APRIL 2021 ◆ VOLUME 51 ◆ PAGES 453–596

# Family Law

The title of reference and record in the field of family law since 1970

FAM LAW


- Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going? Part III *Sir James Munby*
- The Family Solutions Initiative – a response to a system in crisis *Karen Barham*, *Martin Kingerley QC* and *Rhys Taylor*
- The continuing impact of the unavailability of secure accommodation *Stephen Roberts*
- TOLATA update: (1) the use of inference and the role of detriment (2) the issue of illegality since *Patel v Mirza* *Luke Barnes*
- Findings from serious case reviews during the period 1987–2018: a personal and conceptual reflection. Part I *Professor Kim Holt* and *Professor Nancy Kelly*
- ADR for unmarried couples: mediation; private FDRs and arbitration *Elizabeth Darlington*
- Without notice applications in Children Act and Family Law Act: tips, pointers and warnings *Mark Ablett* and *Samara Brackley*
- Transgenderism; the law in context *Professor Chris Barton*
- Knell sounds for the current treatment of minors for gender dysphoria *Mary Welstead*


LexisNexis®

Family Law
LexisNexis®

# TOLATA update: (1) the use of inference and the role of detriment (2) the issue of illegality since *Patel v Mirza*

## Establishing the beneficial interest – the courts' use of inference

Express common intention constructive trusts depend on evidence of informal writing or express discussions (no matter how imprecise their terms or how imperfectly remembered) demonstrating an arrangement, agreement or understanding to share the property beneficially. This can lead to high risk litigation, where the issue may be whether a given conversation did or did not take place, or what its precise contents were.

However, in any given sole name case there may be scope to put forward a compelling claim for a beneficial interest based on an inferred common intention constructive trust. In *Jones v Kernott* [2011] UKSC 53, [2012] 1 FLR 45 four members of the Supreme Court cited Lord Neuberger's words from Stack v Dowden [2007] UKHL 17, [2007] 1 FLR 1858 – now the accepted definition of inferred and imputed intention:

> '[126] An *inferred intention* is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An *imputed intention* is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.'

It is well established that the court may not impute to the parties a common intention to share the beneficial ownership of a property – although it is entirely entitled to draw that inference. In *Capehorn v Harris* [2015] EWCA Civ 955, [2016] 2 FLR 1026 the district judge 'looked at the matter in the round' and 'imputed' an intention that the claimant should acquire a beneficial interest – which he duly lost on appeal. It seems likely that a sole name case will have to go to the Supreme Court before that may change. In the meantime it is crucial for practitioners to understand how the courts approach the use of inference in property disputes when exercising their powers under s 14 of the Trusts of Land and Appointment of Trustees Act 1996.

In *Jones v Kernott* the majority said (per Lord Walker and Lady Hale JJSC, with whom Lord Collins JSC agreed):

> '[34] ... while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great. In this area, as in many others, the scope for inference is wide. The law recognises that a legitimate inference may not correspond to an individual's subjective state of mind. As Lord Diplock also put it in *Gissing v Gissing* [1971] AC 886, 906:
>
> > "… the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party."'

In *Stack v Dowden* Lady Hale set out a non-exhaustive list of factors to assist in assessing the parties' common intention.

> '[69] In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial considerations may be relevant to divining the parties' true intentions. These include:
>
> (1) any advice or discussions at the time of the transfer which cast light upon their intentions then;
>
> (2) the reasons why the house was acquired in their joint names;
>
> (3) the reasons why (if it be the case) the survivor was authorised to give a receipt for capital moneys;
>
> (4) the purpose for which the home was acquired;
>
> (5) the nature of the parties' relationship;
>
> (6) whether they had children for whom they both had responsibility to provide a home;
>
> (7) how the purchase was financed, both initially and subsequently;
>
> (8) how the parties arranged their finances, whether separately or together or a bit of both;
>
> (9) how they discharged the outgoings on the property and their other household expenses;
>
> (10) when a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is the owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally;
>
> (11) the parties' individual characters and personalities may also be a factor in deciding where their true intentions lay.'

