

Case Comment

PRESUMPTION OF ADVANCEMENT: VOYAGE INTO THE UNCHARTED SEA

Lui Kam Lau v Leung Ming Fai

The law of resulting and constructive trust as it applies to disputes in family homes has long been obscure and controversial. Recently, the facts of *Lui v Leung*¹ offered a golden chance for our courts to make breakthroughs in this area; however, it seems the chance has been missed.

The facts

The defendant and a Ms Ng, deceased, went through a ceremony of marriage in 1981 which was never registered and so had no legal effect.² Although legally speaking they were cohabitees, the couple lived as husband and wife and were so treated by their friends and relatives. The premises in issue were initially bought by the deceased in her sole name in 1976. A few months after he moved into the premises the defendant paid all the monthly mortgage instalments.

In 1984, the deceased was found to be suffering from cancer. Before she died, she told the defendant that everything that belonged to her would be his. She then asked him to redeem the mortgage so that she could assign her legal title to the defendant. This he did using his own funds, but the deceased died before the proposed assignment was executed.

The plaintiffs, the sons and administrators of the deceased's estate, brought an action against the defendant to recover possession of the premises and mesne profits. By his defence, the defendant contended first that there was an agreement to convey the premises to him and this was partly performed by his redemption of the mortgage. Secondly, he argued that he had made substantial mortgage payments. Upon these contentions, he counter-claimed that the estate of the deceased held the premises on trust for him. He lost on the first point as Mr Tong, acting as Deputy Judge, held that the facts did not establish an agreement and so it was unnecessary to explore part performance.³ The second contention, however, was accepted and Deputy Judge Tong made an order of half a share in favour of the defendant. His reasoning raises important issues at three levels.

¹ Transcript of the unreported judgment of Deputy Judge Tong, QC, May 11, 1992, HCt Action No A1978 of 1988.

² s 4 of the *Marriage Reform Ordinance* (cap 178, LHK 1981 ed).

³ *ibid*, 13.

1 The doctrinal basis of the order: resulting or constructive trust — does it matter? The first oddity of the case is that both counsels and Deputy Judge Tong seemed uncertain whether resulting or constructive trust was the relevant doctrine to apply. This can be shown by the fact that counsel for the defendant simply claimed a beneficial share of the house in order to avoid having to choose between the two. Deputy Judge Tong was equally undecided. He thought he was more concerned with resulting rather than constructive trust because this was a case of a person advancing money to purchase property registered in another's name. However, he also thought it hardly mattered what label one used, as both concerned trusts implied by law.⁴

Such an approach echoes the attitude of some English judges. In *Gissing v Gissing*,⁵ which is one of the most authoritative decisions on the subject, Lord Diplock thought it unnecessary to distinguish between resulting, implied or constructive trusts. In *Burns v Burns*,⁶ Fox LJ again thought that the description did not matter. With respect, it is submitted that it matters greatly which doctrine we rely on. To conflate the two under a wider generic term, implied trust, reflects but a refusal to face up to the real issue. First, the two doctrines are conceptually distinct and they yield different remedies. Constructive trusts of family homes are based on the *common intention*, whether express or inferred, of a couple as to the beneficial share in a property. In resulting trusts, common intention does not enter into play. Their basis is a party's *contribution to the purchase price* and the law's view that people do not intend to make gifts to strangers casually by purchasing in others' names.⁷ Secondly, and as a result of the difference in their conceptual basis, the remedies one may obtain are different. Beneficial shares in resulting trusts must be directly proportional to the contribution to purchase price, whereas quantifying the share in a constructive trust depends on what was 'commonly' intended by the parties. *Re Densham*⁸ is a good illustration of this difference. A wife had contributed roughly one-ninth of the purchase price of the matrimonial home and so was held entitled to a one-ninth interest in the home on resulting trust principles. However, it was also held that she was entitled to a half share under a constructive trust since she and her husband had agreed the purchase was to be in their joint names, though her name was omitted from

⁴ *ibid*, 14.

⁵ [1971] AC 886.

⁶ [1984] Ch 317, 326.

⁷ The presumptions apply by strict application of law. Intentions are relevant at the rebuttal stage only.

