Neutral Citation Number: [2022] EWCA Civ 1648

Case No: CA-2022-000673

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION
THE HON. MR JUSTICE KERR
[2022] EWHC 631 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE NUGEE

- -

Between :

Lee Hudson	**Appellant**
- and -	
Jayne Hathway	**Respondent**

- -
- -

Alexander Learmonth KC and Zoë Saunders (instructed by **Veale Wasbrough Vizards LLP**) for the **Appellant**
Michael Horton KC and Guy Holland (instructed by **Ashtons Legal**) for the **Respondent**

Hearing dates : 22 & 23/11/2022

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 14.12.2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction and issues

1. Kerr J, from whom this appeal is brought, framed the original issues accurately and concisely on the first appeal from HHJ Ralton:

> "This is an appeal in a case about equitable ownership of a family home purchased in joint names, initially with equal ownership rights, where the unmarried parties later separate. Must a party claiming a subsequent increase in her equitable share necessarily have acted to her detriment? Or does a common intention alone suffice to alter the beneficial shares? And if the former, was the judge right to decide that the requirement of detriment was met?"

2. His answer to the first two questions was that it was not necessary to show detriment; but that a common intention alone was sufficient. But in case he was wrong, he also answered the third question. His answer to that question was that the trial judge was entitled to find that sufficient detriment had been established. His judgment is at [2022] EWHC 631 (QB).

3. For the reasons that follow, in relation to the original issues, I would hold:

    i) A party claiming a subsequent increase in her equitable share as a result of a post-acquisition changed common intention must show detrimental reliance on that changed common intention;

    ii) The trial judge was right to decide on the facts that the requirement of detrimental reliance was met.

4. I would also hold (in response to a point not argued below) that the communications which expressed the parties' common intention that Ms Hathway should have the whole equitable interest in the family home in fact complied with the necessary statutory formalities. Logically, it is this last question that comes first.

The facts

5. Ms Jayne Hathway and Mr Lee Hudson started a relationship in 1990. He moved into her home and became joint owner. They did not marry. They had two sons. They sold the home and bought another, in joint names. Then in 2007, with a mortgage, they bought Picnic House, again in joint names, with no declaration of trusts. Both worked. His earnings soon overtook hers; she left the financial services industry to work in the charity sector; he remained in financial services.

6. In 2009, Mr Hudson left Ms Hathway for another woman, moved in with her and later married her. They are now estranged. Ms Hathway stayed at Picnic House with the two sons. The mortgage was converted to an interest only basis. It was paid, as before, from the joint bank account into which both their salaries were paid. Over the years,

Mr Hudson substantially paid the mortgage; the amount he contributed far exceeded Ms Hathway's contributions.

7. Then in 2011, the house was blighted by an oil spill, making it very difficult to sell. An environmental disaster was how the trial judge described it. Oil leaked into the house from a neighbouring tank and under the ground beneath the house. An environmental clean up was required. A complicated insurance claim dragged on for years. Over the following 20 months or so, the parties had sporadic email discussions about financial arrangements.

8. On 9 November 2011 Ms Hathway emailed Mr Hudson. Her email read in part:

> "Your shares are the main matter outstanding. You have told me that they are not worth anything. Whether or not that is the case, they form part of what was our collective assets at the time we split. I imagine that you feel that I should have no call on them, you earned them, from all the hours of effort you put in at work – my position is, of course, different – you earned them while we were together, your career advancement was part of our relationship, as was the building of pension funds etc. I hope we are both adult and reasonable enough to reach some sort of compromise?"

9. The email was subscribed "Jayne Hathway".

10. Mr Hudson replied on the same day:

> "My thoughts on this are that anything accrued while we were together is for us to come to an agreement on, which I think fits with what you are saying."

11. The email was subscribed "Lee"; and his full name given. On 24 August 2012 Mr Hudson wrote:

> "We'll sort who deserves what in regards to our joint assets (house, shares, savings etc) when we're in a position to liquidate it all, which obviously depends on when you are ready."

12. The email was subscribed "Lee Hudson".

13. In July and August 2013, Mr Hudson and Ms Hathway agreed terms set out in emails. In an email of 30 July (but not sent to Ms Hathway until the following day) he said:

> "So here it is. We were never married. You have no claim over what is mine. What I consider ring-fenced is what I get from my years of personal graft. They are not up for discussion. I'm not agreeing to give you any. …. The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house … again I don't want it; keep it. Which leaves the house, a bad asset which is preventing all of us [from] .. moving on with our lives…. You know what, I

> want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live….
>
> As for a Will, if I were to die before this financial mess is sorted, Heidi [his wife] will have no rights to Picnic House …
>
> What I want is an end to it. So have everything that's available to have now and when the house is sold."

14. The email was subscribed "Lee".

15. Ms Hathway replied on the same day. She said:

> "Can't see any point in putting "my side" of the argument. Not because I don't feel that I have a valid case to make, but because it is clear that it would be pointless."

16. On 12 August 2013 she emailed again:

> "So that we can move forward and get to a point of completely severing our financial connections, your suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments. Is that right? If so, then I will accept this and will do everything I can to get the house ready for sale as soon as the situation with the oil spill is resolved."

17. He replied on 9 September:

> "Yes, that's right. …
>
> Under this arrangement, I've no interest whatsoever in the house, so whilst I will continue to contribute, I won't do so forever."

18. This email was subscribed "Lee".

19. In the autumn and winter of 2013 there was some discussion about Mr Hudson's buying the house. But as his email of 15 December 2013 made clear what was under discussion was his purchase of the whole house and not simply a half share in it.

20. Time passed and Mr Hudson became impatient with a lack of progress in resolving the oil spill clean up, the insurance claim and the sale of Picnic House. In May and July 2014 he referred in emails to how much time had passed "since we came to a deal". In his email of 2 July 2014 he added:

> "If you want to continue to "wait" on the house to maximise your gain (means nothing to me if it sells for a pound or a million) then that needs to be your decision and your responsibility."

21. On 24 August 2014 he wrote:

> "Remember the House is of no value to me: the deal from one year ago which was supposed to be finalised 6 months ago gave you all liquid assets, including the proceeds of the house sale. I don't care what it sells for. "

22. In January 2015, he ceased contributing to the mortgage. Ms Hathway took over the payments. It was cheaper than renting. The two sons, now young adults, remained at Picnic House with her.

23. The trial judge found that the parties had clearly reached a deal, but at that stage it was accepted that the deal did not satisfy the formalities for transferring legal title, an equitable interest or a declaration of trust.

24. In October 2019, Mr Hudson issued his claim under CPR Part 8 and the Trusts of Land and Appointment of Trustees Act 1996. He sought an order for the sale of Picnic House, with equal division of the proceeds. Ms Hathway agreed that the house should be sold but contended that she was entitled to the whole of the proceeds under a constructive trust following a common intention and agreement, in reliance on which she had acted to her detriment.

25. The detrimental conduct relied on was: paying all interest payments on the joint mortgage from January 2015; desisting from claiming against assets in Mr Hudson's sole name acquired during their relationship; not claiming financial support for the benefit of the children under the Children Act 1989; accepting sole responsibility for the oil spill and insurance claim; at her own expense, maintaining and redecorating the property from January 2015; relying from 2014 on the understanding that she was sole beneficial owner, in conducting her finances and lifestyle; and living frugally to afford the upkeep and mortgage.

26. In her first witness statement Ms Hathway explained at paragraph 13 that Mr Hudson was keen to buy Picnic House, but that she did not relish the thought of a large mortgage. She continued:

> "However, Lee was certain that the equity from our house and our savings of £100,000 would mean a manageable mortgage and, if things became tight, he always said that his shares in Hiscox, the insurance company in which he worked, would be sold to pay it off…. I did not know the full extent of his shareholding in Hiscox but he said that it would be sufficient to cover the mortgage."

27. She said at paragraph 19:

> "I knew that as we were not married I had no claim to his shares or pension or to maintenance, but we had been together for 20 years and Lee and I agreed that there needed to be a fair distribution of the assets that we had built up together."

28. At paragraph 23 of the same statement (referring to her email of 9 November 2011) she said:

> "I was of the view that those assets which both of us secured during our relationship were joint assets however they were held legally and that we needed to reach an agreement as to how they were split… My view was that we had been together for 20 years and that my taking time off for looking after our children and our home, and to support him in his career advancement was one of the primary reasons he was able to earn such significant sums, to build his pension and to secure the shares so that they were our joint assets."

29. In her second witness statement she said at paragraph 37:

> "When I returned to work in the charity sector after having the children, I earned less than I had… I needed to fit my work around the children and around Lee's work in insurance, so I worked fewer hours than Lee. I believed that we were in a happy and stable relationship and that our relationship would endure. My understanding was that we would continue to pool our resources and that when we retired we would live on our combined assets all of which were accumulated whilst we were a couple…"

30. The trial judge held that in order to enforce the agreement evidenced by the e-mails, it was necessary for Ms Hathway to show that she had changed her position or otherwise relied on the agreement to her detriment. But he held on the facts that she had shown that. He considered the pleaded elements one by one; and rejected most of them as amounting individually to detrimental reliance of sufficient substance. But he held that by giving up potential claims against Mr Hudson's shares and pension which both she and Mr Hudson perceived she had (whether or not that belief was well-founded) did amount to relevant detrimental reliance. He therefore held that Ms Hathway was entitled to the whole of the beneficial interest in Picnic House.

31. Kerr J disagreed with the trial judge on the question whether it was necessary for Ms Hathway to show that she had changed her position or had acted to her detriment. He held that any such requirement had been abrogated by the decisions of the House of Lords and Supreme Court respectively in *Stack v Dowden* and *Jones v Kernott*. But if he was wrong about that, he went on to hold that the quality of the asserted change of position or detriment was a matter of evaluative judgment for the trial judge; and that the trial judge was entitled to come to the conclusion that he did.

Is section 53 (1) (c) of the Law of Property Act 1925 satisfied?

