Resulting or Constructive Trust: Does it Matter?

Faizi v Tahir [2019] EWHC 1627 (QB)

Introduction

Faizi v Tahir is part of a long line of confusing cases on non-express trusts of land.[1] It presented particular difficulties because the relevant property was purchased as neither a joint home nor a commercial investment. With respect, however, this does not fully excuse the potential problems created by the judgments in omitting adequately to distinguish between resulting and constructive trusts. After outlining the facts and both judgments, this note seeks to analyse on what basis the decision was, and should have been, taken, and whether its correct basis truly matters.

The Facts

Faiz Faizi ("the claimant") began to live at a Luton property in 2006. On his account, he was advised that he was unable to obtain a mortgage because of his then immigration status, so he and Mohammed Tahir ("the defendant"), whom he met through a mutual friend, agreed that the property would be purchased in the defendant's name, with legal title to be transferred to the claimant at a future date. In reliance on this arrangement, according to the claimant, he paid the deposit, the purchase costs and (some of) the mortgage instalments, as well as financing and undertaking improvements (a garage conversion and a small extension) to the property. He blamed his slowness in seeking to have the property and the mortgage transferred to his name on delays with his British citizenship application.

The claimant's account, however, was resisted by the defendant, who asserted that he purchased the property to aid his own wife's application for a UK residence visa. It was agreed that the claimant paid "regular" sums,[2] sometimes to the defendant and sometimes directly to the defendant's mortgagor, but also that some instalments were missed and that the claimant had stopped paying any by 2015. According to the defendant's account, however, the claimant was only ever his tenant and any mortgage payments by the claimant were in

[1] [2019] EW Misc 8 (CC), affirmed [2019] EWHC 1627 (QB).

[2] Albeit that, somewhat inconsistently, the judge also described the payment as "[a]t best, sporadic": [2019] EW Misc 8 (CC) at [19].

lieu of rent, despite the claimant's failure to sign a tenancy agreement having agreed to do so. According to the defendant, the property was to be a home for himself, his wife and his children once they successfully emigrated. That said, the defendant did acknowledge the claimant's garage conversion.

Consistently with their differing accounts, in 2016 the claimant sought "a declaration of his beneficial interest in the property", while the defendant sought a possession order against the claimant.[3]

The First-Instance Judgment

Judgment was given by His Honour Judge Moradifar at Oxford County Court.[4] He quoted extensively from familiar cases concerning the purchase of a home in a "matrimonial or quasi matrimonial" scenario,[5] such as *Midland Bank v Cooke*,[6] *Stack v Dowden*[7] and *Jones v Kernott*.[8] But he also cited *Generator Developments Ltd v Lidl UK GmbH*[9] and *Baynes Clarke v Corless*,[10] covering the *Pallant v Morgan*[11] equity, the common intention constructive trust and proprietary estoppel, to illustrate what the judge called "[t]he contrast in approach by the court in cases of commercial enterprise".[12] He considered the present case to be in the category that "that fall[s] somewhere between the two categories" of (quasi-)matrimonial versus commercial scenarios, and on his analysis, "cases are fact sensitive and the facts whether agreed or found by the court will provide the essential guide to where the starting point must be".[13] He drew this conclusion without reference to the Privy Council decision in *Marr v Collie*.[14] In an unintentionally ironic remark, the judge was anxious that

[3] [2019] EW Misc 8 (CC) at [2]. The defendant's mortgagee sought a possession order against the defendant but took no part in the hearing before Judge Moradifar or the appeal.

[4] [2019] EW Misc 8 (CC).

[5] [2019] EW Misc 8 (CC) at [7].

[6] [1995] 4 All E.R. 562.

[7] [2007] UKHL 17.

[8] [2011] UKSC 53.

[9] [2018] EWCA Civ 396.

[10] [2009] EWHC 1636 (Ch), essentially upheld on appeal: [2010] EWCA Civ 338.

[11] [1953] Ch. 43.

[12] [2019] EW Misc 8 (CC) at [12].

[13] [2019] EW Misc 8 (CC) at [15].

[14] [2017] UKPC 17.

