

# *MARR V COLLIE: THE BALLOONING OF THE COMMON INTENTION CONSTRUCTIVE TRUST*

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## **A. Abstract**

*The decision in Marr v Collie represents a significant expansion of the common intention constructive trust doctrine. It relaxes the requirement that the property be acquired for a 'domestic' purpose, as well widens the doctrine to encompass all property, whether real or personal. Both of these developments are unsupported by past authority. Moreover, its abrogation of the 'purpose' restriction requires that the line between the common intention constructive trust doctrine and the presumed resulting trust doctrine be redrawn; in Marr this is done so in a way which expands the former to the greatest possible extent. These developments may be criticised as exacerbating a doctrine already apt to unintentionally adversely affecting both individual litigants and the justice system as a whole, and which creates incongruous theoretical divisions within the law of intentionally created trusts. As the doctrine is reliant on the proposition, unsupported by authority or legislation, that a conveyance of a title to land into joint names necessarily gives rise to a trust, it is hoped that a further visit to an apex court will lead to reconsideration of the doctrine's proper scope.*

## A. Introduction

In *Marr v Collie*,<sup>1</sup> the Privy Council revisited the common intention constructive trust which arises in domestic or quasi-domestic<sup>2</sup> situations. This marks the third time that the modern incarnation of that doctrine (hereinafter the ‘CICT doctrine’) has been considered at the highest appellate level (the other two instances were, respectively, before the House of Lords in *Stack v Dowden*,<sup>3</sup> and the Supreme Court in *Jones v Kernott*).<sup>4</sup> In *Marr*, Lord Kerr presented his advice as little more than an orthodox application of the CICT doctrine; the reality, however, is that *Marr* significantly widens the doctrine’s scope.

This note will sketch the boundaries of the expanded doctrine. The first expansion is the definitive untethering of the doctrine from the requirement that the property be intended for use as a home. A second is the apparent decoupling of the doctrine from its original subject-matter of real property altogether. Finally, the third is the establishment of the de facto primacy of the common intention analysis over the competing resulting trust analysis in areas where the CICT doctrine would previously have been inapplicable.

Following this, a number of criticisms will be suggested. It will be argued that the CICT

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<sup>1</sup> 3 WLR 1507.

<sup>2</sup> See fn. 30 for a cursory explanation of the relationship between this doctrine and the ‘common intention constructive trust’, also referred to as the *Pallant v Morgan* equity, which typically arises between arms’ length commercial bodies.

<sup>3</sup> [2007] 2 AC 432.

<sup>4</sup> [2012] 1 AC 776.

doctrine makes an unacceptable trade-off of overall systemic benefits for the possibility of justice in individual cases. Its width and discretionary nature encourages costly litigation which weighs down the legal system and ultimately does not benefit even the immediate litigants for whom it hopes to provide a just outcome. Moreover, the route it takes on the road to putative ‘fairness’ circumvents substantive and evidential requirements in the law of trusts and, in doing so, not only undermines the cohesiveness of legal theory in this area, but also neuters the practical safeguards these requirements were intended to provide. Finally, it will be argued that the entirety of the doctrine rests on shaky conceptual foundations, namely, the idea that co-owners of rights to land must hold those rights on trust – a proposition which finds scant support in past decisions or in legislation. In sum, it may be best for the ballooning CICT doctrine to be gently deflated, before one or more of these issues brings it to bursting point.

## **A. Background to the Judicial Committee’s advice**

Notwithstanding the difficult practical and conceptual questions which *Marr* brings to the fore, the underlying facts are simple. Terry Marr and Bryant Collie were an unmarried couple whose relationship spanned from 1991 to 2008. Over its course, they acquired various titles to real property; with one exception, these were vested at law in their joint names.<sup>5</sup> The details vary, but the general theme was that Marr shouldered the bulk of the financial costs involved, whilst Collie undertook to renovate the properties and to be responsible for various other incidental costs. A similar theme is repeated in relation to title to two chattels – a pickup truck and a boat – both of which were again vested in joint names.

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<sup>5</sup> Title to one property, a house in South Westridge, was vested in Marr’s sole name. It appears that the dispute regarding this property was abandoned before the Privy Council: *Marr* (n 1) at [60]. It is therefore immaterial for present purposes.

Upon the breakdown of the relationship, Marr applied to the Supreme Court of the Bahamas for declarations that, inter alia, the various titles were held on trust for Marr alone as the sole provider of the purchase price.

Marr was successful at first instance. Issacs J held that the real properties in question were ‘investment properties’, and were accordingly (relying on *Laskar v Laskar*)<sup>6</sup> outside the ambit of the CICT doctrine. He therefore considered that a presumption of resulting trust arose in Marr’s favour. Such a presumption also arose in respect of the titles to the two chattels at issue. This presumption, Issacs J held, could only be rebutted by Collie ‘demonstrat[ing] that a gift was intended’ – a burden which he held Collie had failed to discharge.

