry recent CICT developments as proof of the 'familiarisation of property law,' a process whereby 'both judges and the legislature have modified general principles of land law or trusts to accommodate the specific needs of family members'.[44] Miles and Probert, for instance, have argued that the presumption of beneficial joint tenancy and the explicit *pre-legal* fairness dialogue of *Jones* today mimic the 'yardstick of equality' created by the House of Lords in family law cases like *White*[45] and *Miller,*[46] approaching the ambit of matrimonial ancillary relief.[47]

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[43] Hayward (n 41) 247. Attention should be paid to cases like *Marr v Collie* [2017] UKPC 17, [2018] AC 631 which extended the application of the CICT to other domains like investment property. This contextual extension is uncertain and has been widely criticised. It must be reconciled with the *dicta* in *Stack* which advocates for a contextual approach to the CICT, clearly splitting family and commercial cases.

[44] Dewar (n 41) 328, cited in Hayward (n 41) 253.

[45] *White v White* [2001] 1 AC 596 (HL) 605 (Lord Nicholls): 'Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.'

[46] *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618.

[47] Joanna Miles and Rebecca Probert, 'Sharing Lives, Dividing Assets: Legal Principles and Real Life' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing 2009) 12.

Unlike matrimonial breakdowns governed by the Matrimonial Causes Act 1973, however, CICT-type breakups do not fall under an equivalent statutory umbrella. Parliament has not authorised a court to use statutory discretionary factors to decide questions relating to title or possession of property between cohabitants 'as [it] thinks fit'.[48] As Lord Denning MR stated in *Bernard v Josephs*, 'if [the cohabiting couple] had been husband and wife, our matrimonial property legislation would have given the Family Division a very wide discretion to deal with all these problems…. But there is no such legislation for couples like these.'[49] Lord Denning MR went on to cryptically suggest that 'justice requires that the courts should have a discretion to apportion the shares', analogising Pearson LJ's reasoning in the matrimonial case of *Hine v Hine,*[50] 'to persons living together, as if husband and wife'.[51]

The current state of the law is thus a reaction to this statutory gap, grappling to give effect to the unique context-specific and fairness-driven considerations of the CICT, ascertainable only by close reference to the facts, while remaining true to orthodox property law principles. Indeed, policy, justice, and fairness all require a certain amount of discretion to fill the lacunae left by the statutory regime. Goodin has termed this judicial exercise 'informal discretion', an implicit and assumed discretion where a statutory mandate lacks, necessary given the

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48 Married Women's Property Act 1882, s 17 provided that a judge may decide, 'as he sees fit', any question as to title or possession of property between husband and wife.

49 *Bernard v Josephs* [1982] Ch 391 (CA) 397 (Lord Denning MR).

50 [1962] 1 WLR 1124 (CA).

51 *Bernard* (n 49) 398 (Lord Denning MR).

vulnerability of many of the claimants concerned.[52] Such a process, however, when completed in the absence of parliamentary guidance, forces courts to be vague, non-committal and cautious in their judgments. It must also be borne in mind that some unwritten communications, as those present in CICT-type breakdowns, can be inherently silent and inconclusive on particular matters of importance.[53]

In the absence of explicit statutory licence, the two-step methodology, separating *acquisition* from *quantification*, finds purchase to discipline judicial discretion. Boundless judicial discretion has traditionally been shunned in English law, and even more so in the property law context.[54] Land holds distinctive importance as a permanent and finite resource. It mandates certain, predictable, and 'bright line' rules to serve its various social functions, to promote dynamic security and protect third-party purchasers, all while acting as 'an instrument of social engineering' capable of exerting 'a fundamental influence upon the lifestyles of ordinary people'.[55] More recently, in the trusts context, the Court of Appeal in *Re Polly Peck International (No 2)* decisively rejected a discretionary RCT precisely fearing the *ad hoc*

[52] Robert Goodin, 'Welfare, Rights and Discretion' (1986) 6 OJLS 232, 234.
[53] Rory Gregson, 'The Limits of Implication' (2025) 141 LQR 413, 421, 430–431.
[54] Graham Virgo, 'The Genetically Modified Constructive Trust' (2016) 2 CJCCL 579, 584; see also Lord Camden in *Doe v Kersey* (1795) (CP): 'the discretion of a judge is the law of tyrants … In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion, to which human nature is liable', cited in Edward Wynne, *Euonymus, or, Dialogues Concerning the Law and Constitution of England: with an Essay on Dialogue*, (5th edn, S Sweet, R Pheeny and R Millikin 1822) 91.
[55] Kevin J Gray and P.D Symes, *Real Property and Real People: Principles of Land Law* (Butterworths 1981) 4, cited in Hayward (n 41) 255.

variation of property rights without parliamentary consent.[56] Canadian courts have nonetheless pioneered the RCT model, an approach which will be discussed subsequently in this article.