"[t]o consider a case from the incorrect starting point can be fatal to the conclusions that are subsequently reached".[15]

Clearly, there was a significant factual dispute to be resolved. The judge accepted that the case was unusual because the parties had only a limited relationship and the property was purchased neither as a commercial venture nor as a joint home. He was also concerned about the quality of the evidence adduced by the claimant. But the judge was heavily influenced by the fact that the defendant could not recall a single correct sum for the rent due, and took no steps to enforce the alleged tenancy agreement, (in the "early years") make up the mortgage shortfalls despite his ability to do so, or inspect the property that he claimed was a future home for his wife and children.[16] Ultimately, the judge had "no hesitation in finding that the claimant and the defendant reached an agreement in 2006 that the defendant would purchase the property and hold its legal title for the benefit of the claimant".[17] The judge concluded that "[t]hey further agreed that, when possible, the legal title would be passed to the claimant",[18] and confirmed that "the parties agreed that this would be a property belonging to the claimant in all but the legal title".[19]

The judge asserted that "[i]n reliance on that agreement, the claimant has acted to his detriment by meeting most of the monthly mortgage payments, applying for planning permission and converting the garage at the property to an office",[20] even if "[t]he evidence about further works on the property [was] not reliable enough to support any further findings".[21] A particular difficulty was that some invoices for the work both pre-dated the incorporation of the relevant company and post-dated its cessation of trading, yet showed it as a limited company with a company number. The judge also accepted, however, that the defendant had been paying some of the mortgage instalments since 2015, and that in light of the parties' agreement he had a reasonable expectation to be reimbursed for those outgoings.

The judge therefore declared that the property was held on trust for the claimant. The claimant was nonetheless ordered to pay "back" to the defendant all the sums paid by way of

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[15] [2019] EW Misc 8 (CC) at [15].

[16] [2019] EW Misc 8 (CC) at [44].

[17] [2019] EW Misc 8 (CC) at [45].

[18] [2019] EW Misc 8 (CC) at [45].

[19] [2019] EW Misc 8 (CC) at [46].

[20] [2019] EW Misc 8 (CC) at [45].

[21] [2019] EW Misc 8 (CC) at [46].

mortgage instalments from 2015 onwards,[22] with those sums to be secured against the property. Since the defendant accepted that the judge's declarations were "fatal" to his application for possession founded on a tenancy, that application was dismissed.[23] That was not quite, however, the end of the story.

The Appeal to the High Court

The defendant appealed on two grounds. First, it was said that the judge was "wrong to place any reliance" on the claimant's evidence because the fact that the relevant company did not exist at the purported date of invoice led "to the inevitable conclusion that those invoices were fabricated".[24] The second ground of appeal was that "the learned judge was wrong as a matter of law to find that an informally and vaguely expressed oral agreement could give rise to a real property transfer of beneficial interest".[25] Murray J gave short shrift to the first ground, since *inter alia* even the defendant accepted that the garage had been converted, and the decision could not be regarded as relevantly "wrong".[26]

In giving permission to appeal on the second ground, Jay J had accepted that "it is arguable that the judge's essential conclusion…required more supporting analysis of the evidence, particularly in the context of the law relating to constructive trusts."[27] Murray J agreed in addressing the substantive appeal, adding resulting trusts to the legal phenomena on which supporting analysis was lacking. Murray J was concerned that the cases considered by the judge all concerned the *constructive* trusts, and that "[t]he only reference to resulting trusts in the [j]udgment is a passing reference" in a quotation from *Jones v Kernott*[28] (although it also appears in a quotation from counsel's submissions).[29] After trial, the judge had sought written submissions on whether the claimant's claim was appropriately regarded

[22] [2019] EW Misc 8 (CC) at [48].

[23] [2019] EW Misc 8 (CC) at [48].

[24] [2019] EWHC 1627 (QB) at [31].

[25] [2019] EWHC 1627 (QB) at [31].

[26] [2019] EWHC 1627 (QB) at [35], citing Civil Procedure Rules 1998 (SI 1998/3132) r.52.21(3)(a).

[27] Quoted [2019] EWHC 1627 (QB) at [9].

[28] [2019] EWHC 1627 (QB) at [9], referring to [2019] EW Misc 8 (CC) at [10].