A good illustration of the use of inference is provided by *Fowler v Barron* [2008] EWCA Civ 377, [2008] 2 FLR 831, a joint names case decided at first instance a week before the decision in *Stack v Dowden*. There was no direct evidence of intention. The relationship lasted 23 years and produced two children. The father paid roughly one half of the purchase price by way of deposit, all the (joint) mortgage instalments, council tax and utilities bills – in short all the expenses of the property. The judge ruled that the mother had no beneficial interest.

On appeal, at para [30] Arden LJ, (with whom Toulson and Waller LJJ agreed) cited paragraph [69] of *Stack v Dowden*, including all of Lady Hale's factors, and ruled:

> '[32] [To] determin[e] the parties' shared intentions about the beneficial ownership of the property, the court must consider the whole of the parties' relationship so far as it illuminates their shared intentions about the ownership of the property and the court must draw any appropriate inferences.'

The judge had erred in determining the parties' shares by reference to their financial contributions to the property. The parties executed mutual wills and Ms F spent much of her income on herself and the children. Mr B's secret intention that Ms F should only benefit in the event of his death was not evidence of shared intention.

The Court inferred that: except for her clothing, Ms F's payments were her contributions to

household expenses for which both were responsible; and they intended that it should make no difference to the interests who paid for what expense. This approach is entirely consistent with the message from *Jones v Kernott* that the court is to be bold in deducing inferences from the evidence.

Both Stack v Dowden and *Jones v Kernott* saw the highest court in the land apply a reinvigorated exercise of inference in order to find the parties' common intention – whether on acquisition (Stack) or subsequently (Kernott) - as to the amount of their shares in the property

# Trend towards wider scope of evidence

What is the state of play regarding the inference of a common intention to share beneficially – the first component of a common intention constructive trust ? The recent trend is towards a wider scope of evidence justifying that inference – although progress has been slow.

Inferred common intention was authoritatively described by the House of Lords (per Lord Bridge) in the seminal case of *Lloyds Bank v Rosset* [1991] 1 AC. In brief, their lordships ruled that it was at least extremely doubtful that anything less than direct contributions to the purchase price, whether initially or by payment of mortgage instalments, would justify the inference necessary to create a constructive trust.

Although in *Stack v Dowden* it was said to be arguable Lord Bridge had set the hurdle too high, Rosset was not expressly departed from – and in the years following Stack the courts' approach in sole name cases reflected orthodoxy eg *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 FLR 1598 and *Morris v Morris* [2008] EWCA Civ 257. In brief, the ratio of those decisions was that in a sole name case (per Chadwick LJ in *James*) 'a common intention constructive trust based only on conduct will only be found in exceptional circumstances'.

*Aspden v Elvy* [2012] EWHC 1387 (Ch), [2012] 2 FLR 807 provides a rare example of a beneficial interest established by indirect contributions in the absence of express common intention. HHJ Behrens inferred, in the absence of discussions between the parties, a common intention that Mr Aspden should acquire a beneficial interest in Ms Elvy's property by virtue of £65 – 70,000 worth of works he carried out there. He went on to impute an intention that the share was worth 25% of the £400,000 property. A proprietary estoppel of the same value also arose on the facts. A key point was that, if the works really had been a gift (as Ms E contended) then Mr A would have been left homeless and without capital.

The decision on appeal in *Pillmoor v Miah and Another* [2019] EWHC 3696 (Ch) provides a recent example of the conservative approach typified by Chadwick LJ's dictum above. The judge applied Lady Hale's factors as expressed at para [69] in *Stack v Dowden* and inferred a common intention to share equally the beneficial ownership of the property, registered in the husband's sole name. The spouses ran a family shop throughout their 28 year marriage and had several children, although the wife did not play a major role in the financial affairs of either the business or the home.

The judge identified and gave weight to factors such as: (i) the wife understood she would share in the property; (ii) the cultural context might lead her to allow her husband to take the financial lead; (iii) the house was acquired as family home; (iv) it was a long and stable marriage; (v) though the evidence was unclear, there was a financial contribution from the jointly owned business.

On appeal, HHJ Kramer ruled that the *Stack* [69] factors are largely relevant at the stage of *quantifying* an interest once it has been established. The judge, faced with limited and contradictory evidence, erred in making an evidential leap between what he had been told and the information required in order to come to a conclusion. He erred in adopting the approach of doing the best he could on the available evidence, however inadequate.

