
HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial
3. Trial bundle for Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court must be structured and succinct, getting to the heart of the matter without delay.
- It is to be assumed that the court has a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

Mr Cleaver Luk is a professional politician who has run for the Legislative Council a number of times (without any success). Throughout his political career, he has worked closely with Mr Wesley Potter, who has acted as his betting agent / bookie for his (usually unsuccessful) horse racing bets.

Cleaver has been living for the past 10 plus years with Ms Wendy Sham, his ex-wife since 2010, at No.7A, Avocado Road, Deep Water Bay ("**the Property**"). Wendy is a renowned novelist with a best-selling series of fantasy novels.

The Property is also the home of Cleaver and Wendy's daughter Leanne, who is now 15 years old and will be leaving Hong Kong soon to study in Sydney, Australia, with a view to emigrating there in the future.

The Property was at all times under Wendy's sole name.

When they divorced in 2010, Cleaver asserted that he had an interest by way of constructive trust in the Property, having won a Mark 6 lottery on 1 April 2007 and paid off a year's mortgage payments (HKD 3,000,000) with part of the winnings.

Wendy did not accept this assertion, and instead claimed that Cleaver came to her the very next day (*i.e.* on 2 April 2007) for a "*loan*" of HKD 3,000,000 so that he could pay off his bookies. Seeing that Cleaver's face was bruised and bloodied and feeling pity for him, she gave him HKD 3,000,000 cash from her personal home safe and said that Cleaver could forget about the mortgage repayment and that she would take care of it.

Cleaver denied Wendy's recollection of events on 2 April 2007, which was unsupported by any documentary evidence, stating that it was a mere figment of Wendy's imagination.

However in the end, Cleaver and Wendy separated amicably without Cleaver making any claim on the Property.

In April 2016, Wendy began an intimate relationship with Ms Scarlett Law, a mutual friend of both her and Cleaver. By April 2017, Scarlett had moved into the Property. Tensions between Scarlett and Cleaver soon arose and in April 2018, Wendy asked Cleaver to leave the Property. Cleaver refused to leave, claiming that the Property was also his in light of his alleged HKD 3,000,000 mortgage contribution.

Wendy then applied for vacant possession of the Property against Cleaver, who brought a counterclaim for a declaration that he is entitled to a 50% interest in the Property on the basis of there allegedly being a common intention constructive trust. On 1 April 2019, after hearing Wendy and Cleaver, Master WONG of the High Court granted Wendy vacant possession of the Property.

Cleaver appealed to the Court of First Instance, where the appeal was heard by Mr Justice Barney on 1 April 2020. Both Cleaver and Wendy were unrepresented before Barney J.

During the hearing, Barney J asked Cleaver whether Cleaver had any evidence to support the existence of a common intention that Cleaver should enjoy any beneficial interest in the property at all. Cleaver answered "*the conduct of the parties at relevant times*" but was unable to provide any further details.

Barney J responded that he could not see how any of the conduct put forward by Cleaver would lead to an inference that Cleaver enjoyed any beneficial interest in the Property in the first place and Cleaver made no further submissions.

In an *ex tempore* judgment, Barney J ruled against Cleaver, holding that Cleaver's inexplicable failure to pursue any action against Wendy in respect of the Property for over 10 years since their divorce negated the existence of any alleged constructive trust.

Cleaver appealed against Barney J's judgment and applied for a stay of execution before Barney J. The basis of Cleaver's application is:-

- (A) Barney J erred in finding that Cleaver's inaction was inexplicable. Cleaver's explanation for his delay in suing Wendy for his interest in constructive trust is explainable and explained in evidence; and
- (B) An appeal would be rendered nugatory unless a stay is ordered.