32. We are concerned in this appeal with property rights in land, not with discretionary adjustments to property rights. The creation and transfer of property rights in land must, as a general rule, comply with statutory formalities. Such formalities are necessary in order that property rights in land should be certain. The most important of such formalities are those laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (contracts for the sale or creation of interests in

land must be in signed writing) and section 53 (1) of the Law of Property Act 1925 (declarations of trust of land or an interest in land to be manifested by signed writing; and dispositions of subsisting equitable interests to be made by signed writing). Section 2 applies to executory contracts for the disposition of interests in land, but not to instruments which effect an immediate disposition. Section 53 (1), on the other hand, applies to instruments which effect an immediate disposition of an interest. Although the distinction has been described as "elusive", it is nevertheless well settled: *Rollerteam Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch 109 (referring to previous authority).

33. For reasons which are difficult to understand, whether section 53 (1) of the Law of Property Act 1925 was satisfied was not argued either at trial or on the first appeal. But at our prompting Mr Horton KC applied to amend the Respondent's Notice to take the point that Mr Hudson's emails of 31 July 2013 and 9 September 2013 complied with the statutory formalities.

34. There is no doubt that the court has the power to entertain a new point on appeal. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ set out the principles which this court generally applies in deciding whether a new point may be advanced on appeal:

> "[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial…
>
> [18] Third, even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."

35. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 Snowden LJ (then sitting in this court as Snowden J) amplified these criteria. He first said that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. He pointed out that there was a spectrum of cases, at one end of which is a case in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new

point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

36. In these (and all the other cases) that we were shown, it has been the appellant who wished to raise the new point. In other words, it is the party seeking to overturn the judgment who wishes to do so on the basis of a point not argued below. The effect of that would be to deprive the respondent of a judgment in their favour. Here, by contrast, it is the respondent (who already has two judgments in her favour) who wishes to raise the new point. CPR Part 52.13 simply says that a respondent's notice must be filed where a respondent "wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court." Whether precisely the same principles apply in such a case is not entirely clear. It is, however, fair to say that in an interlocutory appeal in *Riley v Sivier* [2021] EWCA Civ 713, [2021] 4 WLR 84, where the respondent wished to raise a new point, Warby LJ said that this court does not usually allow new points to be taken on appeal although he also rejected the new points on their merits. On the other hand, in *Golding v Martin* [2019] EWCA Civ 446, [2019] Ch 489 this court permitted a respondent to raise a new point which had not been argued below.

37. Mr Learmonth KC objected to the new point on the ground that the case had not been advanced in that way either at trial or on the first appeal, and that the decision not to argue that point had been deliberate. There is, of course, force in that objection. He pointed out that it had been accepted both at trial and on the first appeal that the email traffic did not amount to a contract compliant with section 2 of the Law of Property (Miscellaneous Provisions) Act 1925. So indeed it was, but it is not sought to argue that the email in question did comply with section 2. The argument now sought to be advanced is a different one. The argument depends on the legal effects of the relevant emails, which is a question of law. In those circumstances the court is not bound by one party's concession (*Bahamas International Property Trust Ltd v Threadgold* [1974] 1 WLR 1514, where a point was raised for the first time in the House of Lords), or the positions taken by the parties on a question of interpretation (*Teesside Gas Transportation Ltd v CATS North Sea Ltd* [2019] EWHC 1220 (Comm) at [119]).

38. Mr Learmonth KC also pointed out, correctly, that this point arose for the first time on a second (rather than a first) appeal. But that, in itself, is not an absolute bar to the raising of a new point: *Bahamas International Property Trust Ltd v Threadgold*; *New Zealand Meat Board v Paramount Export Ltd* [2004] UKPC 45.

39. Although, because of the court's sitting arrangements, there had been a break of a clear morning between the time that the point was raised and the resumed hearing of the appeal when Mr Learmonth raised his objections, Mr Learmonth also said that he and his team had not had adequate time to research the law dealing with the point. We decided to allow him a further seven working days in which to make written submissions; and gave Mr Horton three working days thereafter to respond. Both Mr Learmonth and Mr Horton took advantage of that opportunity.

40. Mr Learmonth also submitted that if we allowed the point to be taken there would have been further evidence that might have been called at trial. That evidence would,

in effect, have consisted of what the parties' subjective understanding of the documents was, and further amplification of the background. Although he suggested that in some circumstances subjective evidence is admissible on a question of contractual interpretation (e.g. to identify the subject-matter of a contract or to demonstrate that the parties had their own private dictionary), that argument erroneously conflates *extrinsic* evidence and evidence of *subjective* intent. In my judgment the point is a pure point of law, which depends on the interpretation of the relevant emails. As with any question of interpretation of a written document, the test is an objective one; and I am unable to see how the course of *relevant* evidence might have been affected. Mr Learmonth also said that if the point had been taken, Mr Hudson might have applied to rectify the email. In view of HHJ Ralton's finding of fact about the parties' intentions, that seems to me to be purely theoretical.

41. The third objection was that Mr Hudson had suffered detriment in a broad sense. Had he known that this point was to be taken, he might have had a different approach to a possible settlement of the dispute; and Mr Learmonth also emphasised that the ongoing litigation had had a devastating effect on Mr Hudson personally and, in particular, his relationship with his sons. There is some force in the point about settlement (although that is likely to be the case whenever a party seeks to raise a new point on appeal), but there is less force in the effect of the ongoing litigation. It was, after all, Mr Hudson who initiated the litigation in the first place, Mr Hudson who appealed unsuccessfully against an adverse judgment at trial; and Mr Hudson who has brought this second appeal.

42. In my judgment the new point is at the latter end of the spectrum identified by Snowden LJ. Although I have carefully considered Mr Learmonth's objections, in my judgment the balance of justice comes down in favour of allowing the new point to be taken. I would therefore allow the amendment.

43. Section 36 of the Law of Property Act 1925 (as amended by the Trusts of Land and Appointment of Trustees Act 1996) relevantly provides:

> "(1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held in trust, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.
>
> (2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenant…"

44. Since the enactment of the Trusts of Land and Appointment of Trustees Act 1996 a co-owner's beneficial interest is an interest in the land itself, rather than (as formerly) an interest in its proceeds of sale.

45. Section 53 (1) of the Law of Property Act 1925 relevantly provides:

> "(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;…
>
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

46. It is common ground that on acquisition of Picnic House it was held by Mr Hudson and Ms Hathway as joint tenants both in law and in equity. In strictly technical terms, it is not possible for one joint tenant to assign his beneficial interest to another joint tenant. That is because, as a matter of theory, each joint tenant is entitled to the whole of the land. But section 36 (2) expressly preserves the right of one joint tenant to release his interest to the other joint tenant. The difference between a release and an assignment was explained by Lord Millett (albeit in a dissenting speech) in *Burton v Camden LBC* [2000] 2 AC 399, 408:

> "A purported assignment of the interest of one joint tenant to the other joint tenant does not constitute an assignment, because each of the joint tenants is already the owner of the whole. The so-called assignor has no separate interest of his own which is capable of being transferred to the other and which the other does not already own. None of this, of course, applies to a tenant in common, because he has a separate and distinct interest of his own which he can assign either to a third party or to his co-owner.
>
> Before 1926, therefore, one joint tenant could not assign his interest to the other. But he could achieve much the same result by releasing his interest. The release operated to extinguish his interest and not to assign it. The difference, though technical, was not a formality. Since a release did not operate by way of assignment or conveyance, it required no words of limitation. Moreover, where there were three or more tenants, a release by one joint tenant did not destroy the unity of title of the others and so sever their interests, for they did not acquire any interest by the release which they did not already own.
>
> No particular form of words was required for a release. Even if it was drafted as any assignment, it still took effect as a release. The difference was one of substance, not form; it was not merely a matter of language. The ability of one joint tenant to release his interest to the other has been preserved by section 36(2) of the Law of Property Act 1925. It is still not possible for one joint tenant to assign his interest to the other."

47. In *Re Wale* [1956] 1 WLR 1346 Upjohn J said at 1350:

> "Another familiar principle is that an assignment of an equitable estate need not be in any particular form. As Lord Macnaghten said in *Brandt's (William) Sons & Co Ltd v Dunlop Rubber Co Ltd*: "The language is immaterial if the meaning is plain." That, in my judgment, applies as much to a voluntary assignment as to one for valuable consideration as in that case. (See also *Lambe v Orton*). An equitable assignment may take many forms. It may in terms purport to operate as an assignment, or it may take the form of a direction to the trustees in whom the legal estate is outstanding to hold the property on trust for the donee or on new trusts."

48. So as in the case of a release there is no need for any particular form of words. As Lord Macnaghten said in the *Brandt's* case: "It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission."

49. Mr Learmonth submitted that in a domestic or social context there might have been no intention to create legal relations. This is a principle that applies to executory contracts. But assuming that it can apply to immediate dispositions, the fact that although married, the parties are separated, leads to the conclusion that there is no presumption that legal relations are not intended: *Merritt v Merritt* [1970] 1 WLR 1211. Still less so is there a presumption where the parties have never married but are negotiating their final separation. Moreover, it is not a question of subjective intention as Lord Denning MR made clear in *Merritt*.

50. In my judgment Mr Hudson's emails of 31 July and 9 September 2013 are sufficient in point of form to amount to a release of his equitable interest in the house. They evince a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future. His email of 30 July 2013 said in relation to the house, "Take it"; and in his follow up on 9 September he disavowed any interest in it. Further emails, with which Mr Learmonth supplied us at the end of the hearing (and in particular those of 2 July 2014 and 25 August 2014) confirm the finality of that decision. Does that amount to the disposition of an interest in land or an equitable interest?