Collie appealed to the Court of Appeal of the Bahamas. The court held that Issacs J applied the wrong test in determining whether the presumption of resulting trust had been rebutted; the proper test was whether Marr intended to benefit Collie.<sup>7</sup> Applying this test, the Court of Appeal concluded that the presumption had been rebutted.<sup>8</sup> The same conclusion was reached in respect of the title to the truck.<sup>9</sup> Collie was also awarded an equitable interest in the boat for purchasing ‘ancillary equipment’ which had increased its value.<sup>10</sup>

## **A. Remapping the common intention constructive trust**

The Judicial Committee’s reasoning differed markedly from that of both Issacs J and the Court of Appeal of the Bahamas. In brief, it was held that the CICT doctrine was applicable

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<sup>6</sup> [2008] 1 WLR 2695.

<sup>7</sup> *Marr v Collie* [2014] BSCA 99 at [14].

<sup>8</sup> *Marr v Collie* [2014] BSCA 99 at [20].

<sup>9</sup> *Marr v Collie* [2014] BSCA 99 at [37].

<sup>10</sup> *Marr v Collie* [2014] BSCA 99 at [38].

notwithstanding that the properties were intended as investments, and the case was therefore remitted to the Supreme Court of the Bahamas for determination of the parties' intentions.

**B.** *Relaxation of the 'purpose' requirement*

The most immediately apparent way this reasoning expands the CICT doctrine is its acceptance of the doctrine's applicability to real property not intended for habitation. Prior to *Marr*, there had to be some interpersonal nexus before the CICT doctrine could apply; this was comprised of a combination of the relationship between the parties and the purpose for which the house was acquired. Thus, the central case of the CICT doctrine was where the parties were a couple in an intimate relationship, and the house was intended to be their family home. This was the case in both *Stack* and *Jones*.

In *Stack* itself, Baroness Hale's speech appeared to impliedly limit the doctrine to that central case. After reference<sup>11</sup> to changes in the social conditions surrounding home ownership and intimate relationships, her Ladyship stated that 'the law has indeed moved on in response'.<sup>12</sup> Later in her speech, her Ladyship again highlighted that 'in family disputes, strong feelings are aroused when couples split up... the domestic context is very different from the commercial world'.<sup>13</sup>

Nevertheless, it was subsequently recognised that the CICT doctrine 'may be applied outside the precise confines of a co-habiting couple'.<sup>14</sup> Its application in a parent-child setting was seen

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<sup>11</sup> *Stack* (n 3) at [41]-[52].

<sup>12</sup> *Stack* (n 3) at [60].

<sup>13</sup> *Stack* (n 3) at [68]-[69].

<sup>14</sup> *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [25] (David Richards LJ).

in *Sandhu v Sandhu*;<sup>15</sup> and it was considered (albeit rejected on the facts) in the context of a dispute between daughter and step-mother in *Wodzicki v Wodzicki*.<sup>16</sup> Moreover, in *Gallarotti v Sebastianelli*<sup>17</sup> the Court of Appeal recognised that the CICT doctrine could apply where the close relationship between the parties was platonic rather than familial or intimate.

However, prior to *Marr*, the ‘purpose’ aspect of the requisite interpersonal nexus was strictly insisted upon. *Laskar v Laskar*<sup>18</sup> considered whether the CICT doctrine could apply to a flat which had been purchased in order to be let out. Lord Neuberger held that:<sup>19</sup>

[T]he primary purpose of the purchase of the property was as an investment, not as a home. In other words, this was a purchase which, at least primarily, was not in the ‘domestic consumer context’ but in a commercial context. To my mind, it would not be right to apply the reasoning in *Stack v Dowden* to such a case as this ... even where their relationship is a familial one

*Laskar* was applied in *Erlam v Rahman*,<sup>20</sup> another ‘buy-to-let’ case, in which Chief Master Marsh held that:<sup>21</sup>

Neuberger LJ [sic] in *Laskar* distinguishes what he describes as a “domestic consumer context” from a commercial context. The former will primarily be a situation in which a home is being acquired by the parties, whether they are married

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<sup>15</sup> [2016] EWCA Civ 1050.

<sup>16</sup> *Wodzicki* (n 14).

<sup>17</sup> [2012] EWCA Civ 865.

<sup>18</sup> n 6 above.

<sup>19</sup> *Laskar* (n 6) at [17].

<sup>20</sup> [2016] EWHC 111 (Ch).