In *Amin v Amin (deceased) and others* [2020] EWHC 2675 (Ch) Nugee LJ dismissed an appeal from

the judge's decision that Mrs Amin held the property, which was in her sole name, on trust for her husband's estate and two sons. He rejected the submission that there was a sharp divide between the evidence enabling an inference as to the common intention to share the property beneficially and the evidence enabling an inference of common intention as to the amount of the interests.

He carefully considered the opinion of Walker and Hale JJSC in *Jones v Kernott* and ruled (correctly, it is submitted) that the factors set out by Lady Hale in Stack at para [69] (see above) could apply to the issue of *establishing* the beneficial interest as well as quantifying it. The essential question for the judge was whether the defendants' financial contributions and other factors were sufficient to displace the presumption that Mrs Amin was the sole beneficial owner as well as legal owner. Financial contributions were not determinative – but were usually highly significant.

## Detrimental reliance

On 27 November 2020 the Court of Appeal (*O'Neill v Holland* [2020] EWCA Civ 1583) unanimously confirmed that the claimant's detrimental reliance on the relevant common intention remains an essential ingredient of a claim to a beneficial interest under a constructive trust in a sole name case. 'Detriment' is a description or characterisation of an objective state of affairs leaving the claimant in a substantially worse position.

The facts constituting the detriment need to be pleaded, but their characterisation is ultimately a matter for the court, in the light of all the evidence adduced at trial. A bare finding of unconscionability on the part of the registered proprietor will not suffice to give rise to a constructive trust.

The woman's father ('F') purchased the property in his sole name in 1999 intending it to be a family home for the parties. By itself this could not give rise to a constructive trust in favour of either party. The trial judge found that the original intention of F and the parties was that when F was ready to transfer the property it would be into the parties' joint names.

However, in 2008 F transferred the property to the man's sole name for nil consideration, when the parties were still living there with three young children. The trial judge found that the transfer into joint names did not go ahead because the man had told the woman wrongly that she would not get a mortgage to raise funds for his property business. Viewed objectively, instead of becoming a legal co-owner presumed to be a beneficial joint tenant she found herself with no legal estate and the burden of proving she had a beneficial interest – which was a clear detriment. Accordingly, the man held the property on trust for the parties in equal shares.

Furthermore, it seemed that F (who died in 2009) also underwent detriment at the time of the 2008 transfer. The primary focus could have been on his intentions when ostensibly making a gift to the man. The clear inference was that he would never have agreed to transfer the property to the man's sole name without a clear understanding shared by the three of them that his daughter was to have a beneficial interest – the striking inference of a common intention shared by three parties.

F transferring away all his interest in those circumstances supplied the necessary detriment. The court's provisional view was that 'such an analysis would have led to the same result'.

This strongly suggests the court took the view both that (a) F (if still alive) or his estate could have been heard to assert that a constructive trust arose in his daughter's favour and to pursue a case to establish that constructive trust and (b) that the daughter could have relied on F's detriment to establish her beneficial interest.

If that analysis is sound, it seems to open up the possibility of an interesting extension of the use of common intention constructive trusts.

# Illegality – *Patel v Mirza* [2016] UKSC 42

*Tinsley v Milligan* [1994] 1 AC 340 is no longer. T and M (unmarried cohabitants) bought a house to live in, intending to share ownership, but placing legal title in T's name, to enable M to make fraudulent benefits claims. M later confessed to the authorities, and the parties issued cross-claims: T contending she was sole beneficial owner; and M contending they shared beneficial ownership equally.

The majority of the House of Lords accepted the principle that a party may not succeed in a claim where to make out the claim he must rely on his own fraud or illegality (for example. a fraudulent common intention). But, since M contributed to the purchase price, there was a presumption of resulting trust in her favour (and no countervailing presumption of advancement) and she could make out her case without relying on the illegal scheme. However, the effect of competing presumptions made the law complex and the outcome of cases somewhat arbitrary.