51. The word "disposition" in section 53 is a word of wide import. In *IRC v Grey* [1960] AC 1, 12 Viscount Simonds said:

> "If the word "disposition" is given its natural meaning, it cannot, I think, be denied that a direction given by Mr. Hunter, whereby the beneficial interest in the shares theretofore vested in him became vested in another or others, is a disposition. But it is contended by the appellants that the word "disposition" is to be given a narrower meaning and (so far as relates to inter vivos transactions) be read as if it were synonymous with "grants and assignments" and that, given this meaning, it does not cover such a direction as was given in this case. As I am clearly of the opinion, which I understand to be shared by your Lordships, that there is no justification for giving the word "disposition" a narrower meaning than it ordinarily bears, it

> will be unnecessary to discuss the interesting problem that would otherwise arise."

52. To similar effect in *Newlon Housing Trust v Alsuleimen* [1999] 1 AC 313, 316 Lord Hoffmann said:

> "'Disposition' is a familiar enough word in the law of property and ordinarily means an act by which someone ceases to be the owner of that property in law or in equity."

53. Likewise, in *IRC v Buchanan* [1958] Ch 289 this court held that a surrender of a life interest under a trust amounted to a disposition. In view of the wide meaning of "disposition", I consider that the same reasoning would apply to the release of his interest by one joint tenant to another joint tenant.

54. Accordingly, the emails of 30 July 2103 and 9 September 2013 amount in point of form, in my judgment, to a "disposition" for the purposes of section 53. But they also need to satisfy the statutory formalities.

55. There is no dispute that the emails I have quoted are "writing" as defined by Schedule 1 to the Interpretation Act 1978. Are they signed? There is no relevant statutory definition of "signed". The touchstone for determining what is a signature is an intention to authenticate the document: *Caton v Caton* (1867) LR 2 HL 127. Applying that principle, it has been held that a printed name may amount to a signature (*Schneider v Norris* (1814) 2 M & S 286); as may the name on a telegram form (*Godwin v Francis* (1869-70) 5 CP 295), or a rubber stamp (*Goodman v J Eban Ltd* [1954] 1 QB 550).

56. It goes without saying that electronic communications in the form of emails were not known to Parliament in 1925. But it is a general principle of statutory interpretation that an Act of Parliament is regarded as "always speaking." What that means is that the words of the Act should generally be interpreted so as to cover new technological developments which the legislators might not have foreseen, if they conform to the policy of the Act in question. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 Lord Steyn said at [25]:

> "In such a case involving the application of a statute to new technology it is plainly not necessary to ask whether the express statutory language is ambiguous. … But in order to give effect to a plain parliamentary purpose a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament."

57. In *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 the question was whether an email address automatically inserted by the sender's internet service provider was a valid signature for the purposes of section 4 of the Statute of Frauds 1677 (relating to guarantees). HHJ Pelling QC, sitting as a judge of the High

Court, held that it was not, but that was because it had been automatically inserted. In the course of his judgment, he said at [27]:

> "In the light of the dicta cited above, it seems to me that a party can sign a document for the purposes of section 4 by using his full name or his last name prefixed by some or all of his initials or using his initials, and possibly by using a pseudonym or a combination of letters and numbers (as can happen for example with a Lloyds slip scratch), providing always that whatever was used was inserted into the document in order to give, and with the intention of giving, authenticity to it. Its inclusion must have been intended as a signature for these purposes."

58. He concluded at [29]:

> "I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference. However, that is not the issue in this case."

59. *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953 concerned the acceptance of a Part 36 offer which had been contained in an email from solicitors. Mr Peter Prescott QC, sitting as a judge of the High Court, said at [21]:

> "Mr Zelin doubted whether simply typing "Putsmans" on the e-mail amounted to a signature that complied with the practice direction, citing *J Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543, but wisely he did not waste much time on the point. In that case the signature was alleged to be constituted by the words "From: Nelmehta@aol.com" appearing in the e-mail header. It was a mere statement of the sender's e-mail address and it would have been generated automatically after the message was transmitted. It was not put there by the sender with the intention of authenticating the document. In contrast, in our case the word "Putsmans" was deliberately typed in (what is more, after the customary salutation "Yours faithfully"). I have no doubt that its purpose would be recognised throughout the profession. Anyone would think: "Putsmans are signing off on this document". It was intended to signify that document was being sent out with the authority of the defendants' legal representative."

60. *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), [2012] BCC 153 was another case about the validity of a signature for the purposes of section 4 of the Statute of Frauds. Flaux J said at [95]:

> "In a modern context, the section will clearly be satisfied if the representation is contained in an email, provided that the email

> includes a written indication of who is sending the email. It seems that it is not enough that the email comes from a person's email address without his having "signed" it in the sense of either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the email…"

61. In *Re Stealth Construction Ltd* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 the question was whether a valid charge had been created. The charge was required to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. David Richards J said:

> "[44] … The liquidator accepts, adopting the reasoning of his Honour Judge Pelling QC in *J Pereira Fernandes SA v Mehta* … in the context of the statutory requirements for a guarantee, that Miss Gillis on behalf of the company and Mrs Ireland, by inserting their names at the end of the e-mails sent by them respectively, had "signed" them for the purposes of s 2.
>
> [45] Section 2(3) requires also that the document incorporating the terms be signed by or on behalf of each party. The liquidator accepts that Miss Gillis's e-mail to Mrs Ireland and Mrs Ireland's reply constitutes a single document for these purposes. In my view, this is right where, as here, the second e-mail is sent as a reply and so creates a string, as opposed to [being] simply a new e-mail referring to an earlier e-mail. It is the electronic equivalent of a hard copy letter signed by the sender being itself signed by the addressee."

62. *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 was another case about the signature of a guarantee. The document concluding the alleged contract of guarantee was an email subscribed "Guy", a reference to the broker, Mr Hindley. Tomlinson LJ said at [32]:

> "It was common ground both before the judge and before us that an electronic signature is sufficient and that a first name, initials, or perhaps a nickname will suffice. Mr Kendrick's point was that the affixing of Mr Hindley's name was not done in a manner which indicated that it was intended to authenticate the document, that being the touchstone… I do not accept Mr Kendrick's first argument. Chartering brokers may communicate with one another in a familiar manner but that does not detract from the seriousness of the business they are conducting. In my judgment Mr Hindley put his name, Guy, on the e-mail so as to indicate that it came with his authority and that he took responsibility for the contents. It is an assent to its terms. I have no doubt that that is a sufficient authentication."

63. He added at [34]:

> "Naturally I accept that the e-mail … is not itself the contract of guarantee. I have no doubt however that the signature on that document of Mr Hindley, assuming his authority, is properly regarded as authentication of the contract of guarantee contained in it and the other document or documents in the sequence to which I have already referred."

64. In *Bassano v Toft* [2014] EWHC 377 (QB) the question was whether a consumer credit agreement had been validly executed. Popplewell J said at [42]:

> "Generally speaking, a signature is the writing or otherwise affixing of a person's name, or a mark to represent his name, with the intention of authenticating the document as being that of, or binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email: see *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* at [32]. Section 7 of the Electronic Communications Act 2000 recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity."

65. In *Neocleous v Rees* [2019] EWHC 2462 (Ch), [2020] 2 P & CR 4 the question was whether an email subscribed "Many Thanks David Tear" was "signed" for the purposes of section 2 of the Law of Property (Miscellaneous Provision) Act 1989. HHJ Pearce held that it was. The subscription appears to have been automatically generated by the email software. HHJ Pearce said:

> "[54] … It was common ground that the rule that a footer of this type be added to every email involved the conscious action at some stage of a person entering the relevant information and settings in Microsoft Outlook. Furthermore, Mr Tear knew that his name was added to the email. Indeed, the manual typing rather than automatic inclusion of the words "Many Thanks" at the end of the email strongly suggests that the author is relying on the automatic footer to sign off his name.
>
> [55] In such circumstances, it is difficult to distinguish between a name which is added pursuant to a general rule set up on an electronic device that the sender's name and other details be incorporated at the bottom from an alternative practice that each time an email is sent the sender manually adds those details. Further, the recipient of the email has no way of knowing (as far as the court is aware) whether the details at the bottom of an email are added pursuant to an automatic rule as here or by the sender manually entering them. Looked at objectively, the presence of the name indicates a clear intention to associate oneself with the email—to authenticate it or to sign it."

66. At [56] he referred to the policy behind section 2; namely to reduce uncertainty and the need to prove intent by extrinsic evidence. But he continued at [57]:

> "In my judgment, no such difficult arises if the email footer here is treated as being a sufficient act of signing:
>
> i) it is common ground that such a footer can only be present because of a conscious decision to insert the contents, albeit that that decision may have been made the subject of a general rule that automatically applied the contents in all cases. The recipient of such an email would therefore naturally conclude that the sender's details had been included as a means of identifying the sender with the contents of the email, since such a footer must have been added either as a result of a conscious decision in the particular case or a more general decision to add the footer in all cases;
>
> ii) the sender of the email is aware that their name is being applied as a footer. The recipient has no reason to think that the presence of the name as a signature is unknown to the sender;
>
> iii) the use of the words "Many Thanks" before the footer shows an intention to connect the name with the contents of the email; and
>
> iv) the presence of the name and contact details is in the conventional style of a signature, at the end of the document. That contrasts with the name and contact address of Mr Hale, the person alleged to have signed the letter in [*Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567], whose name and address appeared above the text of the letter, in the conventional manner of inserting the addressee's details."

67. There is, therefore, a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature. Given that so much correspondence takes place nowadays by email rather than by letters with a "wet ink" signature, it is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature. I would hold, therefore, that Mr Hudson's emails of 31 July and 9 September 2013 were "signed" for the purposes of section 53 (1) (a) and (c) of the Law of Property Act 1925.

68. It follows, therefore, that by those emails Mr Hudson released his beneficial interest in Picnic House to Ms Hathway.

Constructive trust

69. Strictly speaking, my conclusion on section 53 is enough to dispose of the appeal. But the main reason why Asplin LJ gave permission for this second appeal was to decide the point of principle: namely whether a constructive trust can arise simply as a matter of common intention without the need to show any detrimental reliance on that

intention. That question was fully argued, and I consider that it is appropriate that we decide it.

Is detriment or change of position necessary?