<sup>21</sup> *Erlam* (n 20) at [40]. See also [41] and [70].

or not. The latter situation will apply where the property is being acquired primarily for business purposes. Thus, for example, if a married or cohabiting couple decide the [sic] buy a property on a “buy-to-let” basis, and, applying *Laskar*, the common intention trust analysis derived from *Stack v Dowden* will not apply and a stricter resulting trust analysis will be applicable.

In a significant reversal, Lord Kerr held in *Marr* that ‘the Board does not consider... that *Laskar* is authority for the proposition that the principle in *Stack v Dowden*... applies only in “the domestic consumer context”’.<sup>22</sup>

Lord Kerr offered two reasons for this. The first was that in *Laskar* ‘the co-funding of the purchase was required because the mother could not have afforded to buy the house herself. This was a joint investment impelled by her circumstances.... The investment could therefore be characterised as a purely financial one’.<sup>23</sup> In other words, *Laskar* did not lay down a rule about ‘mixed’ commercial and domestic transactions, because it is properly analysed as a purely commercial case. However, contrary to this characterisation, it was apparently accepted in *Laskar* ‘that this case was midway between the cohabitation cases of co-ownership where property is bought for living in, such as the *Stack* case, and arm’s length commercial cases of co-ownership, where property is bought for development or letting’.<sup>24</sup> Second, *Erlam* (which was not cited in *Marr*) cannot be explained away as ‘purely commercial’, as the title-holder in that case *was* able to afford to enter into the transaction himself.<sup>25</sup>

The second reason put forward by Lord Kerr was that, in *Laskar*, ‘there were no discussions

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<sup>22</sup> *Marr* (n 1) at [49].

<sup>23</sup> *Marr* (n 1) at [48].

<sup>24</sup> *Laskar* (n 6) at [17].

<sup>25</sup> *Erlam* (n 20) at [75].

between the parties as to the ownership of the beneficial interest in the property, and it does not appear to have been suggested that the court could or should infer any intention in that connection'.<sup>26</sup> Plainly, this cannot be a suggestion that Lord Neuberger's statements were obiter, *Laskar* turned on whether the default position under the CICT analysis – that 'the beneficial interests were the same as the legal interests'<sup>27</sup> regardless of financial contributions – was applicable. Instead, Lord Kerr must have meant to explain the absence of a constructive trust in *Laskar* on the basis that the court was not asked to find a positive common intention, rather than because of the purpose for which the property was bought. However, this still pays insufficient regard to the fact that the CICT issue was raised in *Laskar* specifically to determine the applicable rules absent a positive common intention. In any event, this reason again cannot apply to *Erlam*, where the claimant *did* claim that there had been a common intention.

One is therefore left with the unsatisfactory result that the Privy Council has departed from *Laskar* sub silentio. Lower courts, which remain bound by *Laskar*, nevertheless find themselves facing down a decision of the Privy Council purportedly distinguishing it. To date, the only English law post-*Marr* decision on the point is *Secretary of State for Work and Pensions v Tower Hamlets LBC*,<sup>28</sup> a decision of the Upper Tribunal Administrative Appeal Chamber, and it is unclear whether *Marr* was even cited to the Tribunal. Still, although it is now clear that lower courts cannot disregard decisions of the Court of Appeal on the basis that it is a 'foregone conclusion' that the Privy Council's approach would be followed by a superior

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<sup>26</sup> *Marr* (n 1) at [48].

<sup>27</sup> *Laskar* (n 6) at [12].

<sup>28</sup> [2018] UKUT 25 (AAC). Interestingly, the approach adopted by Upper Tribunal Judge Poynter, although similar to that taken in *Laskar*, is in some ways novel in its focus on the trust between the parties rather than the purpose for the transaction: see esp. [62].



court,<sup>29</sup> as a practical matter it is inconceivable that the statements in *Marr* do not now reflect English law.

It therefore seems that, after *Marr*, the CICT doctrine is no longer concerned with the purpose of the relevant transaction.<sup>30</sup> Provided that title was acquired in the context of some close relationship (the boundaries of which are yet to be defined), the transaction is prima facie amenable to the imposition of a common intention constructive trust.

## **B.** *Expansion beyond real property*

The decision in *Marr* also introduces – with little fanfare and indeed no discussion – the possibility of the CICT doctrine applying to titles to chattels, rather than merely titles to land. Having concluded that the case turns on the intentions of the parties, Lord Kerr held that:<sup>31</sup>

No proper examination of the actual intentions of the parties has taken place. For the reasons given earlier, the Board considers that such an examination is unavoidable if a proper determination is to be made in respect of the investment properties, the truck, and the boat (emphasis added).

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<sup>29</sup> *Willers v Joyce (No 2)* [2016] 3 WLR 534 at [16].