The evidential material to be used consists of the following affirmations:

1. Affirmation of Ms Wendy Sham, the Plaintiff
2. Affirmation of Mr Cleaver Luk, the Defendant

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent in the hearing:

- i. The Affirmations listed above.
- ii. The following case, copies of which are attached:
 - a. **Mo Ying v Brille Development Ltd** [2015] 2 HKLRD 985
 - b. **Star Play Development Ltd v Bess Fashion Management** [2007] 5 HKC 84
- iii. Hong Kong Civil Procedure (the Hong Kong White Book)

Evidential Material

HCA 1342/2020

Wendy Sham v Cleaver Luk

3rd Affidavit of Wendy Sham

I, Wendy Sham, of No.7A, Avocado Road, Deep Water Bay (“**the Property**”), do solemnly, sincerely and truthfully swear and say as follows:-

1. I am the Plaintiff herein. I make this affirmation in opposition of the Defendant’s application for stay of execution of the Hon. Mr Justice Barney’s decision dated 1 April 2020.
2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge, information and belief.

The appeal is without merits

3. While Cleaver is correct that Barney J erred in stating that Cleaver offered no explanation whatsoever for his failure to pursue a claim in constructive trust in the Property for over 10 years, it is also important to bear in mind the alternative bases Barney J found in my favour.

4. Immediately after the passage cited by Cleaver, Barney J said,

“Furthermore, I note that there is conflicting evidence between Cleaver and Wendy over what took place on 2 April 2007. While the issue is by no means easy to decide, I am of the very preliminary view that Wendy’s version of events is preferable to Cleaver’s version and that Cleaver’s HKD 3,000,000 contribution in respect of the Property was immediately repaid by Wendy.

However, in light of my conclusions regarding Cleaver’s unexplained failure to pursue any litigation to protect his alleged constructive trust, it is unnecessary (and indeed undesirable) for me to comment on this issue without the benefit of oral evidence from Cleaver and Wendy.”

5. In any event, if Barney J had examined Cleaver’s allegations concerning the conversation with Mr Wesley Potter, he would have rejected Cleaver’s explanation.

-
6. First, Mr Wesley Potter is not just a political consultant to Cleaver, but also his long-time bookie, helping Cleaver place bets on Hong Kong Jockey Club races.
 7. Mr Potter is not an independent witness and Cleaver's allegation that Mr Potter gave him some advice over litigation concerning the Property is suspicious.
 8. Secondly, the handwritten note alleged to be a record of Mr Wesley Potter's advice is undated and Cleaver has given no particulars as to why such a record was made, how such records are kept, or in fact who wrote down the advice. Again, the handwritten note is suspicious and of low evidential value.

The appeal would not be rendered nugatory

9. I am advised and believe that none of the allegations put forward by Cleaver supports his assertion that the appeal would be rendered nugatory without a stay.
10. I will leave it to my legal advisors to make suitable submissions.
11. However, just to set the record straight, Cleaver does not have a close relationship with Leanne.
12. Leanne has just turned 15 years old, not 17 years old. While Newt Wong is an Australian-born Chinese, she is a female model whose photos have appeared in publications such as VOGUE Hong Kong, as Cleaver could have found out if he took the simple step of googling "*Newt Wong*". Cleaver has obviously assumed from Newt's tomboy look that she is Leanne's boyfriend.
13. Leanne is going to study in Sydney, not Melbourne.
14. I have expended very significant time and costs in obtaining the Court's order removing Cleaver from the Property. I would humbly pray that the Court not deprive me of the fruits of the litigation and that it refuses Cleaver's application for a stay.

Wendy Sham v Cleaver Luk

3rd Affirmation of Cleaver Luk

I, Cleaver Luk, of No.7A, Avocado Road, Deep Water Bay ("**the Property**"), do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Defendant in this action. I make this affirmation in support of my application for stay of execution of the Hon. Mr Justice Barney's order as per his *ex tempore* judgment dated 1 April 2020 ("**Judgment**").
2. Unless otherwise stated, the matters deposed to herein are true to the best of my knowledge, information and belief.
3. I am advised and believe that there ought to be a stay of execution of the Judgment because (a) the appeal is meritorious, and (b) the appeal would be rendered nugatory if a stay is not granted.