70. These statutory formalities do not affect the creation or operation of constructive trusts. The constructive trust is a creature of equity. In this respect, equity operates by settled principles. In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 Lord Walker, referring to equitable estoppel, said at [46]:

> "My Lords, equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in *Muschinski v Dodds* (1985) 160 CLR 583, 615–616,
>
> "Under the law of [Australia]—as, I venture to think, under the present law of England—proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' and 'the formless void' of individual moral opinion …" (references omitted)."

71. Or to adopt Lord Neuberger's colourful metaphor (*The stuffing of Minerva's owl? Taxonomy and taxidermy in equity* [2009] CLJ 537):

> "… equity is not a sort of moral US fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated as a result of the defendants behaving badly, and the common law affords him no remedy."

72. Equity acts where the application of the common law would produce an unconscionable result. But it is necessary to have some principles about what equity would recognise as an unconscionable result, otherwise, as Donaldson LJ put it in *Chief Constable of Kent v V* [1983] QB 34 at 45, one might as well "issue every civil judge with a portable palm tree."

73. What, then, would cause equity to regard a common law result as unconscionable? Until recently, at least in the context of the creation of constructive trusts, the answer would not have been in doubt. What makes it unconscionable to resile from a promise or agreement unenforceable at common law is detrimental reliance on that agreement or promise. In *Gissing v Gissing* [1971] AC 886, 905 Lord Diplock said:

> "A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the

> trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired, and he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

74. *Grant v Edwards* [1986] Ch 638 is a very important case for two reasons. First, the judgment clearly differentiated between what was needed in order to establish a beneficial interest of some kind and the process of quantifying that interest once established. Second it emphasised (if it needed emphasising) that where there is no writing that satisfies the statutory formalities, detrimental reliance is critical to the establishment of a constructive trust. At 646 Nourse LJ said:

> "In a case such as the present, where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it."

75. At 647 he said:

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

76. Accordingly, even where there has been an express agreement, it is still necessary to find detrimental reliance.

77. He went on to say that where it is established that the claimant made contributions referable to the acquisition of the property "such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted upon it."

78. In the same case Mustill LJ said at 651:

> "(2) The question whether one party to the relationship acquires rights to property the legal title to which is vested in the other party must be answered in terms of the existing law of trusts.

> There are no special doctrines of equity, applicable in this field alone.
>
> (3) In a case such as the present the inquiry must proceed in two stages. First, by considering whether something happened between the parties in the nature of bargain, promise or tacit common intention, at the time of the acquisition. Second, if the answer is "Yes," by asking whether the claimant subsequently conducted herself in a manner which was (a) detrimental to herself, and (b) referable to whatever happened on acquisition. (I use the expression "on acquisition" for simplicity. In fact, the event happening between the parties which, if followed by the relevant type of conduct on the part of the claimant, can lead to the creation of an interest in the claimant, may itself occur after acquisition. The beneficial interests may change in the course of the relationship.)."

79. There are a number of points to be made about this passage. First, there are no special rules of equity applicable in this field. The ordinary law of trusts applies. Second, detrimental reliance is necessary even if there is a bargain. Third, there is no difference between an intention formed on acquisition and one formed after acquisition.

80. Sir Nicolas Browne-Wilkinson V-C said at 654:

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

81. That is the first stage of the inquiry. He went on to say:

> "Once it has been established that the parties had a common intention that both should have a beneficial interest *and* that the claimant has acted to his detriment, the question may still remain "what is the extent of the claimant's beneficial interest?" This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important. If this analysis is correct, contributions made by the claimant may be relevant for four different purposes, viz.: (1) in the absence of direct evidence of intention, as evidence from which the parties' intentions can be inferred; (2) as corroboration of direct evidence of intention; (3) to show that the claimant has acted to his or her detriment in reliance on the common intention: Lord Diplock's speech does not deal directly with the nature of the

> detriment to be shown; (4) to quantify the extent of the beneficial interest." (Original emphasis)

82. At 656 he said:

> "But as Lord Diplock's speech in *Gissing v Gissing* … and the decision in *Midland Bank Plc v Dobson* … make clear, mere common intention by itself is not enough: the claimant has also to prove that she has acted to her detriment in the reasonable belief by so acting she was acquiring a beneficial interest."

83. Finally, he said:

> "I suggest that in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing*…. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions."

84. In *Yaxley v Gotts* [2000] Ch 162 Robert Walker LJ said much the same thing about the relationship between constructive trusts and proprietary estoppel at 176, although, as we will see, he later modified his view in *Stack v Dowden*.

85. In *Lloyds Bank plc v Rosset* [1991] 1 AC 107 the main issue was whether an agreement had been sufficiently established. But at 129 Lord Bridge said:

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

86. He added at 132:

> "The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly

> remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel."

87. As we will see, the stringency of the requirement of express discussions has been overtaken by subsequent developments in the law, but the requirement of detrimental reliance has not.

88. In *Stokes v Anderson* [1991] 1 FLR 391 it is equally clear that this court regarded detrimental reliance as an essential ingredient in establishing the existence of a constructive trust.

89. *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 is another important milestone. Chadwick LJ surveyed the law in detail but cast no doubt on the requirement of detrimental reliance to the establishment of a constructive trust. He referred to a number of the passages in the authorities which I have already quoted without any hint of disagreement. In his summary of the law at [68] and [69] Chadwick LJ identified two questions. The first question was whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property. In relation to that question he went on to say:

> "… if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention."

90. The need for detrimental reliance is plain. The second stage is the quantification of that interest, in relation to which the court can take a broader view.

91. This body of authority is consistent with the long-standing approach of equity, often summarised in the statement that equity will not assist a volunteer. In *Milroy v Lord* (1862) 4 De G F & J 264 Turner LJ said:

> "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the

> trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift."

92. In *Dillwyn v Llewellyn* (1862) 4 De G F & J 517 Lord Westbury LC said:

> "About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift."

93. So, too, in the case of the old doctrine of part performance. An oral contract for the sale of land was not enforceable, but part performance by the claimant might raise an equity. In *Maddison v Alderson* (1883) 8 App Cas 467, 475-476 Lord Selborne LC explained:

> "In a suit founded on ... part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself ... The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

94. Lord Hoffmann also explained this principle (by reference to *Maddison v Alderson*) in *Actionstrength Ltd v International Glass Engineering In GL en SpA* [2003] UKHL 17, [2003] 2 AC 541 at [24]:

> "The reconciliation thus draws a distinction between the executory contract, not performed on either side, and the effect of subsequent acts of performance by the plaintiff. The former attracted the full force of the Statute while the latter could create an equitable rather than purely contractual right to performance. The Statute and the doctrine of part performance could co-exist in this way because contracts for the sale of land almost always start by being executory on both sides and usually remain executory until completed by mutual performance."

Stack v Dowden

95. I come now to *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432. Ms Dowden and Mr Stack were in a long-term relationship, although they were unmarried. The house in which they lived was in joint names. The question was whether Ms Dowden had established an entitlement to more than a half share in the house. The House of Lords

held that she had. At [19] Lord Walker quoted the passage from the speech of Lord Diplock in *Gissing v Gissing* which I have already quoted, which he had described as "hugely influential" in developing the law; and which he also said had "dominated this area of the law". Lord Walker's subsequent discussion was concerned with (a) what was necessary to establish an agreement and (b) what might count as a contribution. I cannot see that he dissented from Lord Diplock's view that detrimental reliance was necessary. Indeed at [35] he singled out both *Grant v Edwards* and *Stokes v Anderson* (both of which had stressed the need for detrimental reliance) as among the cases which had developed the law, without any hint of disapproval. Bearing in mind what he himself said in *Cobbe v Yeoman's Row* a year later, it would be very surprising if he had regarded detrimental reliance as unnecessary.

96. At [37] he said this:

> "I add a brief comment as to proprietary estoppel. In paras 70 and 71 of his judgment in *Oxley v Hiscock* [2005] Fam 211 Chadwick LJ considered the conceptual basis of the developing law in this area, and briefly discussed proprietary estoppel, a suggestion first put forward by Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch 638, 656. I have myself given some encouragement to this approach (*Yaxley v Gotts* [2000] Ch 162, 177) but I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and "common interest" constructive trusts can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (*Crabb v Arun District Council* [1976] Ch 179, 198), which may sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

97. As I read this, Lord Walker's reservations had nothing to do with the necessity (or lack of it) of detrimental reliance but with how the equity should be satisfied. Moreover, in saying that he was less enthusiastic about "completely" assimilating the two concepts, he did not suggest that they belonged in watertight compartments.

98. At [60] Lady Hale referred to Lord Walker's speech with evident agreement. Most of the rest of Lady Hale's speech is concerned with the question when it is proper to infer an agreement that the beneficial interest in the property in question is to be shared in proportions which differ from that which the legal title would suggest. At [61] she said:

> "… the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended."

99. At [64] she also referred to *Grant v Edwards* and *Stokes v Anderson* without any hint of disapproval (and also quoting Chadwick LJ's observation that *Grant v Edwards* was "an important turning point"). Her subsequent discussion is focussed on inferring

an agreement from subsequent conduct. Nowhere does she say that mere agreement after the initial purchase of the property is of itself enough to alter the beneficial interests. At [70], for example, she said:

> "There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then."

100. Following *Stack v Dowden*, this court decided *Qayyum v Hameed* [2009] EWCA Civ 352, [2009] 2 FLR 962. In March 1991 Mr and Mrs Qayyum bought a property for Mrs Qayyum's occupation, which was conveyed into joint names. In July 1991 Mr Qayyum executed a deed declaring that he held his interest on trust for Mrs Qayyum absolutely. In June 2004 Mr and Mrs Qayyum applied for a mortgage loan. In the following month they agreed orally to restore the position under which they were equal beneficial owners of the property. They both executed the charge in favour of the lenders in September 2004. The question was whether that agreement was effective. This, then, was a case of a change in the common intention. The trial judge found that Mr Qayyum had relied on the common intention to his detriment by entering into the mortgage. It was argued that entry into the mortgage was not sufficient detriment; but this court rejected that submission. At [32] Etherton LJ said that the judge "was entitled to find that Mr Qayyum entered into the … mortgage pursuant to, and in reliance on, that … agreement." At [34] he said that by entering into the mortgage Mr Qayyum was accepting a substantial detriment such that it would have been unconscionable to deny him the benefit of the beneficial interest. There was no suggestion that detrimental reliance was unnecessary, even in a case of a changed common intention.