<sup>30</sup> It appears to be settled, at least to the level of the Court of Appeal, that the ‘*Pallant v Morgan* equity’, which can arise between entirely arms’ length commercial entities’, is also attributable to a ‘common intention constructive trust’: see *Crossco v Jolan* [2012] All ER 754 at [129] (Arden LJ) and [121]-[122] (McFarlane LJ); and *Generator Developments v Lidl* [2018] EWCA Civ 396 at [72] (Lewison LJ). However, ‘the application of the principles underpinning the *Pallant v Morgan* equity, insofar as they rest on the doctrine of common intention constructive trust, operate quite differently in a commercial context from the way in which they operate in a domestic context’: *Generator Developments* at [78]. For present purposes, therefore, they may be treated as if they were separate doctrines.

<sup>31</sup> *Marr* (n 1) at [60].

Prior to this, there is no discussion in the advice regarding application of the CICT doctrine to chattels, let alone any citation of authority supportive of such a proposition. Interestingly, this was also the case before Court of Appeal of the Bahamas.<sup>32</sup>

This is striking given the focus of the orthodox CICT doctrine on homes. As noted above, Baroness Hale emphasised developments in home ownership as playing a role in the development of the doctrine. Moreover, there appears to have only been one case prior<sup>33</sup> to *Marr* in which a *Stack v Dowden* constructive trust of a right other than a fee simple title was alleged – and the CICT doctrine was held not to apply in that case. In *De Bruyne v De Bruyne*,<sup>34</sup> a wife claimed that certain shares were held by her husband absolutely, rather than on constructive trust for his children. Although it was ultimately decided that the shares were held on constructive trust, this was not a *Stack v Dowden* constructive trust. Patten LJ said:<sup>35</sup>

It is, I think, artificial and unrealistic to decide the question whether the Husband took the shares in 1991 free of or subject to any trust by reference to a set of principles designed to resolve issues of beneficial ownership between adult co-habitees in a property... [However] the authorities dealing with common intention constructive trusts provide only one example of a situation in which equity will impose a trust

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<sup>32</sup> *Marr v Collie* [2014] BSCA 99 at [36]-[38].

<sup>33</sup> Following the decision in *Marr*, CICT principles were again raised before the Privy Council in *Whitlock v Moree* [2017] UKPC 44, in the context of money held in a joint bank account. However, notwithstanding the ambiguous comment at [26] that ‘these principles are by no means confined to beneficial interests in real property’, it is clear from the judgment as a whole that the principle referred to in that paragraph is the proposition that express declaration of trust is conclusive of the parties’ entitlements absent duress, fraud, or the like.

<sup>34</sup> [2010] EWCA Civ 519.

<sup>35</sup> *De Bruyne* (n 34) at [48]-[49].

upon the owner or transferee of property

Admittedly, *De Bruyne* does not say that the CICT doctrine *cannot* apply to chattels - shares are a chose in action, not a chattel - although it does show that the doctrine's applicability to personalty generally is not uncontentious. It is also true that Patten LJ's decision was reached, at least in part, due to the difficulty of infant children sharing in any 'common intention'.<sup>36</sup> Nevertheless, given the absence of any authority the other way, as well as the consistent references to particular issues arising in the context of acquisition of titles to land, it is remarkable that the Privy Council so readily accepted the CICT doctrine applying to other rights.

## **B.** *The 'clash of presumptions' analysis*

The final way in which *Marr* went beyond previous understandings of the CICT doctrine is in its treatment of the relationship between it and the resulting trust doctrine. As the authorities referred to previously show, the conventional dividing line between the two doctrines was the purpose for which the relevant rights were acquired – if for habitation, the CICT doctrine applied; if for investment, the resulting trust doctrine instead.

Plainly, this demarcation could not withstand Lord Kerr's rejection of the 'purpose' requirement. A new boundary had to be drawn to identify what ground had been taken over by the expanded CICT doctrine, and what ground was left within the purview of the resulting trust. Lord Kerr held that:<sup>37</sup>

Save, perhaps, where there is no evidence from which the parties' intentions can be

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<sup>36</sup> *De Bruyne* (n 34) at [48].

<sup>37</sup> *Marr* (n 1) at [53]-[54].

identified, the answer is not to be provided by the triumph of one presumption over another... If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of the property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership... the resulting trust solution may provide the answer.

Examination of this test shows that it cedes most, if not all, of the possible ground the resulting trust approach could have occupied to the CICT analysis. One may start with the premiss that one cannot have an unintentional intention. It follows that, if the question ‘should the CICT approach apply?’ is to be answered by asking whether the relevant common intention is the ‘unambiguous mutual wish of the parties’, the answer must always be ‘yes’. Where the parties have formed a common intention, by definition that intention cannot be anything other than their ‘mutual wish’.