The appeal is meritorious

4. In Barney J's *ex tempore* judgment, his Lordship said,

“Critically, Cleaver has given no explanation whatsoever why over the course of 10 years, he never pursued any legal action to protect his alleged interest in constructive trust in the Property. I find this an important fact against Cleaver's credibility and find in favour of Wendy in this case on this basis and this basis alone.”
5. With the greatest respect, his Lordship failed to take into account the following passage in my 3-page 2nd Affirmation, where I explained,

“21. After our divorce, I seriously considered initiating litigation against Wendy to seek a declaration that I have an interest in constructive trust in the Property. However, I was advised by my political consultant Mr Wesley Potter that it would be harmful to my political career, especially women voters, if I were to be seen as someone who fights with his wife over the family home. Accordingly, I decided not to sue Wendy.

-
22. It is now produced and shown to me marked “CL-3” a true copy of an undated handwritten note, recording Mr Wesley Potter’s advice to me, which I have found amongst my files.”
6. I am advised and believe that, given my claim in constructive trust is highly fact-sensitive, his Lordship’s misstatement of the facts must have materially impacted his decision.
7. Accordingly, my appeal against Barney J’s decision is meritorious.

Without a stay the appeal would be rendered nugatory

8. Moreover, I am advised and verily believe that without a stay the appeal would be rendered nugatory.
9. The Property has been my home for over 10 years. Unless the Court orders a stay, I will be homeless and in need of alternative accommodation.
10. Furthermore, the Property has also been the home of Wendy and my daughter Leanne. Leanne is turning 17 years old and will soon leave to study in Melbourne University, Australia, with a view of staying there with her Australian-born Chinese boyfriend, Newt Wong.
11. I have a very close relationship with Leanne and highly cherish my time with her. Given that she will soon be an adult and may be staying in Australia after her graduation, this may be the last period of my life where I will be living with her.
12. Unless the Court orders a stay, I will miss this unique and irreplicable time with my daughter, which cannot be compensated in monetary terms.
13. For the above reasons, I humbly pray the Court orders a stay of execution of the Judgment pending appeal.

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12-point font, single spaced).

You may refer to the attached case authorities as you think appropriate. You do not need to attach them to the skeleton; the Judge will have a copy of the cases at the hearing. You may also refer to the White Book as you think appropriate.

Please note that for the purpose of this assessment, your arguments must be limited to the case authorities and the White Book only.

You must email your skeleton arguments in MS Word format to the Secretariat to the Higher Rights Assessment Board at info@hrab.org.hk by **no later than 3:00pm of the Wednesday prior to the day of the assessment**. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. If you submit your skeleton late, it may not be marked and will place you at risk of failing the assessment.

THE CONDUCT of the Interim Application

1. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.
2. No reply submissions will be conducted.
3. You should be prepared to deal with judicial interventions and questions in relation to your submissions.
4. You should be prepared to address the court on the issues of costs as a matter of principle.

Mo Ying
and
Brillex Development Ltd

(Court of Appeal)
(Civil Appeal No 120 of 2014)

Cheung, Yuen and Kwan JJA
4–5 March, 15 April 2015

Land law — beneficial ownership — family home — property purchased in husband's sole name — whether wife had beneficial interest under common intention constructive trust — whether common intention could be inferred was to be deduced objectively from conduct of parties — common intention not established — remedy lay in matrimonial regime

Land law — common intention constructive trust — estoppel by silence or inaction — whether wife who knew of sale of matrimonial home before completion estopped from setting aside sale to purchaser due to her failure to inform purchaser of her interest in property

Trusts — common intention constructive trust — whether established

土地法 — 實益擁有權 — 家庭居所 — 以丈夫的唯一名字購買物業 — 妻子是否有共同意圖的法律構定信託下的實益權益 — 是否可以推論出共同意圖是可從當事人的行為客觀地推斷 — 未能確立共同意圖 — 在婚姻法律體制下提出補救的申索