Jones v Kernott

101. *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 was another joint names case. Ms Jones claimed a share in the property that was greater than half. The trial judge found in her favour, but his decision was reversed by the Court of Appeal. Ms Jones appealed successfully to the Supreme Court. The argument put forward by counsel on her behalf was:

> "There was ample evidence from which the trial judge could properly draw the inference that after 1993 the parties intended that the claimant's beneficial interest should be greater than the defendant's, that the claimant acted to her detriment in continuing to pay all of the endowment and maintenance costs, and that it would be inequitable to permit the defendant one half share of the property."

102. There is no suggestion in that argument that detrimental reliance was unnecessary. Indeed, he went on to submit:

> "By the date of the trial the claimant had contributed more than 85% of the purchase price of the property, and since 1993 all of

> the indirect contributions. From 1993 the claimant had also paid all the payments due in respect of the life insurance policy. The defendant would not have been able to put down a deposit or buy a property of his own without the claimant's co-operation in encashing the life insurance policy. The claimant acted to her detriment in paying all the endowment and maintenance costs and in agreeing to encash and share the insurance policy equally, having paid all the premiums since 1993."

103. Lord Walker and Lady Hale delivered the majority judgment. At [16] they referred to *Grant v Edwards* (again without any hint of disapproval). At [48] they appear to me to have accepted counsel's submissions on behalf of Ms Jones. They said:

> "At the outset, their intention was to provide a home for themselves and their progeny. But thereafter their intentions did change significantly. He did not go into detail, but the inferences are not difficult to draw. They separated in October 1993. No doubt in many such cases, there is a period of uncertainty about where the parties will live and what they will do about the home which they used to share. This home was put on the market in late 1995 but failed to sell. Around that time a new plan was formed. The life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on 39 Badger Hall Avenue. The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise then. Just as he would have the sole benefit of any capital gain in his own home, Ms Jones would have the sole benefit of any capital gain in Badger Hall Avenue. In so far as the judge did not in so many words infer that this was their intention, it is clearly the intention which reasonable people would have had had they thought about it at the time. But in our view it is an intention which he both could and should have inferred from their conduct."

104. This, then, was a case in which conduct fulfilled all the functions identified by Nourse LJ and Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards*.

105. They summarised their conclusions at [51]:

> "(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity. (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change. (3) Their common intention is to be deduced objectively from their conduct. … (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original

> intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property"…. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions. (5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4))."

106. I cannot regard this summary as stating that conduct is irrelevant. On the contrary, it is an essential part of point (3). In addition, *Jones v Kernott* was a case in which the change of intention was in fact inferred from conduct.

107. I do not, therefore, detect in either *Stack v Dowden* or *Jones v Kernott* any intention on the part of the court to abrogate the long-standing principle that what makes an unenforceable agreement or promise enforceable in equity is detrimental reliance. The principle of detrimental reliance was not challenged in either case, and that it why it was unnecessary for the court to deal with it. As Professor Dixon put it (*Non-problems, future problems and fairy dust* [2022] Conv 119):

> "… detrimental reliance was not in issue in either *Stack* nor *Jones*, not least because its existence was blindingly obvious on the facts. It was not pleaded as an issue, and was not argued as an issue. To infer therefore that the silence about detrimental reliance in those cases means that it is not required is imaginative. I may not specifically mention that you may not steal my laptop, but I am not authorising you to take it."

108. In my judgment it would have been astonishing if Lord Walker and Lady Hale intended to overrule a long-standing principle that detrimental reliance is necessary to crystallise a common intention constructive trust and to depart from two decisions of the House of Lords affirming that proposition without saying so, particularly in the light of their approving references (in *Stack v Dowden*) to *Stokes v Anderson* and (in both cases) to *Grant v Edwards*. Moreover, if that had been their intention, they would have needed to explain how a mere oral agreement (without more) overcame the statutory formalities laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 53 (1) of the Law of Property Act 1925. Apart from a brief tangential mention of section 53 (1) (b) (not section 53 (1) (a) or (c)) in paragraph [55] of Lady Hale's speech in *Stack v Dowden*, they are not referred to at all in any of the majority speeches or judgments.

109. If that is what they did intend, their intention has gone virtually unnoticed.

Subsequent cases

110. *Quaintance v Tandan* [2012] EWHC 4416 (Ch) was a change of intention case. Ms Tandan and Mr Quaintance bought a property conveyed into their joint names, which apart from monies raised on a joint mortgage, was paid for entirely by Ms Tandan. Nevertheless, at the time of acquisition, their common intention was that the property would be held in equal shares. After a few weeks their relationship broke down and Mr Quaintance left the property, and made no financial contributions of any kind. He left no forwarding address; and made no contribution to the mortgage. Ms Tandan managed to pay the mortgage for a time but ultimately she fell into arrears and the mortgagee repossessed the property and sold it. The proceeds of sale produced a surplus over the mortgage debt. Mr Quaintance claimed half the surplus, but his claim was rejected. The trial judge held that by his actions Mr Quaintance had abandoned not only the property but any interest in it. He wished to have nothing further to do with the property. That intention was (at least inferentially) shared by Ms Tandan. An appeal was dismissed by HHJ Waksman QC, sitting as a High Court judge. It was not suggested in that case that there could not be a concept of abandonment; and HHJ Waksman held at [15] that the finding that the common intention had changed could not be attacked. At [17] he said that once the common intention had changed, it was necessary for the judge to decide what the relevant shares should be. On the facts, the judge was entitled to find that Ms Tandan was entitled to the entire beneficial interest in the property. There is no discussion of any requirement of detrimental reliance on the changed intention, which does not appear to have been argued. But if it were necessary to find detrimental reliance it is, in my judgment, to be found in Ms Tandan's payment of the whole of the mortgage payments, even if only for a relatively short time. I cannot regard this case as authority for the proposition that detrimental reliance is not required.

111. In *Smith v Bottomley* [2013] EWCA Civ 953, [2014] 1 FLR 626, [2021] 2 FLR 1016, Ms Smith claimed a share in property owned by a company which Mr Bottomley had formed. This court held that the claim failed. The first reason was that no promise had been made by the company. Sales J (sitting in this court) articulated the second reason at [61]:

> "Secondly, even if (contrary to my view above) there was a promise by the Company given after it was formed in April 2002, I consider that the analysis proposed by Mr Crossley fails because the detrimental reliance on the part of Ms Smith on which he seeks to rely cannot be clearly and distinctly related to that promise in such a way as to justify the creation of a good claim in equity against the Company."

112. In *Agarwala v Agarwala* [2013] EWCA Civ 1763, [2014] 2 FLR 1069 Sullivan LJ said at [13]:

> "… it was common ground that there was an oral agreement or understanding between the parties as to the terms on which the property was to be bought, held and used. In these circumstances, if Sunil was able to establish, on the balance of probabilities, that the agreement was that he should be the sole beneficial owner, then provided he could also show that he had

> acted to his detriment in reliance on that agreement, he would be able to discharge the onus of showing that the beneficial ownership differed from the legal ownership."

113. One of the grounds of appeal was that the trial judge had made inadequate findings on the question of detrimental reliance. Having considered the judge's judgment as a whole, Sullivan LJ concluded at [32]:

> "While an explicit reference to detriment in para [7] would have been desirable, having set out in para [3](e) the detriment claimed by Sunil, which included the work he put into buying, converting and running the business, the judge was not required to repeat it word-for-word in para [7]. The judge's reference to Sunil managing the letting business must be a reference back to the detriment claimed by Sunil and an implicit acceptance of at least that part of Sunil's case on detriment. It is not without significance that, having referred to the applicable legal principles in para [3](e), which of course include the need for there to be detriment in reliance upon a common understanding, the judge referred again to those principles in his concluding words in para [7]."

114. In *Curran v Collins* [2015] EWCA Civ 404, [2016] 1 FLR 505, in a judgment with which Davis LJ agreed, I said:

> "[77] Overarching all these points is the lack of detrimental reliance. The need for detrimental reliance on the part of the claimant is an essential feature of this kind of case….
>
> [78] Although Ms Crowther's skeleton argument suggested that the need for detrimental reliance had been abolished by *Stack v Dowden* and *Jones v Kernott*, she rightly abandoned that argument in the course of her oral address. The judge's finding on that point at [101] was that Ms Curran did not in any way act to her detriment in reliance on the specious excuse "or at all". That in itself is fatal to Ms Curran's case."

115. In *Montalto v Popat* [2016] EWHC 810 (Ch) Recorder Davis-White QC, sitting as a judge of the High Court, referred to both *Stack v Dowden* and *Jones v Kernott* and said at [107] (2):

> "Once a relevant common intention is divined by the Court, then that common intention will be given effect to by constructive trust provided that the person relying on establishment of the same has acted to his or her detriment in reliance upon the common intention."

116. In *Ely v Robson* [2016] EWCA Civ 774, [2017] 1 FLR 1704, on which Mr Horton KC relied, an informal compromise between an unmarried couple was upheld by way of a common intention constructive trust. But it is important to note why Kitchin LJ came to that conclusion. At [43] he said:

> "In my judgment it follows that, from the time they met in Poole Park, Ms Robson and Mr Ely had a common understanding as to the extent of their respective interests in 6 Torbay Road and thereafter Mr Ely acted to his detriment in reliance upon that understanding. Accordingly, whatever Ms Robson's interest in 6 Torbay Road may have been prior to that meeting, I am satisfied that thereafter Mr Ely held the property on constructive trust for them both and that Ms Robson's interest was limited to the interest defined in the declaration that the judge made."