This plainly contradicts the statement that ‘the answer is not to be provided by the triumph of one presumption over another’ – by Lord Kerr’s test, where the facts are *prima facie* amenable to both doctrines, the CICT doctrine will necessarily apply. The resulting trust doctrine must therefore shrink to accommodate the expansion of the CICT doctrine, confining itself to those circumstances where the parties have no relevant common intention. Indeed, even in such cases it is not inevitable that a resulting trust analysis will apply. Although Lord Kerr does not directly refer to traditional ‘purely domestic’ cases, it seems unlikely that he intended that the resulting trust approach could apply in those cases merely because the parties formed no different common intention. This would, in fact, be inconsistent with *Jones*, in which it was

held that the presumption of resulting trust no longer applied in ‘purely domestic’ situations.<sup>38</sup>

There is some ambiguity in precisely how far this new approach expands the scope of the CICT doctrine, as Lord Kerr’s test is amenable to two readings. On one view, the test merely chooses between the position which obtains in default of direct proof of a common intention – Lady Hale’s statement in *Stack* that ‘equity follows the law’, or the contribution-based resulting trust division. Whichever starting point is taken, *both* will give way to direct proof of a common intention. This is the more natural reading of Lord Kerr’s statement, which explicitly refers to Lady Hale’s ‘starting point’. The alternative view is that Lord Kerr referred to Lady Hale’s ‘starting point’ as a shorthand for the CICT doctrine as a whole. On this view, if the resulting trust approach *did* apply, there would be no question of it being superseded by a common intention.

The narrow view bears a closer resemblance to the position prior to *Marr*, whereas the latter is a more significant expansion of the CICT principles. It is unlikely that, before *Marr*, a common intention constructive trust could arise once the resulting trust inquiry had been embarked upon. This would be inimical to the nature of the so-called presumption of resulting trust. The best explanation of the presumed resulting trust is that it arises due to proof by presumption of a declaration of trust.<sup>39</sup> It is therefore difficult to see what effect a different, but undeclared, intention could have – the declaration is conclusive unless the presumption is rebutted. It is

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<sup>38</sup> *Jones* (n 4) at [25].

<sup>39</sup> See W. Swadling, ‘Explaining Resulting Trusts’ (2008) LQR 72. cf J. Mee, ‘The Past, Present, and Future of Resulting Trusts’ (2017) CLP 189; and R. Chambers, ‘Is there a presumption of resulting trust?’ in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010). The objection above does not lie against Mee’s intention-based analysis; however, similar concerns can be made in relation to Chambers’ ‘no apparent reason’ analysis.

notable that, when Lord Neuberger considered in *Stack* that proof of the common intention would rebut the presumption of resulting trust,<sup>40</sup> his Lordship was dissenting as to the proper approach. There does not appear to be direct authority on the point; however, reasoning from first principles, it is a necessary pre-condition for a fact proved by evidence to be capable of rebutting a fact proved by presumption that the former is inconsistent with the latter. That is not the case here - proof of an intention to settle a different trust is just as consistent with, for example, a mistake in the presumed declaration, as it is with that declaration having not occurred at all. For comparison, proof that a contract does not reflect the parties' actual intentions does not show that the contract was not formed, it merely supports a claim for rectification.

In any event, regardless of the approach for which *Marr* is authority, both represent a significant expansion of the CICT doctrine. The fact that Lord Kerr's test will necessarily be satisfied in all but the unusual case where the court cannot find *any* common intention of the parties means that, even under the narrow view, the CICT doctrine will be applicable in many cases to which it did not previously apply. Plainly, this is all the more true if the wider view is correct.

## **A. Practical and theoretical criticisms**

*Marr* is a challenging decision, because the CICT doctrine which it expands is open to criticism on both practical and theoretical grounds.

## **B. *Effect on justice system and individual justice***

Judicial remarks that 'the presumption of a resulting trust made a great deal more sense when

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<sup>40</sup> *Stack* (n 3) at [124].

social and economic conditions were different'<sup>41</sup> show that the rationale underpinning the CICT doctrine is to achieve justice between the parties in these more modern times. Unfortunately, not only does the doctrine fail in that undoubtedly noble aim, it does so in a way which is detrimental to all other participants in the justice system.

The fundamental issue lies in the shift from the relatively mechanistic resulting trust analysis to the CICT doctrine under which 'each case will turn on its own facts'.<sup>42</sup> Under the latter, provided that *some* evidential support can be found for one's preferred intention, there is some value in risking taking the matter to litigation. By way of contrast, in taking as its starting point the parties' respective financial contributions, about which there is lesser room for factual dispute, the resulting trust doctrine was more predictable.

