TO IMPUTE OR NOT TO IMPUTE; THAT IS THE QUESTION

Stephen Parker

In order to establish a beneficial interest pursuant to a constructive trust one has to establish two things:

1. A **common intention** to share the beneficial interest, and

2. An act by the asserting party to their **detriment** in reliance upon that common intention. (*Gissing v Gissing* (1971) AC 886).

There are two ways of establishing a **common intention**:

The first is by way of **actual direct evidence** of an **express oral** agreement.

The second is by way of an **inference** through conduct whereby common intention is deduced objectively from that conduct.

The classic definition in respect of each of these scenarios can be found in the case of *Lloyds Bank v Rosset* (1991) 1 AC 107.

**Actual Intentions**

“the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding between them that the property is to be shared beneficially. The finding of an 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”

**Inferred Intentions**

“in sharp contrast with this situation, but a different one, where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been to the parties to reach such an agreement if they had applied their minds to the question, and where the Court must rely entirely on the conduct of the parties, both as the basis from which to **infer a common intention** to share the property beneficially and as the **conduct** relied on to give rise to a constructive trust.”

**Imputed Intentions**

"Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common
intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court’s opinion would have been formed by reasonable spouses.”

(Pettitt v Pettitt (1970) AC 777)

"…………. There is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation”.

(Gissing v Gissing [1971] AC 886)

Thus in the case of Oxley v Hiscock (2004) it was held that it was also permissible:

“to supply or impute a common intention as to the parties respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all material circumstances (including the acts and conduct of the parties after acquisition), is shown to be fair....”

This was seized upon in Stack v Dowden (2007) 1 FLR 1858 where Baroness Hale said that one must “search to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it”.

However she also went on to say that “The search is …for the result which the parties must, in light of their conduct, be taken to have intended............the court (may not) abandon that search in favour of the result which the court considers fair”.

However Neuberger LJ rejected the concept of imputing an intention as this seemed to run counter to the Trusts of Land and Appointment of Trustees Act which limits the Courts powers as to Declaratory Relief only which was the rationale for dispensing with any notion of an award on the basis of ‘fairness’ as opposed to based on the parties intentions be they express or inferred.

“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 deducted 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.”

In Kernott v Jones (2010) EWCA Civ 578 the reference of Baroness Hale to ‘imputation’ was further questioned on the basis that the court cannot invent an ‘intention’ where one cannot be inferred!

“it is possible that she was suggesting........the court ... ascribe to the parties an intention that they neither expressed nor inferentially had: in other words, that the court can invent an intention for them. That, however, appears unlikely, since it is inconsistent with Baroness Hale’s repeated reference to the fact that the goal is to find the parties’ intentions, which must mean their real intentions.’

“I accordingly do not myself interpret Stack as having intended to enable the courts to find, by way of the imputation route, an intention where none was expressly uttered nor inferentially inferred.”
Lasker v Lasker [2008] EWCA Civ 347 is interesting in that whilst commenting that although “fairness” is not the basis upon which the court reaches a decision in these kinds of cases it was not unhelpful to see whether the outcome arrived at seemed unjust:

“It is sensible to stand back and see whether that looks a fair result…………it does seem to me that it is not unhelpful to see whether the outcome ….seems unjust, because if it is, it may be worth revisiting the reasoning”.

In the High Court in Kernott v Jones (on appeal from the County Court) Nicholas Strauss QC held (following HHJ Dedman in the court below):

“In my view, what the majority in Stack held was only that the court should not override the intentions of the parties, in so far as that appears from what they have said or from their conduct, in favour of what the court itself considers to be fair........the court must not impose its view...........To the extent that the intention of the parties cannot be inferred, the court is free........to impute a common intention to the parties. Imputing an intention involves........attributing to the parties an intention which they did not have, or at least did not express to each other. The intention is one which the parties “must be taken” to have had. It is difficult to see how this process can work, without the court supplying, to the extent that the intention of the parties cannot be deduced from their words or conduct, what the court considers to be fair. ”

Thus the linking in with imputation and fairness was back on the agenda as was in Oxley v Hiscock.

Jones v Kernott (2011) UKSC 53

The following principles can be extrapolated from the Judgement:

(i) The starting point where a family home is bought in joint names is that they own the property as joint tenants in law and equity in equal shares i.e. equity follows the law; (in sole name cases however there is no such presumption (see Oxley v Hiscock (2005))

(ii) 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 (ambulatory);

(iii) Common intention, if it can be inferred, is to be objectively deduced from the conduct and dealings between the parties. “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 and 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” (Gissing v Gissing [1971] AC 886);

(iv) Where it is clear that they a) had a different intention at the outset or b) had changed their original intention, but it is not possible to ascertain by direct evidence, or by inference, an actual intention as to their respective shares, then the court is entitled to impute an intention that each is entitled to have based upon that “which the court considers fair having regard to the whole course of dealing between them in relation to the property”. "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 and;
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 or fair.

The majority expressed the view that despite their conceptual differences there was no real practical difference between inferring and imputing. (Lady Hale, Lord Walker, Lord Collins).

"Subjective intentions can never be accessed directly, so the court must always direct itself to a consideration of the parties' objective intentions through a careful consideration of the relevant facts. The point is that the imputation/inference distinction may well be a distinction without a difference with regard to the process of determining parties' intentions. It is not that the parties' subjective intentions are irrelevant but rather that a finding as to subjective intention can only be made on an objective basis."

Lord Collins said "one person's inference will be another person's imputation" and it would be difficult to imagine a scenario where in the absence of express agreement the court would infer a shared or common intention which is unfair.

This clearly has to be right when approaching the exercise from the angle of the Judge through the appliance of what is known as 'judgecraft'.

**To Impute or not to Impute?**

In the case of *Oxley v Hiscock* (2004) Lord Justice Chadwick analysed the position as follows:-

a. The **primary question** – was there a common intention that each should have a beneficial interest in the property? (Sole name Cases) or - Did the parties intend their beneficial interests to be different from their legal interests? (Joint names Cases)

b. The **secondary question** – if so what is the extent of that interest?

At this first stage one has to ascertain the parties ‘actual’ shared intention (i.e. an intention common to both parties) whether expressed orally or inferred objectively from conduct. At this stage there is no room for imputation as this only arises when one reaches the question as to computation being the Second Stage (The Secondary Question)

“Whether the beneficial interests are to be shared at all is still a question of a party’s actual shared intentions. An imputed intention only arises when the court is satisfied that the parties actual common intention, express or inferred, was that the beneficial interest would be shared but cannot make a finding about the proportions in which they were to be shared...”

(*Geary v Rankine* (2012) EWCA Civ 555)(See also *Thompson v Hurst* [2012] EWCA Civ 1752)

However recent High Court decisions seem to have brought in the notion of imputation when answering the primary question more notably *Bhura v Bhura (No 2) (2014) EWHC 727* and *Thandi v Sands [2014] EWHC 2378*. This is a path that the Court of Appeal has clearly expressed must not be taken as imputation can only arise when dealing with the secondary question and even then when the Court is unable to answer that question by reference to actual or inferred intentions.