117. It was the detrimental reliance that made the compromise enforceable as a constructive trust.

118. In *Insol Funding Company Ltd v Cowlam* [2017] EWHC 1822 (Ch), [2017] BPIR 1489, Master Bowles said at [99]:

> "The existence of a continuing common intention, that Ms Cowlam hold an 80% beneficial interest in the Property, is not, however, in my view, the end of the matter, in the determination of her beneficial interest. Such a beneficial interest, if it arises, does not arise as an express trust, since it is not supported by a signed writing in compliance with section 53(1)(b) of the Law of Property Act 1925, but can only arise by virtue of the application of constructive trust principles. Those principles, as is well understood, require, in circumstances where the beneficial interest is not to follow the legal interest, that the party asserting a constructive trust interest different to the legal interest, in reliance upon a common intention, must show that he, or she, has acted in reliance upon that common intention in such a way as to render it inequitable that he, or she, not obtain the intended interest. Although the focus of attention in both *Stack* and *Jones v Kernott* was on the proof of the common intention, whether by agreement, or imputation, there is nothing in either authority to abrogate the requirement of reliance, or the requirement that such reliance render it inequitable that the party asserting the trust be deprived of his or her intended interest."

119. In *Dobson v Griffey* [2018] EWHC 1117 (Ch), HHJ Matthews, sitting as a judge of the High Court, said at [20]:

> "For a common intention constructive trust to arise, the parties must have had a common intention to share the property beneficially, upon the faith of which the claimant then acts in reliance to her detriment. The common intention by itself is not enough for the constructive trust to arise. Otherwise s 53(1)(b) of the 1925 Act would be meaningless. It is the detrimental reliance that makes it unconscionable for the defendant landowner to resile from their otherwise unenforceable agreement."

120. In *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094, at [89] this court clearly considered that it was important that the person alleging the constructive trust (on the facts his personal representative) had "acted to his detriment, in reliance on the express and inferred agreed intention".

121. In *Amin v Amin* [2020] EWHC 2675 (Ch), Nugee LJ accepted at [54] that detrimental reliance is a requirement for a common intention constructive trust.

122. In *O'Neill v Holland* [2020] EWCA Civ 1583, [2022] P & CR 3, Henderson LJ said at [27]:

> "Judge Pelling was in my view right to hold that detrimental reliance remains an essential ingredient of a successful claim to a beneficial interest in a residential property under a common intention constructive trust, in the class of case where the legal estate is in the sole name of the other party."

123. At [32] he pointed out that in both *Stack v Dowden* and *Jones v Kernott* there was no express discussion of detrimental reliance. Having referred to what I said in *Curran v Collins*, Henderson LJ said that it was part of the ratio of that decision and hence binding on this court. If it was binding on the Court of Appeal, *a fortiori* it was binding on Kerr J (and is binding on us). Henderson LJ went on to say at [35]:

> "Nor, for my part, would I wish to question the correctness of the proposition, which seems to me to be firmly based on authority and underlying principles of equity."

124. On 15 February 2022 the Supreme Court (Lords Briggs, Hamblen and Burrows JJSC) refused permission to appeal in *O'Neill v Holland* on the ground that the appeal did not raise an arguable point of law.

125. In *R v Moore* [2021] EWCA Crim 956, [2021] 4 WLR 421, Andrews LJ said at [83]:

> "The issue at the heart of this appeal can be identified as follows: if A gives B money for the express purpose of using it only to purchase an identified property as an investment, A and B agree that A will have an interest in the property pro rata to his financial contribution, and the money is then used to buy the property, does A have a beneficial interest in the property? The answer is yes. It would be surprising if it were otherwise. A has acted to his detriment in consenting to the use of his money to fund the purchase, in reliance on the express promise of an interest in the property. It makes no difference to that answer that the property was subsequently purchased in the name of C, who was B's nominee or agent."

126. The critical importance of detrimental reliance to the intervention of equity was most recently reaffirmed by Lord Briggs, giving the majority judgment in *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911. He said at [10]:

> "… detriment is relevant to both the arising of the equity and to the remedy. Without reliant detriment there is simply no equity at all. This reflects the notion that it is the reliant detriment which makes it unconscionable for the promisor to go back on his promise."

127. Contrary to the view taken by Kerr J, I do not regard the decision of this court in *Barnes v Phillips* [2015] EWCA Civ 1056, [2016] HLR 3 as authority to the contrary. That was a case in which the trial judge inferred an intention to vary the shares in which the property was held by reference to subsequent conduct. He then quantified the altered shares again by reference to conduct. As this court said in *Grant v Edwards* conduct may both establish the common intention and also evidence detrimental reliance. It is plain from the facts that the party whose share decreased had had a substantial personal benefit from exploitation of the property which caused a corresponding detriment to his partner. As Lloyd-Jones LJ put it at [37]:

> "The appellant had received almost 25 per cent of the equity in the property for his own use very shortly before the parties split up in 2005. This entirely warranted an adjustment of the beneficial shares in the property which reflected that change of position. Furthermore the judge was clearly correct in his conclusion that subsequent events required a further adjustment in the intention to be imputed to the parties. Here, the judge properly took account of the respective positions of the parties and, in particular, the payments made in respect of the mortgage and in respect of repairs. … I also consider that he acted correctly in taking account of payments made (or not made) in respect of the children. In this regard the contributions to the mortgage after June 2005 are particularly important. In the period from June 2005 to January 2008 the appellant paid approximately two-thirds of the mortgage contributions and the respondent one-third. However thereafter the appellant failed to contribute towards the mortgage repayments for a period of six years up to trial. In these circumstances it was clearly necessary to vary the intention to be imputed to the parties as to their respective interests in the property. The further adjustment of 10 per cent in the respondent's favour was entirely justified by these changed circumstances."

128. I adhere, therefore, to the view that I expressed in *Curran v Collins*, namely that in the absence of signed writing, detrimental reliance remains a key component in establishing a common intention constructive trust.

The text books

129. At [68] Kerr J said that authors of learned texts do not speak with one voice. But in my judgment, they do. They all take the same view as I expressed in *Curran v Collins*. Emmett on Title states at para 11.115:

> "The third factor requiring emphasis here is that the court's decision as to whether or not there is a common intention

> constructive trust, and if so what are its terms, is still governed by equitable principles. It remains true following *Jones v Kernott* …that in all types of constructive trust, before the court will impose a constructive trust in favour of a non-legal title holder or allow the *Stack v Dowden* … presumptions as to beneficial ownership to be rebutted on the basis of a common intention constructive trust, the claimant must satisfy the court that the intervention of equity is justifiable to remedy the failure to use an express trust or valid contract to confer an interest on the claimant. More specifically, the courts have repeatedly emphasised that a common intention not accompanied by detrimental reliance on shared intentions as to ownership or some equivalent will not give rise to a constructive trust. (although see *Hudson v Hathway* … noted below for a rare dissent).
>
> The insistence that detrimental reliance (or equivalent factor making it unconscionable for a claimant to be denied a beneficial interest) is an essential feature of a common intention constructive trust long pre-dates *Stack v Dowden* … and *Jones v Kernott*….”

130. In Gray & Gray Elements of Land Law (5th ed) the authors state at para 7.3.8 that the imposition of a constructive trust requires proof of three elements: (i) bargain (or common intention) (ii) change of position (or detrimental reliance) and (iii) equitable fraud (or unconscionable denial of rights). They comment that the three elements are interlinked and that the linkage has been made more intense following *Stack v Dowden*. They go on to say at para 7.3.36:

> “In order that a constructive trust should arise in English law, it is not sufficient that a common intention should have been expressed or a bargain made that B should have some equitable entitlement in A’s land. If an assurance of beneficial entitlement is purely oral, further elements are required. One of these is that there must be a “change of position” by the party who relies on the bargain or agreement. This requirement is deeply consonant with the ancient idea that an “equity” attaches to a promised entitlement when it has been acted upon.”

131. Lewin on Trusts (20th ed) puts it this way at para 10-53:

> “Where the purchaser of the property shares a common intention with the claimant that the claimant is to have a beneficial interest in the property even though he is not a legal owner, either at the time of acquisition or at a later date, and the claimant acts to his detriment upon the basis of the common intention, a trust is imposed so as to give effect to the common intention.”

132. At para 10-60 the editors say:

> "A variation in the shares initially declared in a declaration of trust may be effected through a subsequent written declaration. For an express trust to be varied by a subsequent express declaration of trust, the variation must comply with the formal requirement of section 53(1)(c) of the Law of Property Act 1925, which requires dispositions of equitable interests to be in writing. A constructive trust may also be imposed in order to give effect to a common intention to effect such a variation, coupled with the requisite detrimental reliance."

133. At para 10-62 they go on to say:

> "A constructive trust arises in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny to another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest either at the date of acquisition or at a later date and (ii) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest."

134. At para 10-73 they say:

> "If the parties reach a fresh agreement, arrangement or understanding after the time of purchase, varying the original beneficial shares, and the claimant acts upon the agreement to his detriment, effect may be given to that agreement as a common intention constructive trust."

135. They add in a footnote that "The element of detrimental reliance on the agreement is crucial in order to vary the existing shares."

136. In Megarry & Wade on Real Property (9th ed) the law is stated at para 10-027:

> "A constructive trust "does not come into being merely from a gratuitous intention to transfer or create a beneficial interest", because such an intention would amount to an unenforceable declaration of trust. B must have acted to B's detriment in reliance upon the parties' common intention and in the reasonable expectation that she would thereby acquire an interest in the property. It is this detriment that takes the trust outside the formal requirements normally applicable to declarations of trusts of land and the claim fails without it."

137. The editors add that:

> "Recent cases, including *Jones v Kernott*, have tended not to comment on the role of detriment in crystallising the constructive trust, but instead focus on factors which establish

> the common intention, possibly because such factors might also constitute the necessary detriment."