[29] [2019] EW Misc 8 (CC) at [36]. See also [9] and [11], quoting from other parts of the *Jones v Kernott* judgment.

as to a resulting trust or a constructive trust. Both counsel apparently agreed that only a resulting trust was possible, even if this did not have much impact on the eventual judgment.

Defence counsel now submitted that the judge had wrongly concluded that a constructive trust had arisen under the "*Pallant v Morgan* equity". Murray J, in agreement with the claimant's counsel, held that no such equity had arisen. The equity applied to cases where two parties had agreed to *share* beneficial ownership of a property to be acquired by one of them, and in this case both parties claimed a mutually exclusive sole entitlement. The claimant, moreover, had pleaded his case on the basis of a resulting trust. In addition, the parties and Murray J agreed that a *common intention* constructive trust did not arise because this was "not a case concerning the purchase of a shared home".[30]

Having apparently decided that the only plausible basis for the judge's conclusion was a resulting trust, Murray J set about justifying it and determining whether the judge was correct as to the extent of the claimant's interest under one. The parties now agreed that the claimant was entitled to an interest reflecting the contributions to the deposit and the conveyancing costs made at the time of purchase, albeit that the defendant's counsel submitted that he should be *limited* to that proportion (around 6%). The claimant countered, however, that his "agreement to fund the payment liabilities under the [m]ortgage was sufficient to confer the entire beneficial interest on him".[31] Murray J agreed, asserting (with reference to *Barrett v Barrett*)[32] that "where there is an agreement at the time of purchase of a property a party will be responsible for mortgage instalments on terms that he shall have a commensurate beneficial interest or in circumstances from which such an intention can be inferred, then such payments will confer a beneficial interest on the payer".[33] Murray J asserted that the judge had clearly found such an agreement, and he "could not have reached this conclusion unless he was satisfied that under the terms of the agreement, [the claimant] was obliged to indemnify [the defendant]" in respect of his mortgage liabilities, rather than the arrangement (or the default law) relating to a reduced share of the equity.[34] The fact that, "[u]nfortunately, the judge made no explicit statement to that effect in his conclusions" was put down to "no more than an infelicity in the drafting of the [j]udgment"[35] and, conversely,

[30] [2019] EWHC 1627 (QB) at [47].

[31] [2019] EWHC 1627 (QB) at [61].

[32] [2008] EWHC 1061 (Ch).

[33] [2019] EWHC 1627 (QB) at [63].

[34] [2019] EWHC 1627 (QB) at [66].

[35] [2019] EWHC 1627 (QB) at [67].

the defendant's "agreement to incur the liability of the [m]ortgage is not sufficient, in and of itself, to confer on him" any beneficial interest.[36] This latter proposition was said to be supported by *Re Share*[37] and *Carlton v Goodman*.[38]

The fact that the judge "did not use the term 'resulting trust'" in his conclusion was also brushed off as immaterial, "provided that his findings were consistent with a recognised form of trust".[39] The references to detrimental reliance were similarly treated, even though (somewhat understatedly) "they are not strictly relevant to the resulting trust analysis".[40] The defendant's appeal was thus dismissed.

How Was the Case Decided, and How Should it Have Been?

It should already be apparent that aspects of the first instance judgment, arguably along with the fact that it was upheld on appeal, are somewhat problematic. At least some of the difficulty may have been caused by the fact that the judge quoted extensively from various authorities towards the beginning of his judgment, after a brief outline of the facts, but did not come back to apply the details of the relevant law with reference to those authorities once he had made his factual findings. At that stage, he was apparently content to quote from counsel's submissions without reference to authority. What is more, despite his own anxiety about the importance of the correct starting point, the judge was ultimately not minded to share his starting point, or indeed the precise basis of his ending point.

This section will consider whether each possible solution either plausibly formed the basis of the judge's decision or ought to have done so. The next section will consider whether the true basis of the decision really matters.

The Resulting Trust Analysis

The fact that Mr Faizi framed his case according to the resulting trust, that both counsel agreed that only a resulting trust was possible, and that Murray J upheld the judge's conclusion on the basis of one means that it cannot lightly be disregarded as a correct

[36] [2019] EWHC 1627 (QB) at [70].

[37] [2002] 2 F.L.R. 88.

[38] [2002] EWCA Civ 545.

[39] [2019] EWHC 1627 (QB) at [68].