In its current form, the law governing CICTs seems to stray too far towards family law aspirations. Both *Stack* and *Jones* expanded the scope of judicial discretion and did so indiscriminately and imprecisely across both *quantification* and *acquisition* stages. Fairness considerations, for instance, the hallmark of family law adjudication, have been loosely employed in *Jones*. Lord Walker suggests that considerations of fairness should not be used as 'the criterion for determining whether or not the property should be shared' and should be reserved for use only when imputing intention when it is 'impossible to divine a common intention'.[57]

Though the court attempted to restrict this appeal to fairness to the *quantification* stage, it seems unrealistic to expect that these *pre-legal* principles will not broadly permeate judicial reasoning moving forward. Indeed, in the case of *Graham-York v York,* Tomlinson LJ made clear that in deciding what shares are fair 'the court is not concerned with some form of redistributive justice'. In that case, though the female claimant enduring years of abusive conduct by her partner 'attracts sympathy', it did not 'enable the court to redistribute property interests in a manner which right-minded people might think amounts to appropriate compensation'.[58] The search for proof of a common intention

[56] *Re Polly Peck International (No 2)* [1998] 3 All ER 812 (CA). See Lord Neuberger's comments at 827 on the 'unprincipled, incoherent and impractical nature' of this remedial regime.
[57] *Jones* (n 3) [31]–[34] (Lord Walker and Lady Hale).
[58] [2016] 1 FLR 407 [22] (Tomlinson LJ).

can thus easily disintegrate into an analysis of what the court deems fair with regards to beneficial allocation in such a way.[59] As Hayward points out, evidentiary difficulties of pinpointing express and inferred common intentions may result in 'a more intensive engagement with the residual concept of fairness and, in turn, the continuation of this more holistic, discretionary method of adjudication',[60] termed 'palm tree justice'[61] by some. As Behrens J states in *Aspden v Elvey,* final quantified figures are 'somewhat arbitrary' but are unfortunately 'the best [judges] can do with the available material'.[62]

VI. A *Via Media* for Discretion

The foregoing section reveals a judiciary caught between two gravitational pulls. This dilemma is however not irresolvable if one recognises that the *acquisition* and *quantification* stages of the CICT inquiry need not be governed by the same standard of discretion. While discretion can and should be allowed at the *quantification* stage, the same level of fairness- and context-driven discretion is not necessary, and should be avoided, at the *acquisition* stage. Indirect financial contributions and other nuanced factors are not inherently misplaced when apportioning beneficial shares—as reflected in Lady Hale's reasoning at [69] of *Stack*. Adhering to this methodology, courts avoid the risk of

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59 Virgo (n 54) 593.

60 Hayward (n 41) 254–55.

61 *Rimmer v Rimmer* [1952] 2 All ER 863 (CA) 865 (Lord Evershed MR).

62 [2012] EWHC 1387 (Ch), [2012] 2 FLR 807 [128] (Behrens J).

creating property rights unreservedly under the cover of 'justice' or 'fairness'.[63]

As *quantification* and *acquisition* are conceptually and normatively distinct judicial exercises, different levels of judicial discretion can be admitted at each step. To allow the court to apply vague notions of fairness and context to the *acquisition* stage, where the very existence of beneficiary protections and benefits is in question, would be a significant blow to the certainty and predictability of land law. Courts should be incredibly cautious and consistent if they choose to exercise such a discretionary power to alter the legal position of parties in such a way. They should also remember that the imposition of a trust has several important implications for the beneficiary, including priority over the trustee's creditors as regards claims to the trust property in the case of insolvency, and the power to impose an equitable property right against innocent third parties who have received and retained the trust asset or its traceable substitute.[64] Moreover, informal disposition of a proprietary interest is already restricted in English law, requiring an array of formality conditions.[65] Formalities avoid inappropriately validating mistaken or unintended disposals of property rights, rather than modifying their very content. As a result, the remnants of *pre-legal* fairness and context-driven considerations can adequately be dealt with at

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[63] See Charlie Webb, 'The Myth of the Remedial Constructive Trust' (2016) 69(1) CLP 353, 356-57.

[64] eg Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch 437 (CA).

[65] Law of Property Act 1925, s 53(1); Law of Property (Miscellaneous Provisions) Act 1989, s 2.

the *quantification* stage, wary of the same risks to the certainty and predictability of property law.[66]

Though some might critique this approach as overly restrictive, claiming that the power of the *quantification* pales in comparison to its *acquisition* counterpart, it must be remembered that a right quantified at a negligible sum is almost as powerless in practice as a right that never existed. It would be deeply unfortunate if a constructive trust and proprietary remedy were adduced at the first *acquisition* stage only for the resultant interest to be quantified at zero.[67] Though such a risk is far less realistic in practice, it explains imposing a higher burden of proof in answering the *acquisition* question, which is focused on a registered party exercising his Hohfeldian powers to dispose of/transfer his interest.