土地法 — 共同意圖的法律構定信託 — 因緘默或不作為的不容反悔 — 妻子在交易完成前知道婚姻居所之出售是否因其沒有告知買方她於物業的權益而被禁止擱置對買方的售賣

信託 — 共同意圖的法律構定信託 — 是否確立

In May 1988, H purchased a flat (the Property) which was registered in his sole name. In December 1988, H's wife, W, came to Hong Kong from mainland China and the couple lived in the Property as their matrimonial home. Shortly after W's arrival, she and H discussed adding her name as a co-owner but H refused because he said it would be troublesome and cause expense (the Excuse). This was the only discussion between H and W on the matter, and it was not pursued by W. In October 2008, more than two years before W commenced divorce proceedings, H sold the Property to X, and W was informed of the sale some four weeks before

completion. H then leased back the Property from X, and W and the couple's children continued to live there. H used the sale proceeds arising from the Property to purchase some other properties. In 2010, H defaulted on the rent payments and X sought vacant possession. W brought proceedings against H and X, claiming beneficial ownership of the Property on the basis of a common intention constructive trust and seeking to set aside the sale to X on the ground that X had constructive notice of her interest because he failed to inspect the Property before purchase. The Deputy Judge dismissed her action and W now appealed.

Held, dismissing the appeal, that:

(*Per Cheung JA, Yuen and Kwan JJA agreeing*)

- (1) In respect of family homes registered in the sole name of one spouse, whether there was a common intention that the other party had any beneficial interest in the property for the purpose of establishing a common intention constructive trust was to be deduced objectively from the whole course of conduct of the parties, and the factors or types of evidence identified in *Stack v Dowden* were applicable. Detrimental reliance remained a requirement of a common intention constructive trust (*Stack v Dowden* [2007] 2 AC 432, *Abbott v Abbott* [2008] 1 FLR 1451, *Chan Chui Mee v Mak Chi Choi* [2009] 1 HKLRD 343, *Luo Xing Juan v Estate of Hui Shui See* (2009) 12 HKCFAR 1, *Jones v Kernott* [2012] 1 AC 776 applied). (See paras.5.17, 6.1–6.3, 6.12, 7.13.)
- (2) Whether the Excuse would lead to the conclusion of an express common intention on W's beneficial interest was a fact-sensitive and contextual issue and the Deputy Judge's conclusion that H by his words intended to brush off W was justified on the facts. H's words were equivocal and W was not thereby led into believing she would have an interest in the Property. W could not have reasonably believed that the reason given would one day disappear and her name would then be added to the title of the Property (*Eves v Eves* [1975] 1 WLR 1338, *Grant v Edwards* [1986] Ch 638 distinguished). (See paras.7.5–7.7.)
- (3) W's complaint about lack of finding by the Deputy Judge on the husband's credibility was rejected. The Deputy Judge was entitled to rely solely on W's evidence to make the necessary finding, and the relevant material was the words uttered by H which were not challenged and W's understanding of those words. (See paras.7.8, 7.11.)
- (4) W's evidence in cross-examination that H justified his refusal to register her name by saying, "What's the problem with adding your name or not? What belongs to me belongs to

you, I am also yours” would, if actually said, be the best evidence in support of the parties’ express common intention and would have put a different complexion on the Excuse. However, this was neither pleaded nor relied upon at trial in W’s closing submissions and smacked very much of an afterthought. (See paras.7.1–7.3.)