[40] [2019] EWHC 1627 (QB) at [69].

explanation of the decision. But there are a number of potential complications in the application of the "purchase money resulting trust", through which a contributor obtains a beneficial interest in proportion to his contributions, to the facts. An immediate one is that the treatment of mortgage payments as contributions to the purchase price giving rise to a proportionate share under a resulting trust is conceptually difficult. As Lord Neuberger recognised in *Stack v Dowden*, while "[t]here is attraction in the notion that liability under a mortgage should be equivalent to a cash contribution",[41] "there is an argument that taking on liability under a mortgage should not be equivalent to a cash payment" because "[t]he cash contribution is effectively equity, whereas the mortgage liability arises in relation to a secured loan".[42] By *Laskar v Laskar*, he was prepared to suggest that "a mortgage in joint names…for which [the parties] were jointly and separately liable, in respect of a property which they jointly owned…should be treated…as representing equal contributions…by each party to the acquisition".[43] In its 2017 decision in *Wodzicki v Wodzicki*, moreover, the Court of Appeal approved the judge's conclusion, by virtue of an apparent resulting trust analysis, that the respondent's beneficial interest was "limited to the contributions (if any) that the respondent had made to the repayment of the mortgage loan", notwithstanding the fact that the respondent was a party to the mortgage.[44] That approach apparently remains controversial, however: Davies and Virgo are clear that "the size of the mortgage facility represents the party's contribution: since the parties' shares under a resulting trust crystallize on the moment of acquisition, how the mortgage is later financed is of no consequence to the resulting trust".[45]

In any event, the claimant in *Faizi* was not a formal party to the mortgage: the basis of the whole situation was that he could not be. Moreover, even if mortgage payments themselves are in principle relevant to a resulting trust analysis, the straightforward application of that analysis is potentially hindered by the claimant's failure to pay all the instalments, so that if he is to obtain an interest proportionate in size to his contribution he should not arguably receive all of the equity. Unless it is sufficient for him merely to *agree* to pay all the instalments, this was at best a case of a generously interpreted presumption of

[41] [2007] UKHL 17 at [117].

[42] [2007] UKHL 17 at [118].

[43] [2008] EWCA Civ 347.

[44] [2017] EWCA Civ 95 at [28].

[45] P.S. Davies and G. Virgo, *Equity & Trusts: Text, Cases and Materials*, 3rd edn (Oxford: OUP, 2019), p.368.

resulting trust partially rebutted (as Murray J acknowledged to be possible, but did not say was applicable)[46] by evidence of another intention.

In support of his contention that a mere agreement to pay all instalments *was* sufficient to give rise to a corresponding resulting trust, Murray J cited *Barrett v Barrett*, where it was indeed held that, in the context of a resulting trust:

> To establish that they are intended to confer a beneficial interest, [contributions to mortgage instalments] must be referable to an agreement or arrangement made at the time of purchase that the payer should be responsible for the mortgage instalments.[47]

It is also true that *Barrett* involved a claim to a beneficial share in the property by a non-party to the mortgage under a resulting trust by virtue of such an arrangement. A significant complication, however, is that David Richards J cited *Carlton v Goodman* in support of that proposition, whereas *Carlton* was concerned with the beneficial entitlement of a joint mortgagor and joint legal owner (at least before the death of her partner). There is also the fact that the arrangement in *Barrett* was unenforceable by reason of illegality, and that there was no such arrangement (or any payment) by the appellant on the facts in *Carlton*.

Moreover, rather than purely seeing the defendant as the mortgagor and considering whether the claimant's agreed liability for or payment towards the mortgage gives rise to a beneficial interest for him, Murray J seemed at times to have regarded the *claimant* as akin to the mortgagor and asked whether the *defendant* had a beneficial interest by virtue of his agreement to incur liability under the mortgage (answering that question in the negative). Murray J apparently did so on the strength of *Barrett*, which as we have seen is not a particularly strong authority. He also pursued this analysis despite the fact that the very reason for the arrangement in *Faizi* is that the claimant apparently *could not* be a legal mortgagor, treating him as some form of "equitable mortgagor" as well as an equitable owner, with at least some of the rights and obligations of their legal equivalents. *Carlton*, however, is authority for the proposition that a joint *legal* mortgagor who makes no payments under the mortgage has no entitlement under a resulting trust (which may be in doubt following *Laskar*). *Re Share*, moreover, is a case where a legal non-owner paid the deposit and all mortgage instalments and succeeded in claiming the entire equity by virtue of a

[46] [2019] EWHC 1627 (QB) at [49].