As such, a CICT that allows for broader judicial discretion at the *quantification* stage that gives effect to the unique context of trusts of the family home should not be feared as a usurpation or break from broader constructive trusts doctrine. By advocating for a clearer separation in these stages, applying a different standard of discretion in each, a middle ground can be reached between overly rigid and certain proprietary rules and overly vague family law notions that might seem inappropriate to some. Collapsing these distinctions would only risk turning the CICT, a proudly Institutional Constructive Trust ('ICT'), into a discretionary RCT as some other common-law jurisdictions have.

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[66] Webb, 'Myth of the Remedial Constructive Trust' (n 63) 357.

[67] John Gardner, 'Problems in Family Law' (2013) 72(2) CLJ 301, 306.

VII. Looking Across the Common Law

The extent to which judicial discretion must be controlled thus reflects a broader debate on whether English law should recognise RCTs. As the main point of comparison, the RCT has been controversially pioneered by the Canadian courts. The doctrine finds its roots in Laskin J's dissent in *Murdoch v Murdoch*.[68] In *Murdoch*, the majority were unwilling to find a common intention that the property's beneficial interest was to be held otherwise than solely by the registered party.[69] Laskin J concurred on the absence of a common intention but argued for the opposite result through a 'constructive trust which does not depend on evidence of intention'.[70]

Laskin J's approach was adopted seven years later: where marital or quasi-marital relationships break down, Canadian courts will find a constructive trust if satisfied (a) that unjust enrichment has occurred, and (b) that it would be appropriate, given the circumstances, to award a proprietary rather than a personal remedy.[71] The constructive trust remedies any unconscionability arising from one party holding the entire beneficial interest, wholly rejecting the common intention approach.[72] It is within, and solely within, the courts' discretion

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[68] 1973 SCC 193, [1975] 1 SCR 423.
[69] ibid 439 (Martland J).
[70] ibid 454 (Laskin J).
[71] *Pettkus v Becker* 1980 SCC 22, [1980] 2 SCR 834, 848-849 (Dickson J); *Sorochan v Sorochan* 1986 SCC 23, [1986] 2 SCR 38, 47-48 (Dickson CJ) ; *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 269 [50] (Cromwell J).
[72] *Kerr* (n 71) [26] (Cromwell J).

to decide whether a proprietary remedy should be granted. If unjust enrichment is made out, Canadian courts emphasise that the usual remedy will be the personal remedy of monetary compensation.[73] Proprietary relief has nevertheless been steadily preferred in cases involving the division of matrimonial or cohabitated property.[74]

The RCT, unlike the ICT, is a 'judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court'.[75] It arises through the exercise of judicial discretion whenever it is considered just for the claimant to have an equitable proprietary interest in property received by the defendant.[76] A claimant need only show some 'reason to grant [him] the additional rights that flow from the recognition of a right to property' with seemingly any relevant policy factor capable of being taken into account.[77] An ICT, on the other hand, arises by operation of law from the date of the qualifying event which gives rise to it.[78] Once these events have occurred, the court declares the existence of the trust and awards the applicable proprietary remedies.[79]

The key distinction between the two can be so distilled: 'is the purported beneficiary able, as of right, to elect a proprietary

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[73] *Rawluk v Rawluk* 1990 SCC 152, [1991] 1 SCR 70, 73 (Cory J).
[74] ibid 85-86 (Cory J).
[75] *Westdeutsche* (n 7) 714 (Lord Browne-Wilkinson).
[76] *Soulos v Korkontzilas* 1997 SCC 346, [1997] 2 SCR 217 [34] (McLachlin J); Virgo (n 54) 582.
[77] *Lac Minerals Ltd v International Corona Resources Ltd* 1989 SCC 34, [1989] 2 SCR 574, 678 (La Forest J).
[78] *Westdeutsche* (n 7) 714 (Lord Browne-Wilkinson).
[79] Virgo (n 54) 592.

remedy in response to the relevant event?'[80] If yes, then the trust is institutional. The beneficiary's claim is staked on an extant right to be recognised by the court. If the answer is no, then the trust is remedial. Here, the beneficiary appears before the court with only an *expectation* of being granted a proprietary remedy. A successful claim relies on a right being recognised *ex post* by the court.[81] Where the ICT *declares*, the RCT *creates* a constructive trust.