- (5) As for inferring common intention, while it was tempting to elide the matrimonial regime with the constructive trust approach, this was wrong in principle. In the constructive trust approach, the matrimonial relationship was no more than one of the factors to be considered. It should be given more weight because it was in the context of this relationship that the inference should be drawn, but one must not too readily infer the existence of the common intention of a claimant’s beneficial interest simply because of this relationship. Further, the acquisition of the Property as the matrimonial home did not throw any light on the spouses’ intentions with respect to its beneficial ownership (*Lloyds Bank Plc v Rosset* [1991] 1 AC 107 applied). (See para.7.14–7.16.)
- (6) The funding of the purchase of the Property through a loan from W’s sister and the sister’s occupation of it after the purchase also did not add much to the inference of the common intent. On the facts, W never had any joint bank account with H, and W never claimed that she had to use any part of her money in her personal account for payment towards the Property or that H had requested her to do so. W also admitted that H paid all mortgage instalment payments and all the expenses relating to the Property. Further, mere payment of household expenses by W was not expenditure referable to the acquisition of the Property (*Gissing v Gissing* [1971] AC 886, *Burns v Burns* [1984] Ch 317 applied.) (See paras.7.16–7.22.)
- (7) Under the present law and based on the factual finding of the Deputy Judge, W had failed to establish a claim to the Property based on a common intention constructive trust. Her remedy was to pursue in the matrimonial regime a share of the flats bought by H with the sale proceeds of the Property (*White v White* [2001] 1 AC 596, *DD v LKW* (2010) 13 HKCFAR 537 considered). (See paras.5.2, 7.23.)

(*Obiter*) (*Per Cheung JA*)

- (8) Even if W could establish an interest in the Property, she was estopped from setting aside the sale to X due to her failure to inform X of her interest in the Property. The mere fact that X had constructive notice of W’s interest at the time of purchase did not necessarily mean that W’s better priority could never be lost, estopped and/or waived (*Shropshire*

Union Railways and Canal Co v R (on the Prosecution of Robson) (1875) LR 7 HL 496 applied). (See paras.8.4–8.6, 8.12.)

- (9) W knew of the sale of the Property to X and the leaseback arrangement. Nonetheless, she had chosen not to speak up until 27 months later. W had a duty to speak up once she realised that H had agreed to sell the Property to X and further agreed to lease it back. X must have been prejudiced by W's conduct when X could have sought to rescind the sale if W had informed it of her interest (*Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253 distinguished). (See paras.8.4, 8.7.)

(*Obiter*) (*Per Kwan JA*)

- (10) W had raised no objection to the sale of the Property, and she consented to H entering into a lease back arrangement. There was "positive conduct" to found representation, alternatively W's silence or inaction had acquired a "positive content". X could "reasonably assume" that no adverse title or interest would be claimed (*Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 applied). (See paras.16–21.)

Appeal

This was an appeal by the plaintiff-wife against the judgment of Deputy Judge Eugene Fung SC (see [2014] 3 HKLRD 224) dismissing her action for a beneficial interest in the matrimonial home on the basis of a common intention constructive trust. The facts are set out in the judgment.

Mr William Wong SC and Mr Justin Lam, instructed by Fairbairn Catley Low & Kong and assigned by the Director of Legal Aid, for the plaintiff.

Ms Audrey Eu SC and Mr Alan Kwong, instructed by Poon, Yeung & Li, for the 1st defendant.

The 2nd defendant appeared in person.

Cases cited in the judgment

Abbott v Abbott [2007] UKPC 53, [2008] 1 FLR 1451

Barclays Bank Plc v O'Brien [1994] 1 AC 180, [1993] 3 WLR 786, [1993] 4 All ER 417, [1994] 1 FLR 1

Burns v Burns [1984] Ch 317, [1984] 2 WLR 582, [1984] 1 All ER 244, [1984] Fam Law 244

Chan Chui Mee v Mak Chi Choi [2009] 1 HKLRD 343

Chan Yuen Lan v See Fong Mun [2014] SGCA 36

Crabb v Arun District Council [1976] Ch 179, [1975] 3 WLR 847, [1975] 3 All ER 865, (1976) 32 P & CR 70