[47] [2008] EWHC 1061 (Ch) at [24].

constructive trust, so it does not appear to provide particularly strong support to Murray J's overall analysis either.

If it is accepted as a matter of authority that an agreement (at least) to share mortgage instalments by a non-party to the mortgage gives rise to a presumption of resulting trust accordingly, even where the money does not come through as agreed and before the presumption is varied with reference to another intention, it is doubtful whether that is doctrinally desirable. The resulting trust is a simplistic presumption based on the "solid tug of money".[48] That "tug" does not seem particularly "solid" where the money has not actually been paid. In *Stack*, Lord Neuberger recognised that even if *formal* liability under the mortgage were to be recognised as giving rise to a resulting trust presumption:

> If one party then repays more of the mortgage advance, equitable accounting might be invoked to adjust the beneficial ownerships at least in a suitable case. Such an adjustment would be consistent with the resulting trust analysis, as repayments of mortgage capital may be seen as retrospective contributions towards the cost of acquisition, or as payments which increase the value of the equity of redemption.[49]

Such an approach would be consistent with that in *Wodzicki*. An emphasis on agreements between the parties in the resulting trust context, on the other hand, further blurs the boundaries between resulting and common intention constructive trusts.

In a more straightforward purchase scenario, a mere agreement to make a financial contribution is unlikely to give rise to a resulting trust presumption, and it is not necessarily clear that it should in a mortgage situation. It is ironic that, as Murray J viewed *Faizi*, the claimant's agreement to pay the mortgage instalments, despite not being a party to the mortgage, was sufficient to give rise to a resulting trust presumption relating to the whole beneficial interest, while the defendant's actual payment of some instalments gave rise to none.

Perhaps the biggest problem with the argument that *Faizi* was decided on the basis of a resulting trust, however, is the judge's references to the claimant's detrimental reliance. While this concept remains at the heart of some species of constructive trust (including the

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[48] *Hofman v Hofman* [1965] N.Z.L.R. 795, 800, cited in *Bhura v Bhura* [2014] EWHC 727 (Fam) at [8].

[49] *Stack v Dowden* [2007] UKHL 17 at [117].

common intention variety) on one view because of the need for unconscionability,[50] it traditionally holds no relevance for the resulting trust. Even if there is considerable debate about the true nature of the resulting trust, it is tolerably clear that it has some basis in the intention (even if presumed or imputed)[51] of the putative beneficiary,[52] rather than being based on unconscionability per se.

If an undergraduate purported to apply a resulting trust analysis but made reference to detrimental reliance, the student's essay would no doubt come back bearing at least some red ink. With respect, therefore, it would seem surprising for the judge's approach not to receive stronger criticism when appealed, even if Murray J was understandably reluctant to allow an appeal where the substantive outcome may well have been the same. The next sub-section considers whether the decision ought to have been explicitly analysed as a common intention constructive trust.

The Common Intention Constructive Trust Analysis

The proposition that it was "wrong to find that an informally and vaguely expressed oral agreement could give rise to a real property transfer of beneficial interest"[53]appears inconsistent even with Lord Bridge's conservative view that a common intention constructive trust could be founded on "express discussions…however imperfectly remembered and however imprecise their terms may have been".[54] What counsel presumably meant was that a constructive trust was inappropriate because of the particular (non-domestic) context of the case, as on one view emphasised in *Stack*, which is also consistent with counsel's unanimous acceptance that only a resulting trust was possible. It is true that the case does not fit into the dual-owner, couple-based scenario where only the presumption that equity follows the law, potentially displaced by a *constructive* trust, is possible because the resulting trust

[50] See, e.g., G. Virgo, *Principles of Equity &* Trusts, 3rd edn (Oxford: OUP, 2018), Ch.7.