In *Patel v Mirza*, P transferred £620,000 to M so that M could use inside information which he expected to acquire in order to bet illegally on the price of shares. The information did not materialise, so nor did the betting. P sued M for the return of the money. At first instance the claim was dismissed for illegality, as the claimant had to prove the illegal purpose to make good his case.

The Supreme Court overruled the 'reliance principle' in *Tinsley v Milligan* and held that the rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct to establish the claim should no longer be followed. It set out new principles at [120], per Lord Toulson:

> '120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system … In assessing whether the public interest would be harmed in that way, it is necessary
>
> (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,
>
> (b) to consider any other relevant public policy on which the denial of the claim may have an impact and
>
> (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts*.
>
> Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. …
>
> 121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case.'

* P and M's agreement was a conspiracy to commit the offence (s 52, Criminal Justice Act 1993) of insider dealing.

Lord Toulson, with whom the majority agreed, listed various factors ([107]), which may be relevant to the issue of proportionality: the seriousness of the conduct*; its centrality to the contract; whether it was intentional and whether there was marked disparity in the parties' respective culpability. However, he emphasised that the list was neither prescriptive nor definitive, because of the infinite

variety of cases.

* He suggested at [116] the court would not assist a claimant to enforce his title, where this would assist him in a drug-trafficking operation.

He endorsed ([115]) Gloster LJ's approach in the CA. She examined the policy underlying the statutory provisions about insider dealing and concluded there was no logical basis why public policy should require P to forfeit the money, which was paid to M, but never used for the illegal purpose. Such a result would not be a just and proportionate response to the illegality.

## Enforcing claims tainted by illegality

The decision has dramatically liberalised the law on enforcing claims tainted by illegality. However, it has now introduced a striking exercise of discretion into the law (which caused three of the nine JJSC to dissent from the reasoning of the majority) which may increase legal uncertainty. However, in the majority of domestic cases, the decision will introduce a welcome element of proportionality, and should help to prevent people from failing to obtain property rights tainted by relatively minor illegal conduct.

*Patel v Mirza* was followed in *Kliers v Schmerler and another* [2018] EWHC 1350 (Ch). C and D2 had been married. They purchased a property in D1's name (he being C's brother). C contended that she and D2 had entered a tenancy agreement with D1 and obtained up to £150,000 housing benefit (some of which may have been used to make mortgage payments). A dispute arose in which D1 contended that he was the true owner, not a nominee.

The judge held that the court should take account of the illegal purpose of the ownership structure (although D1 had not pleaded it) ie for D1 to obtain funds as mortgagor and from HB which he would not have been entitled to if the true situation had been disclosed.

However, C was not to be barred from relief. Firstly, she had agreed to the arrangement under undue influence from religious leaders and family (all Hasidic Jews). Secondly, on the application of *Patel v Mirza* and considerations of restitution and public policy. Public policy against mortgage fraud was strong but did not militate against C's remedy in this case. D1's reliance on C's illegality demonstrated extreme hypocrisy and to leave matters where they stood would be to continue the perpetration of the fraud (which, it seems, was more serious than that in *Tinsley v Milligan* itself).

The orders and judgments of the court would be referred to the authorities and C undertook to give disclosure to them and to take steps to ensure both the mortgagee and the DWP were fully repaid out of the house – possibly by way of charges over the house for the repayment of HB on the sale by the mortgagee. To remedy the position in this regard was accepted to be an important part of C's aim in the proceedings.

In *Stoffel & Co v Grondona* [2018] EWCA Civ 2031 G had instructed S in her proposed purchase of a property from her friend M. G obtained a mortgage fraudulently, in that her true intention was to obtain finance for M by misrepresentation. S negligently failed to register G's title or the legal charge and G sued S for damages. S defended on the basis of illegality. At trial, G's claim succeeded (on 11 April 2016) on the basis she did not need to rely on the illegality to prove her claim.

On the solicitor's appeal, the applicable law was *Patel v Mirza*. On the *Patel* criteria, the Court of Appeal ruled:

> 'underlying purpose of the prohibition transgressed':
>
> 'mortgage fraud … is a canker on society and it is extremely important that dishonest applicants for mortgages should not be empowered by law to abuse the system.'