⁸ [1975] 1 WLR 1519.

the transfer because of some misunderstanding.⁹ Thirdly, to conflate the two doctrines ignores the fact that where the beneficial share arising from the resulting trust differs from that of the constructive trust, as where the proportions of contribution to the purchase price differ from the parties' common intention, the latter can displace the former.¹⁰ This last point will become more significant as we come to the quantification of the shares.

2 *Application of the presumption of advancement to cohabitees.* Although he refused to draw a distinction between resulting and constructive trusts, Deputy Judge Tong's reasoning resembles more closely a resulting trust analysis. He relied heavily on *Lily Cheung v Commissioner of Estate Duty*,¹¹ a case on resulting trust. He first considered whether the presumption of advancement applied and held that it did, even to cohabitees, with the terse statement that '... the defendant was never legally married to the Deceased. However, the relation of husband and wife was certainly recognised and accepted not only by the immediate parties but also by their relatives.'¹²

Various comments may be made: first, this statement seems stunningly revolutionary. It clearly departs from the general position in English law, but none of the English authorities was cited. Under English law, the presumption of advancement arises only in certain historically established categories, such as between a father and a son, a husband and his wife, indeed even his fiancée, but definitely not between a man and his mistress or a woman with whom he cohabits as man and wife.¹³ The decision of *Rider v Kidder*¹⁴ in 1805 was categorical. Even if one were to regard the overtone of moral disapproval in *Rider v Kidder* as obsolete, there is recent confirmation of the policy of drawing a distinction between married and unmarried couples. *Diwell v Farnes*¹⁵ held that cases relating to the division of property between married couples were inapplicable to cohabitees. Even as recently as 1989, Millet J said at the start of his judgment in *Windeler v Whitehall*¹⁶ that 'English law recognises neither the term nor the obligation

⁹ See Hayton & Marshall, *Cases and Commentary on the Law of Trusts* (London: Sweet & Maxwell, 9th ed 1991) 439 for a fuller discussion of this case.

¹⁰ See the recent case of *Springette v Defoe* [1992] 2 FLR 388. Noted 1992 Conv 347. On the facts a 'communicated' intention was not found.

¹¹ [1988] 1 HKLR 517.

¹² n 1 above, at 16.

¹³ See Underhill, *Law of Trusts and Trustees* (London: Butterworths, 14th ed 1987, with supplements 1992) 284; *Snell's Equity* (London: Sweet & Maxwell, 29th ed 1991) 179; Hayton & Marshall, n 9 above, at 254; and Hanbury & Maudsley, *Modern Equity* (London: Stevens & Sons, 13th ed 1989) 243.

¹⁴ (1805) 10 Ves 360.

¹⁵ [1959] 1 WLR 624.

¹⁶ [1989] FCT 268.

to which [cohabitation] gives effect. In [the United Kingdom], a husband has a legal obligation to support his wife even if they were living apart. A man has no legal obligation to support his mistress even if they are living together.¹⁷

Admittedly, the issue was not faced directly in these recent English decisions. Where it has been, in the High Court of Australia, the courts have come down in favour of the same view. *Calverley v Green*,¹⁸ affirming *Napier v Public Trustee (WA)*,¹⁹ held that the rule was well established. In both cases, Gibbs J was prepared to apply the presumption of advancement to cohabitees but he was in dissent.²⁰

Reformists might defend *Lui v Leung* by saying that though revolutionary, it is a step in the right direction. It liberates the presumption of advancement from its historical shackles. In the nineteenth century the presumption had been a useful legal tool in filling evidentiary gaps in family situations where formality was often ignored and difficulties of evidence abounded. Gardner prefers to go even further. For him, the presumption is a tool, dressed up as the purchaser's or the transferor's intention, to ensure that he carries out what social policy regards to be his moral duty.²¹ Hence, there is a presumed intention to advance when husbands transfer to wives but not vice versa, since the latter do not have a social obligation to provide for their husbands. Nor does the presumption apply when mothers transfer property to their children, although ordinary human expectations tell us that both parents are equally disposed to make gifts to their children. With evolution (or rather the lack of it) by a slow and rigid categorised approach, the presumption has become ossified and fails to reflect the social changes of sexual equality and an increasing preference for cohabitation. Nowadays, it is more of a hindrance than a tool in resolving evidential difficulties in cases.