[51] See, e.g., B. Sloan, "Keeping up with the Jones case: Establishing Constructive Trusts in 'Sole Legal Owner' Scenarios" (2015) 35 *Legal Studies* 226, 228, but cf. the more nuanced discussion in G. Virgo, *Principles of Equity &* Trusts, 3rd edn (Oxford: OUP, 2018), Ch.8.

[52] Or, more controversially, the common intention of the putative trustee and beneficiary: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 708.

[53] [2019] EWHC 1627 (QB) at [31].

[54] *Lloyds Bank plc v Rosset* [1991] 1 A.C. 107, 132.

presumption has arguably been abolished in that respect by *Jones*.[55] Consistently, in *Stack* Lord Walker appeared to suggest that the resulting trust should have more of a role where a case was not easily classified.[56] Moreover, if it is assumed that the *Stack* and *Jones* dichotomy between domestic and non-domestic cases is fundamental, the case appears to be towards the "non-domestic" end of the spectrum, notwithstanding that it was not an investment per se as in *Laskar*. While a common intention constructive trust can be invoked by friends who *share* a home,[57] *Faizi* might be more akin to *Wodzicki*, where conversely the resulting trust was purportedly applied as between a step-mother and step-daughter who did not physically share the property and did not have a close relationship.

Even if the "context" is resolutely "commercial" or "non-domestic", however, this need not lead to a conclusion that the presumption that equity follows the law coupled with a potential constructive trust is inapplicable. In *Marr*, the Privy Council expressly stated *inter alia* that Lady Hale's analysis in *Stack* was not intended to "be confined exclusively to the domestic setting",[58] and that it would be "wrong" to consign it there.[59] According to Lord Kerr, the decision as to which approach should be followed is to be made according to the parties' common intention. This note will return to that matter in the next section. But the fact that counsel closed down the constructive trust route so readily, and that neither Judge Moradifar nor Murray J cited *Marr*, demonstrates how much impact a particular view of *Stack* and *Jones* has had on practice, and conversely how little influence *Marr* has had.

If we could *either* leave aside the "context" problem, as *Marr* appears to permit, *or* argue that the case is relevantly "domestic" after all, however, *Faizi* seems to fit squarely within the common intention constructive trust framework. There was an express common intention that the claimant was to have an interest in the property, supported by detrimental reliance, and this would be sufficient under Lord Bridge's approach in *Lloyds Bank v Rosset* irrespective of debates about whether a broader approach to finding a common intention is now permissible.[60] The quantification of the interest could still give rise to some discussion,

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[55] *Jones v Kernott* [2011] UKSC 53.

[56] *Stack v Dowden* [2007] UKHL 17 at [32].

[57] *Gallarotti v Sebastianelli* [2012] EWCA Civ 865.

[58] [2017] UKPC 17 at [40].

[59] [2017] UKPC 17 at [39].

[60] See, e.g., B. Sloan, "Keeping up with the Jones case: Establishing Constructive Trusts in 'Sole Legal Owner' Scenarios" (2015) 35 *Legal Studies* 226; M. Mills, "Single Name Family Home Constructive Trusts: Is *Lloyds Bank v Rosset* Still Good Law?" [2018] Conv. 350.

but the common intention constructive trust might have supported the very conclusion that the judge made. The Court of Appeal, moreover, applied a common intention constructive trust analysis based on *Rosset* in the post-*Faizi* case of *Kahrmann v Harrison-Morgan*, recognised as "commercial", or potentially "intermediate".[61] Henderson LJ, however, potentially invited further controversy by omitting to cite *Marr*, asserting that "[i]t is well established that the principles…developed in domestic contexts of [the *Stack* and *Jones*] kind should not normally be applied to cases where property is jointly purchased as an investment"[62] and describing a *Rosset*-based approach founded on an express agreement as "very different" from that in *Stack* and *Jones*.[63]

Certainly, a common intention constructive trust-based analysis in *Faizi* cannot be dismissed out of hand, not least since it fits with what the judge implicitly said. It is arguable, however, that the judge's mysterious references to detrimental reliance are insufficient, even when combined with his emphasis on agreement, to indicate that he did in fact decide the case on the basis of a common intention constructive trust. As argued in the last sub-section, they may simply add to the confusing nature of the decision. Whether jettisoning the "context" analysis is normatively desirable will be considered further in the next section.