> ‘However … the premise that it would assist the fight against mortgage fraud if mortgagors involved in making false representations to mortgagees were unable to recover if their solicitors were negligent in failing to register the mortgagee’s security seems, so say the least, questionable.’
>
> ‘other relevant public policies’:
>
> ‘… there is a genuine public interest in ensuring that solicitors’ clients are entitled to seek civil remedies for negligence / breach of contract arising from a lawful retainer.’
>
> ‘… proportionality’:
>
> ‘it would be entirely disproportionate to deny G’s claim if one takes into account the … factors set out by Lord Toulson at [107]’.
>
> The court went on to refer to the factors that: the mortgagee adopted the transaction and raised no complaint; G did not seek to evade her obligations to the mortgagee; her illegal conduct was not central or relevant to the otherwise proper and legitimate retainer, but simply part of the background; her claim against S was brought to obtain funds to reduce her liability to the mortgagee; there was no risk that enforcement of her claim would undermine the integrity of the justice system.

The solicitors appealed to the Supreme Court (judgment given on 30 October 2020). The issue was whether the Court of Appeal had erred in its application of the *Patel v Mirza* guidelines. Dismissing the appeal, the Supreme Court ruled, per Lord Lloyd-Jones JSC:

> ‘[23] … the evaluation of [factors (a) to (c)] is directed specifically at determining whether there might be inconsistency damaging to the integrity of the legal system.
>
> ‘[26] … The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play … [but] is simply seeking to identify [those] which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. …
>
> If, on an examination of the relevant policy considerations, the clear conclusion emerges that the [illegality] defence should not be allowed, there will be no need to go on to consider proportionality … If, on the other hand, a balancing of the policy considerations suggests a denial of the claim, then [the court will] consider proportionality.’

The conclusion on issues (a) and (b) was:

> ‘[35] … To permit the respondent’s claim in the particular circumstances of this case *would not undermine the public policies* underlying the criminalisation of mortgage fraud and could, indeed, operate in a way which would protect the interests of the victim of the fraud, ie the mortgagee [as damages recovered by G from S could be applied to repay the lender]. Furthermore, *to deny the respondent’s claim would run counter to other important public policies*. It would be inconsistent with the policy that the victims of solicitors’ negligence should be compensated for their loss. It would be a disincentive to the diligent performance by solicitors of their duties. It would also result in an incoherent contradiction given the law’s acknowledgment that an equitable property right vested in the respondent.’

It was therefore not necessary to consider factor (c) ie the proportionality of denying G’s claim. However, the Supreme Court observed emphatically (at [43)] that G’s claim for negligence against

her solicitors was conceptually entirely separate from her fraud on the mortgagee. So the fraud was by no means central to the claim in negligence – the inference being it would have been disproportionate to deny the claim.

*Al-Dowaisan and another v Al-Salam and others* [2019] EWHC 301 (Ch) provides a clear example of a case which failed for illegality on the *Patel v Mirza* criteria. The judge found that a NatWest bank account had been set up in the name of C as nominee for D1 and D2, for the purpose of concealing D1 and D2's beneficial entitlement to the money passing through the account in order for D1 and D2 to evade tax – which they duly did. The judge did not attempt to quantify how much tax was evaded, although a grand total of £5.4m passed through the accounts.

D1 counterclaimed £400,000 received by C, to which the judge found D1 was entitled. Applying Lord Toulson's factors (a), (b) and (c) the judge ruled that:

(a) to reject the illegality defence and allow the counterclaim would be harmful to the integrity of both the legal and the tax systems of this country;

(b) to allow C to treat D1's £400,000 as his own would serve to discourage third parties from tax evasion and assist the underlying purpose of ensuring that HMRC receives tax which is due; and

(c) to reject the counterclaim on the ground of illegality would be a proportionate response to D1's conduct.

To judge by the court's approach in *Al-Dowaisan*, if the insider dealing had in fact gone ahead in *Patel v Mirza* and generated significant illegal profits, Mr Patel might not have enjoyed such a favourable outcome to the proceedings. Doubtless, borderline cases will emerge in which the courts will carry out delicate exercises of applying the new criteria to permit or deny a remedy in the presence of illegality – producing some interesting case law.