This leads to three consequences. First, potential litigants are likely to assess their chances of a favourable outcome more highly under the CICT doctrine, as the wide scope for factual dispute means much can be 'up for grabs'. This creates greater incentives to proceed to litigation rather than settle. Second, even litigants minded to settle will face difficulties reaching an agreement – the 'expected value' of the litigation will be hard to assess, and accordingly translate into a settlement, because of the wide range of potential factual conclusions a trial judge might reach. Third, those litigants who do proceed to trial will likely face costlier litigation than they would under the resulting trust regime, as the wider range of evidence will increase both the length of the proceedings as well as the preparation counsel necessary beforehand. All of these issues are compounded by the fact that CICT disputes can

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<sup>41</sup> *Jones* (n 4) at [24].

<sup>42</sup> *Stack* (n 3) at [69].

involve more aggressive litigation, as Baroness Hale herself noted:<sup>43</sup>

[S]trong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs.

These costs impact upon not only the immediate parties, but also the justice system as a whole. Court time, like all finite resources, must be distributed between competing demands, and lengthier trials of CICT disputes necessarily means less time available for other cases to be heard – cases which are no less meritorious or deserving of just resolution. This can result in compressed hearings and in listing delays.

None of this is intended as a defence of the admittedly anachronistic presumption of resulting trust. Nor should it be taken as denying the correctness of the sentiment behind the CICT doctrine. But the tool which has been chosen is inappropriate for the task at hand: positive reform must come through tailored legislation which can take into account these concerns in a way which the law of trusts cannot.

## **B.** *Relationship with substantive and evidential requirements*

An equally important criticism is that the CICT doctrine essentially allows for the intentional creation of trusts without compliance with the substantive or evidential requirements to create or prove an express trust. This not only undermines the cohesiveness of legal taxonomy in this area, but also circumvents the safeguards those requirements were intended to institute.

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<sup>43</sup> *Stack* (n 3) at [68].



Although formally a ‘constructive’ trust, the reality is that the common intention constructive trust has more in common with express trusts than those arising by operation of law. Unlike most constructive trusts, the common intention trust does not respond to the commission of a wrong, an unjust enrichment, or any of the identifiable miscellany that give rise to trusts. Instead - like an express trust - it responds, at least in part, to consent.<sup>44</sup> However, as Megarry J stated in *Re Vandervell’s Trusts (No 2)*,<sup>45</sup> ‘the mere existence of some unexpressed intention in the breast of the owner of the property does nothing... To yearn is not to transfer.’ There must be a declaration of trust for an express trust to come into being. In contrast there is no declaration of trust in the case of a common intention constructive trust. If there had been, that declaration would have been conclusive.<sup>46</sup>

The incongruity this creates for legal taxonomy goes beyond the mere fact that there exist two species of ‘intention-based’ trusts, one of which requires a declaration, the other which does not. The real difficulty is that what distinguishes those two types is arbitrary. Following *Marr*, the determinative issue is the closeness of the relationship between the parties; it is open to parties in a close relationship to, with the necessary common intention, create an undeclared trust, whereas arms’ length parties must make a declaration of trust.<sup>47</sup> However, the rule

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<sup>44</sup> There is a view, which finds some support in authority (see eg *Curran v Collins* [2015] EWCA Civ 404 at [78]), that although consent is a necessary element for a common intention constructive trust, the trust arises due to detrimental reliance rather than the intention itself. The merits of this may not be relevant for present purposes, although it is noted that the authorities do not speak with one voice in insisting upon detrimental reliance. Whether or not arising *due to* detrimental reliance, the trust which arises *gives effect to* the parties’ intentions – it does not merely protect the reliance of the disappointed party. It is therefore in functional, even if not theoretical, terms an intention-based trust.

<sup>45</sup> [1973] 3 WLR 744, 767.

<sup>46</sup> *Stack* (n 3) at [49]; *Pankhania v Chandegra* [2012] EWCA Civ 1438 at [13] (Patten LJ) at [28] (Mummery LJ).

<sup>47</sup> Subject to the considerations arising out of the *Pallant v Morgan* equity.

requiring that trusts be declared exists to prevent people from unwittingly creating trusts,<sup>48</sup> and the possibility for 'loose conversations'<sup>49</sup> to give the appearance of an intended trust exists equally in both situations. There is, therefore, no coherence in treating these two situations differently.