The Pallant v Morgan *Analysis*

The true nature of the *Pallant v Morgan* equity is elusive.[64] According to the majority of the Court of Appeal in *Crossco No.4 Unltd v Jolan Ltd*,[65] it is simply a species of common intention constructive trust. If that were true, little could be added to the analysis in the preceding sub-section, and treating the equity as the true basis of the judge's decision in *Faizi* would equally explain the otherwise mysterious reference to detrimental reliance. It would also be consistent with his citing *Generator Developments Ltd*.

Grower, however, has suggested that the "equity" should be regarded as an orthodox example of the principle that an agent who breaches a fiduciary duty holds any profit derived from the breach on constructive trust for her principal.[66] In *Kahrmann* Henderson LJ asserted

[61] [2019] EWCA Civ 2094 at [98], [100].

[62] [2019] EWCA Civ 2094 at [98].

[63] [2019] EWCA Civ 2094 at [99].

[64] See, e.g., M. Yip, "The *Pallant v Morgan* Equity Reconsidered" (2013) 33 *Legal Studies* 549.

[65] [2011] EWCA Civ 1619.

[66] J.A.W. Grower, "Explaining the 'Pallant v Morgan equity'" [2016] Conv. 434.

that the "equity" "differs in some significant respects from express common intention constructive trusts of the kind" applied there,[67] and there is certainly an irony in considering it as a straightforward example of that trust. Judges (including Judge Moradifar) have regarded the "equity" as being particularly appropriate in relation to more commercial and less domestic joint ventures, and yet (subject to *Marr*) another orthodox view appears to be that it is the resulting trust, and not the common intention constructive trust, that is most appropriate to deal with "commercial" situations. If Grower's analysis is correct, on the other hand, Judge Moradifar's references to detrimental reliance may remain puzzling.[68]

As a matter of authority, it nevertheless seems plausible for Murray J to have rejected the equity as the true or appropriate basis of the decision since (in addition to the fact that the claimant pleaded his case on the basis of the resulting trust) there was to be no true sharing of the property. The normative basis of that apparent requirement may be questionable, since it is surely worse for an agent to seek to retain the whole beneficial interest when he was not intended to have any of it, but perhaps that scenario could be seen as less of a true "joint venture".

Does the Correct Basis Matter?

On one view, the preceding section of this note, and perhaps the very decision to write it, makes much ado about nothing. Essentially, the judge found a clear common intention between the parties (at least, inevitably, until they fell out) that the claimant should have the whole beneficial interest in the property, and the precise route through which that conclusion is reached is "academic". That view would arguably be consistent with Murray J's judgment, with the confusing picture produced by *Marr*, and with Roche's view of both *Marr* and *Stack*.

According to Lord Kerr's analysis in *Marr*, it was "simplistic" for both counsel to concede that *Faizi* had to be a resulting trust case because it was "commercial", or at least not fully "domestic".[69] But, he would presumably continue, the common intention of the parties tells one the correct starting point, and in this case *that* determines that it should reflect their agreed financial contributions. The difficulty or, depending on one's perspective, the beauty, of the *Marr* emphasis on common intention is that, by the time one has used the common

[67] [2019] EWCA Civ 2094, at [127].

[68] J.A.W. Grower, "Explaining the 'Pallant v Morgan equity'" [2016] Conv. 434, 440.

[69] [2017] UKSC 17 at [53].

intention to determine the starting point, perhaps one may as well also use it to determine the end point, subject to the point about actual versus intended financial contributions raised earlier if a resulting trust *presumption* is genuinely raised. On that basis, it arguably does not much matter whether one starts with a resulting trust and varies it according to common intention, or starts with a presumption that equity follows the law and grafts a common intention constructive trust onto that (whatever the possible difficulties of doing that in light of the distinction between "sole name" and "joint name" cases). Some normative support for this approach can arguably be derived from the level of difficulty evident in classifying *Faizi* as either a "domestic" or a "commercial" case.[70]