138. Snell's Equity (34th ed) states at para 24-056:

> "Simple proof of the oral or inferred agreement between the parties or an unwritten declaration of trust would not be enough to entitle the claimant to an enforceable interest in the property under a trust. Such an arrangement could only take effect as an express trust. It would be unenforceable since it would not be evidenced by writing signed by the party declaring the trust. Accordingly, proof that the claimant has acted to his detriment in reliance upon the agreement that he would take an interest in the property is essential to explaining the constructive trust. In these circumstances it would be fraudulent for the proprietor of the legal estate to rely on the formality requirements to deny the enforceability of the beneficial interest and claim the entire beneficial rights to the property for himself. The constructive trust arises to prevent this result. Where the [agreement] is inferred, then the parties' conduct is both the evidence from which the agreement is inferred and the detriment which gives rise to the constructive trust."

139. In Underhill & Hayton on Trusts (20th ed), article 32 states that a constructive trust may be imposed:

> "where it is the proprietor and the claimant's common intention, express or inferred (but not imputed), that the claimant is to have some beneficial interest in the property and the claimant acts to his detriment in reliance thereon."

140. At para [32.9] the editors state:

> "A constructive trust may be imposed on property, such as a house in A's name that is occupied by A and B as a shared home, to give effect to A and B's express or inferred (but not imputed) common intention (whether at the time of the purchase or subsequently) that B should have a beneficial interest therein, so leading B to act to her detriment in reliance on that intention, thus making it unconscionable to allow A to deny B any interest by pleading the lack of the necessary written formalities for a valid declaration of trust or contract."

141. Wildblood et al on Cohabitation and Trusts of Land (3rd ed) discuss *Stack v Dowden* and *Jones v Kernott* at length in Chapters 4 and 6. They state at para 4-038:

> "It is not sufficient for a claimant to establish only that there has been some express or tacit common intention. Thus a constructive trust does not come into existence simply because D makes some promise or forms some intention to transfer an interest to C or create an interest for C. It is necessary for C

> also to demonstrate that he/she has placed reliance on that agreement to his/her detriment, or at least has significantly altered his/her position in reliance upon the agreement. The importance of this second requirement can easily be overlooked in the quest to demonstrate a common intention; yet so important is the necessity of demonstrating reliance upon the common intention that even an express common intention that the claimant should have a beneficial interest will not give rise to any such interest if, as Scott J said in *Layton v Martin*, the express agreement is "unsupported by any quid pro quo moving from the claimant"."

Sole name/joint names

142. Mr Horton did suggest that there might be a difference between a case in which the property is conveyed into the name of one person only, and a case where it was conveyed into joint names. That is true, up to a point.

143. The starting point in these two classes of case is different (because of the presumption that the equitable interests follow the legal title). Thus, in a sole name case, the claimant has first to rebut the presumption that he or she has no interest at all, whereas in a joint names case, the starting point is that there is a beneficial joint interest. In a sole name case, he or she therefore has an additional hurdle to overcome.

144. In *Stack v Dowden* Lady Hale said at [56]:

> "Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

145. She went on at [59] to pose the question how the presumption could be rebutted. At [63] she pointed out that the House was "not concerned with the first hurdle." That was because Mr Stack was one of the joint legal owners and thus the presumption was that he had an interest of some kind. So, Mr Horton is right to the extent that in a joint names case the claimant does not have to displace any presumption in order to establish that he or she has *some* beneficial interest in the property. The question then becomes one of quantification.

146. At [65] she referred to *Oxley v Hiscock* and said:

> "The approach to quantification in cases where the home is conveyed into joint names should certainly be no stricter than the approach to quantification in cases where it has been conveyed into the name of one only."

147. There may have been some doubt, following *Stack v Dowden*, whether there was a substantive difference (other than the starting point) between sole name cases and joint name cases. In my judgment, that doubt was laid to rest in *Jones v Kernott*. Lord Walker and Lady Hale said in their joint judgment:

> "[16] In an interesting article by Simon Gardner and Katharine Davidson, "*The Future of Stack v Dowden*" (2011) 127 LQR 13, 15, the authors express the hope that the Supreme Court will "make clear that constructive trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to 'joint names' and 'single name' cases". At a high level of generality, there is of course a single regime: the law of trusts (this is the second of Mustill LJ's propositions in *Grant v Edwards* [1986] Ch 638, 651). To the extent that we recognise that a "common intention" trust is of central importance to "joint names" as well as "single names" cases, we are going some way to meet that hope. Nevertheless it is important to point out that the starting point for analysis is different in the two situations. That is so even though it may be necessary to enquire into the varied circumstances and reasons why a house or flat has been acquired in a single name or in joint names (they range, for instance, from *Lowson v Coombes* [1999] Ch 373, where the property was in the woman's sole name because the man was apprehensive of claims by his separated wife, to *Adekunle v Ritchie* [2007] WTLR 1505, where an enfranchised freehold was in joint names because the elderly tenant could not obtain a mortgage on her own).
>
> [17] The starting point is different because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed a "common intention" constructive trust. The claimant whose name is on the register starts (in the absence of an express declaration of trust in different terms, and subject to what is said below about resulting trusts) with the presumption (or assumption) of a beneficial joint tenancy."

148. In their summary of principle at [51] (which I have already quoted) Lord Walker and Lady Hale said that the principles applied to a joint names case. But they went on to say at [52]:

> "This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above."

149. I agree, therefore, with the way that Nugee LJ analysed the position in *Amin v Amin* at [32]:

> "… it is true that *Jones v Kernott* was a joint names case and the analysis in [51] is expressly said to be applicable to such a case. But at [52] Lord Walker and Lady Hale dealt with sole name cases and, as set out above, said that the parties' common intention had once again to be deduced objectively from their conduct. That is a reference back to [51(3)]. In a joint names case the starting point is the presumption that equity follows the law and hence that the parties are beneficial joint tenants, and the common intention referred to in [51(3)] is the intention, either at the date of acquisition or subsequently, that the parties' beneficial interests should be something other than joint: see [51(2)]. In a sole name case the starting point, as the Judge expressly recognised, … is that the presumption is that the sole legal owner is also the sole beneficial owner, and the common intention referred to in [52] is a common intention that the beneficial interests should be something other than the legal owner being also the sole beneficial owner. But that apart, it seems to me that the exercise that Lord Walker and Lady Hale envisaged is similar in a sole name case to that in a joint names case. In each case what needs to be found to displace the presumption that equity follows the law is a common intention that the beneficial ownership should be something different from the legal ownership; and (save for the case where there is evidence of express discussions as referred to by Lord Bridge in *Lloyds Bank v Rosset*) that is to be deduced objectively from their conduct."

150. It is also true, as I have said, that at the quantification stage the court may be able to take a broader view of what amounts to detrimental reliance. Lady Hale's non-exhaustive list of factors in *Stack v Dowden* at [69] to be taken into account in determining the quantification of beneficial interest at the time of acquisition do include discussions at the time of the transfer; but she does not suggest that discussions alone are sufficient. Moreover, when she addressed the question of a post-acquisition change in common intention at [70] it is notable that she referred to conduct alone.

151. It is also the case that in *Grant v Edwards* (which, as I have said was approved in both *Stack v Dowden* and *Jones v Kernott*) Mustill LJ made it clear that the same principles applied both to an initial common intention and also to a change of common intention post-acquisition. This is consistent with the general principle of equity (and with section 53 (1) (a) and (c) of the Law of Property Act 1925) that a mere oral agreement unaccompanied by any detrimental reliance does not suffice to make a post-acquisition change in common intention enforceable in equity. That is also the view expressed in Lewin at paras 10-53 and 10-73 (quoted above).

Conclusion on the issue whether detrimental reliance is necessary

152. Kerr J expressed his conclusion on the first issue at [61] as follows:

> "By not dealing with the issue of detriment in *Jones v Kernott*, the Supreme Court either omitted mentioning for completeness that it did not need to be proved in the case before them, or omitted to mention a crucial element of the relevant principles to be applied. In my judgment, the latter is less likely than the former."

153. I respectfully disagree. In my judgment Kerr J was wrong to hold that detrimental reliance is no longer required. The overwhelming weight of authority both before and after *Stack v Dowden* and *Jones v Kernott* is to the contrary. Moreover, to hold that an oral agreement, disposition or declaration of trust was binding without more would directly contradict two statutory provisions. Equity cannot repeal the statute.

Was detrimental reliance established?

154. In *Gillett v Holt* [2001] Ch 210 Robert Walker LJ said at 232:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances."

155. He also made the point at 233 that allegations of detrimental reliance are not to be examined at a granular level but that it is necessary to "stand back and look at the matter in the round."

156. Although that was a case of proprietary estoppel, I do not consider that there is any significant difference between the kind of detriment required in that kind of case, and that required in the context of a common intention constructive trust.

157. In *Kelly v Fraser* [2012] UKPC 25, [2013] 1 AC 450 (a case of estoppel by representation), Lord Sumption, giving the advice of the Privy Council said at [17]:

> "… the detriment need not be financially quantifiable, let alone quantified, provided that it is substantial and such as to make it unjust for the representor to resile. A common form of detriment, possibly the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain."

158. In *O'Neill v Holland* (which was a common intention constructive trust case) Henderson LJ said at [62]:

> "'Detriment' in this context is a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant. Although the facts which constitute the detriment need to be pleaded, their characterisation is ultimately a matter for the court, in the light of all the evidence adduced at trial."