VIII. Lessons to be Learned

The RCT offers some appeal and could 'prove a satisfactory way forward' for developing proprietary restitutionary remedies.[82] It takes account of deprivation that is unjust, enables the position of innocent third parties to be considered, and renders available restitutionary defences like change of position.[83] Moreover, it enables more case-specific solutions while allowing courts to meet shifting social norms head-on, instead of hiding behind the façade of purely institutional trusts.

Yet, despite its advantages, the RCT is hardly reconcilable with English conceptions of common-law rights and remedies. English property rights 'are determined by fixed rules and settled principles' and 'do not depend upon ideas of what is "fair, just, and reasonable".'[84] Lord Neuberger, extra-judicially,

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[80] Orestis Sherman, 'Orthodoxy Reasserted: Tempering the Support for the RCT' (2018) 24(9) T&T 860, 860.
[81] ibid.
[82] *Westdeutsche* (n 7) 716 (Lord Browne-Wilkinson).
[83] Donovan Waters, 'Resulting Trusts, and the Canadian Remedial Constructive Trust: Reconciling the Two' (2014) 20(3) T&T 234, 241.
[84] *Foskett v McKeown* [2001] 1 AC 102 (HL) 127 (Lord Millett).

expressed distrust of RCTs, seeing them as an unpredictable affront to this common-law view and as a judicial usurpation of the role of the legislature to create new property rights.[85] It is no surprise then that the Canadian RCT has been rejected by the UK Supreme Court in *FHR European Ventures*: it is 'authoritatively…not…part of English law'.[86]

The chief reason for this incompatibility is the fact that the RCT, by creating equitable property rights anew and imposing them retroactively on parties, undermines how fixed and predictable the rules for a land law regime are, while empowering courts to more flexibly achieve fairness *inter partes*. As such, the RCT addresses the *acquisition* and *quantification* questions in restitutionary terminology—*(acquisition) has* there been unjust enrichment and *(quantification)* if so, *how* should the court remedy it? The RCT creates new Hohfeldian relations without any prior exercise of a relevant power by a pre-existing right holder. From the court's determination, the beneficiary of an RCT gains an array of Hohfeldian prerogatives in a manner foreign to English law. English property law is inherently allocative and certain; property consequences flow from the pre-determined content of the recognised rights.[87] An English court that imputes intention, in the guise of fairness at the *acquisition* and *quantification* stage, veers dangerously close to Canadian discretionary remedialism.

[85] Lord Neuberger, 'The Remedial Constructive Trust – Fact or Fiction' (Speech at Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014) <https://supremecourt.uk/uploads/speech_140810_9c66db6801.pdf> accessed 30 December 2025.

[86] *FHR European Ventures v Cedar Capital Partners* [2014] UKSC 45, [2015] AC 250 [47] (Lord Neuberger).

[87] Sherman (n 80) 866.

Yet the main English lesson from the Canadian experience should be one of honesty. Canadian courts openly admitted the difficulty of finding a common intention and instead opted for a remedial approach. Meanwhile, under the auspices of giving effect to common intention, English courts allowed similar *pre-legal* considerations of 'fairness' and 'context' to distort its CICT reasoning at both *acquisition* and *quantification.* The uncertain scope of imputed intention is further proof of this judiciary compromise.

The need for a stricter segregation between *acquisition* and *quantification* thus becomes all the clearer. Despite the Law Commission's recommendations, statutory guidance in this area is still lacking.[88] The judiciary is then implicitly trusted as custodian of the English property regime. Attention to the *acquisition/quantification* distinction helps judges remain rigorous, institutional and sensitive in their pronouncement of proprietary rights. By clearly asking two different questions at each stage, the court is reminded that it must merely *declare* the limits of already-extant rights, rather than create them anew.

IX. Conclusion

Homes should necessarily be treated with proper sensitivity to the personal investment of those concerned. This does not, however, warrant a departure from established property law principles.

In single name cases, Hohfeldian analysis illustrates the gulf between answering whether an unregistered party has *acquired*

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[88] Law Commission, Cohabitation: The Financial Consequences of Relationship Breakdown (Law Com No 307, 2007) paras 8.1–8.24.

an interest *vis-à-vis* answering how an unregistered party's interest, once established, is to be *quantified*. While unitary, the PMRT and CICT approaches only achieve superficial coherence through oversimplifying the picture. The differentiated approach advocated for by this article may not be the most satisfyingly straightforward, but family disputes never are. Proprietary certainty must be balanced with familial flexibility. The latter demands discretion while the former requires that such discretion be controlled. Disregard of such limits would transform the CICT into a remedial instrument of the kind used in Canada; judicial avowals of proprietary orthodoxy would be empty. Thus, to answer the titular question, the two are not mutually exclusive: homes are still houses.