The CICT doctrine also undercuts the evidential rule laid down in section 52(1)(b) of the Law of Property Act 1925, which provides that: 'a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust...'. In other words, one can only prove the declaration of an express trust of a title to land by the signed writing of the purported settlor. A common intention constructive trust, on the other hand, cannot and does not require proof in this manner.<sup>50</sup>

The purpose of the rule in section 53(1)(b) was to protect people who held their titles to land absolutely from being defrauded by false claims that they had declared a trust in favour of the would-be fraudster.<sup>51</sup> In one sense, since the common intention trust responds to the intentions of the parties it does not offend the purpose of this rule: if both parties intended the trust, then there can be no question of fraud. Still, the door to fraud is left ever so slightly further ajar. As discussed above, the CICT doctrine involves a factually intensive inquiry, and so the risk that a judge will find the presence of a common intention when there was, in reality, none, is increased. Such a risk must be particularly acute in the context of potentially 'vengeful'<sup>52</sup>

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<sup>48</sup> *Jones v Lock* (1865-66) L.R. 1 Ch. App. 25, 29.

<sup>49</sup> *Ibid.*

<sup>50</sup> Note, of course, that the common intention constructive trust is exempted from the requirement in section 53(1)(b) by the provisions of section 53(2).

<sup>51</sup> W. Swadling, 'The Nature of the Trust in *Rochevoucauld v Boustead*' in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010).

<sup>52</sup> *Stack* (n 3) at [68].

litigation.

## **B.** *Theoretical foundations*

Given these criticisms, the theoretical correctness of the doctrine is of considerable importance. In *Stack*, Baroness Hale said that ‘all joint legal owners must hold the land on trust’.<sup>53</sup> This simple proposition, for which no authority is cited, is crucial to the CICT doctrine. For if one takes as a premiss that there *must* be a trust, then the logical next question is ‘on what trusts are the rights held?’ This question requires an answer before the parties’ entitlements can be determined; if no answer is forthcoming from a declaration of trust, it appears necessary (and acceptable) for a judge to fall back on an unexpressed intention – without doing so, the case cannot be disposed of.

However, the centre-piece of that reasoning – that rights to land vested in multiple persons must be held on trust – is unsupported either by authority or legislation. The starting point is that, under the general law of trusts, a person who holds a right absolutely does not hold it on trust for themselves.<sup>54</sup> It makes no difference that the right in question is co-owned. Therefore, if there is any rule stating that co-owned titles to land must be held on trust, that rule must be found in legislation. Baroness Hale did not refer to any legislation, but the most likely candidate is the Law of Property Act 1925 – specifically, sections 34 and 36.

Section 34, however, is only concerned with preventing tenancies in common at law; it is silent on legal co-ownership as joint tenants. Whilst section 34(2) describes one situation in which legal joint tenants *will* hold on trust – when the right was expressed to be conveyed to them as tenants in common – it does not follow that legal joint tenants hold on trust in any *other* situation.

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<sup>53</sup> *Stack* (n 3) at [55].

<sup>54</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 706.

Section 36(1), on the other hand, applies in situations where there is a pre-existing trust for any persons as joint tenants: ‘Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants...’ (emphasis added).<sup>55</sup> It therefore cannot be read as imposing any trust which would not exist dehors the section.<sup>56</sup> It is harder still to see how any of this could support extending the doctrine to chattels.

Once the idea that all co-owned rights to land must be held on trust falls away, one no longer needs to ask ‘on what trusts are the rights held?’ In the absence of a declaration, there simply is no trust. The parties’ unexpressed intentions cease to be relevant to determination of their entitlements, and the CICT doctrine ceases to be a necessary tool for disposal of the case, and instead is seen to be a method for imposing a trust where none should exist.

Had this analysis been adopted in *Marr*, the only question for the Privy Council would have been whether a declaration of trust over any of the titles had been proved. One way in which such a declaration could have been proved is by direct evidence; however, neither party adduced any evidence in favour of such a conclusion. Alternatively, the declaration could have been proved by presumption, arising due to the fact that Marr was the sole provider of the purchase prices (ie, the ‘presumption of resulting trust’).

Three outcomes could have followed. The first is that the Privy Council could have concluded that *Jones* abrogated the presumption of resulting trust in circumstances such as those in *Marr*;<sup>57</sup> accordingly, as no declaration had been proved by direct evidence, the court should

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<sup>55</sup> Law of Property Act, s 36(1).

<sup>56</sup> There are a number of decisions which adopt the contrary view (see eg *Re Gaul and Houlston’s Contract* [1928] Ch 689, 692; *Re Buchanan-Woolston’s Conveyance* [1939] Ch 217, 222). However, in all of these cases, the point appears not to have been argued.

<sup>57</sup> It is worth mentioning, en passant, that this approach has much to commend it. The judicial criticisms of the

declare that the titles were not held on any trust – Marr and Collie were simply joint tenants of the various titles at issue. The second possible outcome would have been that the Privy Council considered that the presumption of resulting trust did still arise (either because the treatment of the presumption of resulting trust in *Jones* could not survive the rejection of the CICT doctrine advocated here; or because *Jones* applied only to domestic situations, which this was not), but had been rebutted on the facts, leading to the same result as the first possibility. The third and final possibility is that the Privy Council held that the presumption did apply and was not rebutted, which would have resulted in a declaration that the various titles were all held on trust for Marr alone as the sole provider of the purchase price.