159. Kerr J did not consider the question of detriment afresh. He said:

> "[98] I agree with Mr Horton that the judge's decisions on detriment were not just primary findings of fact but were evaluative, i.e. they extended to the judge's considered assessment of the quality and character of the primary facts and whether they sufficiently amounted to a detriment. He decided that some of them did while others did not. He gave sound reasons for that assessment. I respectfully defer to it and find no reason to do otherwise.
>
> [99] That applies as much to the findings of "no detriment" criticised by Mr Horton as to those of detriment which he seeks to defend. The judge's thinking was, in essence, that it was the agreement between the parties that was all-important. It was, as Mr Horton rightly submitted, open to the judge to decide that foregoing a weak claim to an interest in personal assets of Mr Hudson was sufficient because Mr Hudson might well have been willing to part with some of his personal assets whether the legal claim to them was good or bad.
>
> [100] The other supposed detriments relied on were not, on the judge's findings, what made it inequitable for Mr Hudson to resile from the main agreement, the lynchpin of the parties' understanding. It was the main agreement which made that inequitable. Although the notion of detriment is broad and unconfined in this domestic context, it was not wrong for the judge to tie the detriment to the central basis of the parties' understanding and to reject other peripheral features as sufficient in themselves.
>
> [101] Thus, while the judge might have viewed with more favour Ms Hathway's mortgage payments after January 2015, her payments of other outgoings of the property, her taking responsibility for the oil spill and its consequences, her conduct of her financial affairs and her lifestyle generally, he was not (contrary to Mr Horton's contention in his respondent's notice) bound to treat those matters as detriments separate from the effect of the agreement. His rejection of those matters as sufficient detriments in themselves was an evaluative decision which was open to him."

160. If the relevant emails had simply been an executory agreement, I do not consider that such agreement which is unenforceable at common law is enforceable in equity without more. If that were the case it would mean, for example, that an oral agreement to sell Blackacre for £100,000 would be enforceable in equity, even though unenforceable at law. What potentially makes an informal agreement enforceable in equity is detrimental reliance.

161. By elevating the fact of the agreement to the "all-important" consideration that made it inequitable to resile from it, I consider that Kerr J took a false step. What matters is what was done in pursuance of the agreement.

162. What, then were HHJ Ralton's reasons? He considered and rejected a number of factors upon which Ms Hathway relied, either because they did not amount to detrimental reliance at all; or because they were insubstantial. Among these was the fact that Ms Hathway had assumed responsibility for the whole of the mortgage payments. But he said at [65] that Ms Hathway's desisting from making claims against Mr Hudson's assets was sufficient detrimental reliance. The assets in question were Mr Hudson's pension, his share-save schemes and personal savings. The judge rightly said that as "a matter of simple law" Ms Hathway could not claim for a pension sharing order, a lump sum order or a property transfer order. But the parties believed in the concept that wealth generated while the family was together would be shared between them when they separated. At [66] the judge went on to say that Ms Hathway might have had some sort of civil claim in the form of a constructive trust or equity which she could have mounted against the shares. It might have been a weak claim but the judge was not convinced that it was a "non-claim". Until his email of 31 July 2013 Mr Hudson was not saying no to such claims in principle but was entertaining the concept of unwinding their financial affairs. That, he held, was a significant change in position; because it could not be said that Mr Hudson would have refused making some payment to Ms Hathway even if the court might have decided that no payment should be made. The judge summarised his view at [75]:

> "What she [Ms Hathway] is doing is showing that she did rely on a promise. She gave up the claims she perceived she had and which Mr Hudson also perceived may be live against shares and pension."

163. Mr Learmonth mounted a full-scale attack on this conclusion. Although he accepted that whether detrimental reliance was substantial might well be an evaluative decision (as Kerr J held), whether Ms Hathway had a valuable claim which she gave up was a question of law. Mr Learmonth argued that Ms Hathway had no viable claim and had not attempted to articulate one.

164. Nevertheless, the judge found as a fact that both Ms Hathway and Mr Hudson perceived that she might have had a claim. We do not have a transcript of the evidence at trial; and consequently, there is no ground upon which we could interfere with the judge's finding of fact.

What would Ms Hathway's claim have been?

165. Whether Ms Hathway had a viable claim in law does not appear to have been fully investigated at trial. Mr Learmonth argued that the nature of the claim that Ms

Hathway might have made against the shares was never properly articulated. It is true that it was not spelled out in detail in her statement of case which was pleaded in very broad terms. But by the same token, Mr Hudson never served a request for further information under CPR Part 18.

166. Paragraph 15.2 of the Defence and Counterclaim pleaded:

> "[Ms Hathway] desisted from making any claim against [Mr Hudson] in respect of assets held in his sole name but acquired during the course of the parties' relationship."

167. Given that Ms Hathway had acknowledged in paragraph 19 of her first witness statement that she was not entitled to invoke the redistributive powers of the court, that paragraph must have been referring to a different kind of claim, Moreover, it is not difficult to see what the claim would have been.

168. Ms Hathway had said in her first witness statement that she took the view that assets secured during the relationship were joint assets however they were held legally. She said in her second witness statement that her understanding was that she and Mr Hudson would pool assets. She explained that she had taken time off to look after the children and the home, had fitted her work round that of Mr Hudson and the children and had left a job in the finance sector for one in the charity sector. These were not statements that came out of the blue in her witness statements. They had already been expressed in her email to Mr Hudson of 9 November 2011, to which Mr Hudson appeared to agree in his reply of the same day. Mr Hudson also referred to the shares as "joint assets" in his email of 24 August 2012.

169. It is plain, therefore, that what Ms Hathway would have claimed is that she and Mr Hudson had a common understanding that assets accumulated during their relationship were joint assets and that, in reliance on that understanding, she had acted to her detriment in the ways that she described. The consequence would have been that a constructive trust had arisen in relation to those assets. It is not necessary to say whether the claim would have succeeded; but it was undoubtedly a claim known to the law.

170. It follows that Ms Hathway might well have been able to establish a trust of some sort in relation to the shares. At all events, in my judgment, the judge cannot fairly be criticised for having taken that view. The question was whether Ms Hathway lost an opportunity to pursue alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain.

171. Whether detrimental reliance to that extent in the context of an express agreement is sufficiently substantial is, as I think Mr Learmonth accepted, an evaluative decision for the trial judge.

172. Mr Learmonth had an alternative argument to the effect that if Ms Hathway had ever had a claim to the shares (or to an interest in them) under a constructive trust, she still had that claim. In so far as her agreement to Mr Hudson's proposal was an agreement not to sue, that agreement was invalid because it formed part of a contract for the disposition of an interest in land, and hence had to comply with section 2 of the Law of Property (Miscellaneous Provision) Act 1989. It did not. Since there is no

limitation period applicable to the recovery of trust property, Ms Hathway's claim (if she ever had one) remains intact.

173. This was not a point explored either at trial or on the first appeal. But if (as I consider) Ms Hathway's response was not an agreement not to sue, but a renunciation of any claim she might have had, then I do not consider that the argument is a good one. Quite apart from that, where a beneficiary concurs in a breach of trust, the trustee would have a defence to any claim. As Wilberforce J put it in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, 108:

> "The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."

174. In my judgment, in the context of the deal that Mr Hudson and Ms Hathway struck under which Ms Hathway knew that she was giving up any claim to the shares, it would not be fair and reasonable for her now to make a claim to an interest in those shares. In addition, in 2013 Ms Hathway had not established an actual entitlement to a beneficial interest in the shares. All she had was a claim to such an interest. A *claim* to a beneficial interest is, in my judgment, no more than a chose in action, which is not itself an equitable interest in property caught by section 53 (1) (c) of the Law of Property Act 1925. An assignment in equity of such a claim is not required to take any particular form; and consequently, I consider that as a matter of interpretation of Ms Hathway's email of 12 August 2013 can perfectly properly be said to amount to an equitable assignment or release of her cause of action.

175. Finally, I consider that it might have been argued (but it has not) that HHJ Ralton analysed the suggested elements of detriment in over-granular detail, picking them off one by one instead of standing back and looking at them in the round. I am also inclined to agree with Kerr J that HHJ Ralton might have viewed with more favour Ms Hathway's mortgage payments after January 2015 (payment of which was important in both *Jones v Kernott* and *Barnes v Phillips*), but since that aspect of the case was not the subject of a Respondent's Notice in this court, I do not express a concluded view.

176. Nevertheless, I consider that HHJ Ralton asked himself the correct question and I do not consider that we can say that his decision was perverse.

Result

177. For these reasons, which differ from the reasons given by Kerr J, I would dismiss the appeal.

Lady Justice Andrews:

178. I agree.

Lord Justice Nugee:

179. I also agree.

180. As Lewison LJ has so clearly explained, logically the first question is whether the e-mails effected a release by Mr Hudson of his interest in the beneficial joint tenancy to Ms Hathway, and for the reasons given by him I agree that they did. Mr Hudson was not just contracting to do something in the future: he was there and then agreeing that the equity in the house should thenceforth belong entirely to her, something that he confirmed on more than one occasion ("I've no interest whatsoever in the house"; "means nothing to me if it sells for a pound or a million").

181. Such a release, being in fact both a disposition of an interest in land and a disposition of an existing equitable interest, is required by s. 53(1)(a) and (c) of the Law of Property Act 1925 (**"LPA 1925"**) to be in writing and signed by the person disposing of the interest, but these requirements were satisfied on the facts of this case. Mr Hudson added his name "Lee" to the bottom of the e-mails. That is an entirely conventional way to end (or "sign off") an e-mail and I have no doubt that it satisfies the requirement in the authorities that it was added to authenticate the document. Adding your name at the end of an e-mail confirms that the e-mail comes from you. That seems to me enough to mean that the e-mail is signed by you for the purposes of s. 53(1) LPA 1925.

182. If the point is open to Ms Hathway, that is sufficient to decide the appeal. It is only if the statutory formalities were not complied with that it would be necessary for Ms Hathway to rely on a constructive trust and s. 53(2) LPA 1925 (which preserves the creation and operation of constructive trusts). Although the point was not taken in either of the Courts below, I agree that she should have permission to rely on it in this Court for the reasons given by Lewison LJ.

183. Strictly speaking the other points therefore do not arise. But as the masterly exposition of Lewison LJ demonstrates, the suggestion that in cases of this kind a constructive trust can be relied on without the need to show detrimental reliance is not one that can be accepted. And I also agree with him that on the facts of this case HHJ Ralton was entitled to find such detrimental reliance in Ms Hathway giving up any claim to share in the assets in Mr Hudson's name.

184. I therefore agree that the appeal should be dismissed.