While most of these criticisms are clearly warranted, how we should move forward is not so clear. The most radical way is to abandon the presumption, leaving it to the parties to prove their actual intentions.²² With respect, it is doubtful whether we need to go that far. As we have argued,

¹⁷ [1989] FCR 268, 269.

¹⁸ (1984) 56 ALR 483.

¹⁹ (1980) 32 ALR 153.

²⁰ His Honour relied on some cases which apparently regarded the presumption of advancement as arising where a man who knew that he was bigamously married purchased property in the name of the woman he bigamously married. See *Murdock v Aherne* (1878) 4 VLR (E) 244, 249. But the same case has been criticised: *Cavalier v Cavalier* (1971) 19 FLR 199, 205.

²¹ See S Gardner, *An Introduction to the Law of Trusts* (Oxford: Clarendon Press, 1989) 57–58.

²² Murphy J in *Calverley v Green*, n 18 above.

in family situations where evidence is lacking, it is a good tool with which to fill evidentiary gaps. What is unacceptable is the rigid categorisation and obsolescence of the categories. These point to reform, rather than abolition, of the presumption.

A more appropriate solution seems to be to keep the presumption but to modernise it by replacing categorisation with a central theme that is sufficiently flexible to apply to a range of fact situations. It is submitted that this can be done by a two-pronged approach. First, at the preliminary level in deciding whether the presumption of advancement *applies*, we can adopt the test proposed by Gibbs J in *Calverley v Green*, namely, when 'the relationship between two persons makes it more probable than not that a gift was intended.'²³ This includes factual circumstances like the nature of the relationship, its duration and the closeness between the parties. Significantly, policy considerations should also come into play. In this area, intention is only half the story; the presumption has its subsidiary role in enforcing social policies.²⁴ Judges should, for example, be cautious with homosexual relationships or cohabitees lest this conflicts with the legislature's omission to recognise these relationships. In *Lui v Leung*, for example, the one issue the court should have addressed is whether extending the presumption of advancement to a couple whose marriage is not formally valid under the *Marriage Reform Ordinance*²⁵ would recognise through the backdoor what the ordinance had not granted at the front.

Even when the presumption applies, at the second level, its *strength* may accordingly be attenuated (or indeed reinforced) to suit modern-day social conditions. This technique is obvious in *Pettit v Pettit*,²⁶ where the court refused to hold that the presumption of advancement from a husband to his wife had died a natural death but then held it was none the less much weaker than before. This seems the best strategy to provide a fine-tuned treatment of cases.

Be that as it may, the above analysis was not adopted in *Lui v Leung*. If this is so, what can we make of the decision? What are its limits? It is submitted that the ruling in *Lui v Leung* can be interpreted to fit such a model. First, the facts point strongly towards extending the presumption of advancement at least a little further beyond married couples. The couple bothered to go through a ceremonial marriage and indeed thought they were married. They were 'cohabitees' only technically. The long-standing (and harmonious) relationship was terminated by bereavement, not dispute.

²³ *ibid*, 488.

²⁴ For the reason why policy concerns should be relevant, see n 21 above.

²⁵ s 4 of cap 178, LHK 1981 ed.

²⁶ [1970] AC 777.

They bear a closer resemblance to married couples than do short emotional and sexual commitments with the parties preferring to retain their independence. In short, the extension of the presumption of advancement is much milder than it looks. Secondly, in considering the weight of the presumption, Deputy Judge Tong did emphasise that the presumption was very weak, although again without much analysis.

3 Rebutting the presumption of advancement and quantifying the proprietary share. Having held that the presumption of advancement applied, Deputy Judge Tong searched for a contrary intention to rebut it and then to quantify the proprietary share enjoyed by the defendant. However, because of the failure to distinguish between resulting and constructive trusts, this part of the judgment gives the appearance, if not the actuality, of confusion.