## **A. The aftermath of *Marr***

At the time of writing,<sup>58</sup> nearly a year and a half has passed since the judgment in *Marr* was handed down. A striking feature of the reported decisions involving the CICT doctrine in the intervening period is how little of an impact *Marr* has had. In all but one case, *Marr* does not appear even to have been cited to the court.<sup>59</sup> This is so even when *Marr* was directly relevant to the issues which arose, such as in *Gaspar v Zaleski*<sup>60</sup> and *Secretary of State for Work and*

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presumption of resulting trust as anachronistic are well-founded: it is no longer a sufficiently likely inference from the facts which traditionally caused such a presumption to arise that a trust had been declared.

<sup>58</sup> The final draft of this note was completed on 24 September 2018.

<sup>59</sup> The decisions considered were: *Whitlock v Moree* [2017] UKPC 44; *Gaspar v Zaleski* [2017] EWHC 1770; *Inhenagwa v Onyeneho* [2017] EWHC 1971; *Cutting v McGough* (17 December 2017); *Constandas v Lysandrou* [2018] EWCA Civ 613; *Culliford v Thorpe* [2018] EWHC 426; *Wall v Munday* [2018] EWHC 879; *Dobson v Griffey* [2018] EWHC 1117; *Re Bhusate (deceased)* [2018] EWHC 2362 and *Secretary of State for Work and Pensions v Tower Hamlets LBC* [2018] UKUT 25. Where reports have failed to indicate which authorities were cited, it has been inferred from the absence of any mention of *Marr* that the case was not cited.

<sup>60</sup> [2017] EWHC 1770.

*Pensions v Tower Hamlets LBC*,<sup>61</sup> both of which were concerned with ‘investment’ properties. Interestingly, those two cases do not same adopt the same approach: the former applies the CICT doctrine to title to the property, whereas the latter does not (albeit on the somewhat novel basis that the true distinction is not between domestic and commercial cases, but the level of trust in the relationship).

The sole decision which did consider *Marr* is *Re Bhusate (deceased)*,<sup>62</sup> in which C claimed inter alia that certain facts which had occurred subsequent to Bhusate’s death gave rise to a common intention constructive trust in her favour of a title to a house. Chief Master Marsh appeared to recognise obliquely that *Marr* had expanded the law of common intention constructive trusts.<sup>63</sup> However, the dispute involved only the narrow question of whether the CICT doctrine could apply in an intestacy when all the facts relied upon post-dated the deceased’s death; it was decided that it could not.<sup>64</sup> The implications of *Marr* discussed in this note therefore did not fall for detailed consideration.

Nevertheless, it cannot be expected that exploration of the ramifications of *Marr* can be avoided indefinitely. The argument above has been that *Marr* has significantly widened the scope of the CICT doctrine and, if this is so, it is inevitable that an argument reliant on such expansion will eventually be advanced in some future case. When this happens, it is almost inconceivable that (notwithstanding *Willers v Joyce (No 2)*),<sup>65</sup> a lower court would not treat

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<sup>61</sup> [2018] UKUT 25 (AAC). Interestingly, the approach adopted by Upper Tribunal Judge Poynter, although similar to that taken in *Laskar*, is in some ways novel in its focus on the trust between the parties rather than the purpose for the transaction: see esp. [62].

<sup>62</sup> [2018] EWHC 2362.

<sup>63</sup> *Re Bhusate (deceased)* (n 62) at [66].

<sup>64</sup> *ibid.*

<sup>65</sup> [2016] 3 WLR 534.

*Marr* as authoritative.

## **A. Conclusion**

The decision in *Marr* represents a significant development in the law of common intention constructive trusts. It widens the scope of that doctrine to encompass all property, real or personal, acquired in the context of a close relationship, regardless of the purpose for which it was acquired. This is an unfortunate expansion of an already problematic area of the law. It is a doctrine unsupported by principle, as the doctrine adversely affects both individual litigants and the justice system as a whole and circumvents protective evidential rules. It is also unsupported by theory, not only resting on a conceptual foundation which is not justified either by past decisions or legislation, but also creating incongruous divisions within the law of intentionally created trusts. Given the inconsistencies between *Laskar* and *Marr*, it is to be hoped that when the common intention constructive trust doctrine in English law inevitably falls to be again considered by the Supreme Court, some necessary restraint is shown to prevent that doctrine from ballooning out of control.