The potentially alternative view is that presumptions or (to use a less loaded term) starting points matter in the real world, arguably particularly in the cases that do not come to court.[71] Judge Moradifar himself seemed implicitly to accept that at the beginning of his judgment, even if he had abandoned it by the end. Counsel may have over-emphasised the importance and particularity of the *Stack* presumption (and the associated constructive trust) by not apparently daring to suggest that it could apply on the facts of *Faizi*. Recognising the importance of such presumptions or starting points in practice, however, ought not be seen as running counter to Roche's assertion that they "are merely different starting points for the same process – namely working towards an evidence-based conclusion as to the intentions of these particular parties regarding this particular property".[72] But their significance is more difficult to square with any suggestion that the particular route through which the *Stack* conclusion of sharing according to financial contribution was reached was immaterial because "the Court of Appeal in *Stack*…, the majority in the House of Lords, and Lord Neuberger all got to the same result, via respectively *Oxley v Hiscock*…, explicit focus on common intention, and the presumption of resulting trust: fairness, respect for the parties' intentions, and orthodox property law all point in the same direction".[73] If the other principles enunciated by the majority in *Stack* were truly of little importance, that is not easy to reconcile with Lord Neuberger's determination to distance himself from the majority's

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[70] See, generally, B. Sloan, "Proprietary Estoppel: Recent Developments in England and Wales" (2010) 22 Singapore Academy of L.J. 110.

[71] See, e.g., M.P. George and B. Sloan, "Presuming Too Little About Resulting and Constructive Trusts?" [2017] Conv. 303.

[72] J. Roche, "Returning to Clarity and Principle: The Privy Council on *Stack v Dowden*" [2017] C.L.J. 493.

[73] J. Roche, "Returning to Clarity and Principle: The Privy Council on *Stack v Dowden*" [2017] C.L.J. 493, 495-6.

approach (even if, formally speaking, he dissented only on the secondary equitable accounting point),[74] his ostensible reluctance to speak about *Stack* extra-judicially but pointed criticism when doing so,[75] and the deference given to the *Stack* presumption in cases such as *Fowler v Barron*.[76]

Faizi arguably fuels the notion that the particular basis of a decision is largely irrelevant so long as one arrives at the correct conclusion. It may also lend *some* support to Mee's view that the resulting trust "solution" is not a separate "presumption" as such but a shorthand for saying that beneficial interests under a common intention constructive trust should reflect financial contributions.[77] Whether at least the first of these is a positive development is doubtful. Even if it makes little difference to the outcome of cases actually litigated, it damages the intellectual coherence of the law (applied in anticipation outside as well as inside the courtroom) if we do not distinguish properly between resulting and constructive trusts. They are distinct as a matter of statute (even if confusingly distinguished from "implied trusts"),[78] they have distinct places in textbooks and syllabi, and scholars have struggled to come up with unified theories to explain resulting or constructive trusts separately let alone one to encompass both.[79] Of perhaps more immediate importance, moreover, is that the Supreme Court has said that one of them simply does not apply to a very common factual scenario, however much that may have been subsequently undermined by a Privy Council decision.

Conclusion

Both counsel and judges work under considerable time pressure, and it is perhaps unfair to subject their efforts to such detailed analysis under the "legal academic's microscope"[80] as I have done. But the law would be difficult enough to understand even if explained with perfect accuracy and clarity, and cases such as *Faizi v Tahir* do little to aid such

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[74] See, e.g., *Stack v Dowden* [2007] UKHL 17 at [103]-[107].

[75] See, e.g., Lord Neuberger, "The Conspirators, The Tax Man, The Bill of Rights and a Bit About the Lovers", Chancery Bar Association Annual Lecture, 10 March 2008.

[76] [2008] EWCA Civ 377.

[77] J. Mee, "The Past, Present, and Future of Resulting Trusts" (2017) 70 Current Legal Problems 189.

[78] Law of Property Act 1925, s.53(2).

[79] cf., e.g. *Gissing v Gissing* [1971] A.C. 881, 905.

[80] cf. *Hammond v Mitchell* [1991] 1 W.L.R. 1127, 1139.

understanding, or indeed the coherence of future decisions, even if (as with *Faizi*) the substantive decision is perfectly defensible. As Briggs put it in a slightly different context, "[w]ith great respect, this use of language does not make it easy to instruct the young in sound doctrine and clear thinking".[81]

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[81] A. Briggs, "Co-ownership and an equitable non sequitur" (2012) 128 L.Q.R. 183, 184.

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