It is established law that the rules of evidence in rebutting the presumption of advancement are separate and distinct from those which establish a common intention constructive trust. However, Deputy Judge Tong cited a number of cases which established constructive trusts,²⁷ such as *Gissing v Gissing*,²⁸ *Grant v Edwards*²⁹ and *Lloyds Bank v Rosset*,³⁰ as guidelines for rebutting the presumption of advancement. He adopted the two-limb test expounded by *Lloyds Bank v Rosset*, namely, whether there is evidence, direct or indirect, to show that there was a common intention between the spouses as to their beneficial shares in the property.³¹ He found direct evidence that the defendant did not intend the monthly mortgage payments to be gifts to the deceased but simply a discharge of his responsibility as the man of the house.³² In case he was wrong, he also held that there was indirect evidence of the common intention, drawn from the substantial payments made by the defendant to the purchase of the premises. Such is the complicated foray into a labyrinth of resulting and constructive trust. He seemed to conflate the two by using the common intention in constructive trust to rebut the presumption of advancement in resulting trust.

A similar confusion arises with the quantification of proprietary shares. After meticulous calculation, the Deputy Judge assessed the defendant's contribution as 47.1 per cent of the total purchase price. One would have

²⁷ *Grant v Edwards, Lloyds Bank plc v Rosset; Gissing v Gissing* is, admittedly, ambiguous.

²⁸ [1971] AC 886.

²⁹ [1986] 2 All ER 426.

³⁰ [1990] 1 All ER 1111.

³¹ n 1 above, at 23.

³² *ibid*, 24.

thought that if Deputy Judge Tong were loyal to his resulting trust analysis, the defendant would obtain exactly a 47.1 per cent share of the house, being directly proportional to his contribution. However, with a surprising twist, he added that 'Bearing in mind ... that the deceased over the years had always intended what was hers to be the defendant's and vice versa it is not unreasonable for me to hold that the defendant should have a half share in the premises and I so hold.'³³

It is utterly unclear what the legal basis of this final half-share is. It cannot be based on resulting trust principles, for they insist on symmetry between contribution and the ultimate share. Alternatively, he may be giving effect to a common intention constructive trust proved under *Lloyds Bank v Rosset*. If this is the case, three problems arise. First, the learned judge should have justified why it was that the common intention constructive trust could override the result arising from the purchase money resulting trust. *Springette v Defoe* was directly relevant but not cited.³⁴ Secondly, for the purpose of establishing the constructive trust, what is the relevant timing of the common intention (or understanding)? The novelty, and hence difficulty, of *Lui v Leung* is that the flat was bought before the deceased and the defendant lived together. He started paying the mortgage five years after the initial purchase. At that time no oral agreement was made. The first oral agreement was made almost eight years after the purchase, when the deceased discovered that she had cancer. Was it too late? Deputy Judge Tong did not even address himself to this issue. We have to turn to *Lloyds Bank v Rosset* for an answer. Lord Bridge held that the agreement should be prior to the acquisition of the property, *or exceptionally at some later date*, but he did not state what amounted to these exceptional circumstances. It is submitted that the traditional insistence on the agreement being made prior to or at the date of acquisition is a legacy of the out-dated institutional view of constructive trust. It should not be insisted on anymore now that the concept is moving towards assimilation with proprietary estoppel and the remedying of unconscionability. The reason is simple, the unconscionability is the same whether the agreement is made prior to or after the purchase. It lies in the legal title owner refusing to honour an agreement (or understanding) to confer his beneficial title on someone who acts in reliance to his detriment. Thirdly, what is the effect of the common intention? The orthodox teaching was that the parties should be awarded whatever share that was commonly intended. But that would mean that Mr Leung was short-changed; he got half a share when the

³³ *ibid*, 29.

³⁴ [1992] 2 FLR 388.

deceased intended a full. She said that what was hers would be his. Does Deputy Judge Tong mean only that the intention is a 'factor' taken into account to round off odd percentages? But that would be the most unprincipled use of the doctrine!

It is apparent that *Lui v Leung* could have been a landmark decision in this area of law. It is a case which is rich with issues, but unfortunately its significance is undermined by omissions and confusions at the doctrinal level. Much of the ground-breaking work is left to future courts. This will not be an easy task, for where courts in other Commonwealth jurisdictions have already started searching for new bases for constructive trusts, the Hong Kong courts are still struggling with the rudimentary distinction between resulting and constructive trust.³⁵

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³⁵ For a brief survey of the literature, see Davies, 30 Ade LR 578; Hayton, [1990] Conv 370; Ferguson, 109 LQR 104; Gardner, 109 LQR 263 and Nourse LJ in *Law Lectures for Practitioners 1991* (Hong Kong: Faculty of Law, University of Hong Kong) 83.

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