DD v LKW (2010) 13 HKCFAR 537, [2010] 6 HKC 528, [2011] HKFLR 106
Eves v Eves [1975] 1 WLR 1338, [1975] 3 All ER 768
Gissing v Gissing [1971] AC 886, [1970] 3 WLR 255, [1970] 2 All ER 780, (1970) 21 P & CR 702
Grant v Edwards [1986] Ch 638, [1986] 3 WLR 114, [1986] 2 All ER 426, [1987] 1 FLR 87
James v Thomas [2007] EWCA Civ 1212, [2007] 3 FCR 696
Jones v Kernott [2011] UKSC 53, [2012] 1 AC 776, [2011] 3 WLR 1121, [2012] 1 All ER 1265, [2012] 1 FLR 45
Lee Bing Chueng v Secretary for Justice [2013] 3 HKC 511
Lloyds Bank Plc v Rosset [1991] 1 AC 107, [1990] 2 WLR 867, [1990] 1 All ER 1111, [1990] 2 FLR 155
Luo Xing Juan v Estate of Hui Shui See (2009) 12 HKCFAR 1
Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890, [1976] 3 WLR 66, [1976] 2 All ER 641, [1976] RTR 437
Morris v Morris [2008] EWCA Civ 257, [2008] Fam Law 521
Pettitt v Pettitt [1970] AC 777, [1969] 2 WLR 966, [1969] 2 All ER 385, (1969) 20 P & CR 991
Rose v Stavrou [2000] L & TR 133
Savage v Foster 88 ER 299, (1722) 9 Mod Rep 35
Shropshire Union Railways and Canal Co v R (on the Prosecution of Robson) (1874–75) LR 7 HL 496
Spiro v Lintern [1973] 1 WLR 1002, [1973] 3 All ER 319
Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 WLR 831, [2007] 2 All ER 929, [2007] 1 FLR 1858
Ting Kwok Keung v Tam Dick Yuen (2002) 5 HKCFAR 336, [2002] 3 HKLRD 1, [2002] 1 HKC 601
White v White [2001] 1 AC 596, [2000] 3 WLR 1571, [2001] 1 All ER 1, [2000] 2 FLR 981
Williams & Glyn's Bank Ltd v Boland [1981] AC 487, [1980] 3 WLR 138, [1980] 2 All ER 408, (1980) 40 P & CR 451
Wong Chim Ying v Cheng Kam Wing [1991] 2 HKLR 253, [1989–91] CPR 476

Other materials mentioned in the judgment

Gardner and Davidson, "The Supreme Court on Family Homes", (2012) 128 LQR 178, pp.178–179
Gardner, "Family Property Today", (2008) 124 LQR 422, p.440
Goo & Lee on Land Law in Hong Kong (3rd ed., 2010), p.312
Gray and Gray, *Elements of Land Law* (5th ed., 2008), para.8.2.108
Handley on Estoppel by Conduct and Election (2006), para.3-012
Lewin on Trusts (19th ed., 2014) para.33-023
Snell's Equity (32nd ed., 2010) para.4-049
Spencer Bower on the Law Relating to Estoppel by Representation (4th ed., 2004) p.48 paras.III.4.3 and III.4.4(1)

Cheung JA

1. The plaintiff wife (the wife) claims beneficial ownership of a residential property in the State Theatre Building, North Point (the property) which was registered in the sole name of the 2nd defendant husband (the husband). The property was sold by the husband to the 1st defendant (the purchaser) in October 2008. The wife claims against the husband and the purchaser for, among other things, a declaration that she has a beneficial interest in the property and the husband is holding that interest on trust for her. She also seeks to set aside the sale of the property to the purchaser. The wife's claim against the husband and the purchaser was dismissed by Deputy High Court Judge Eugene Fung SC. The wife now appeals.

I. Background

2.1 The wife was a resident of Hangzhou in mainland China. The husband was a Hong Kong resident. On 29 October 1987 they were married in Hangzhou and about a year later in December 1988 the wife came to Hong Kong to join the husband and lived in the property as their matrimonial home. Shortly after the marriage, on 31 May 1988 the husband bought the property for \$500,000. The sale was completed on 20 June 1988. The husband paid a deposit of \$50,000 and the balance of the purchase price of \$450,000 was financed by a mortgage obtained by the husband. The wife claims that the property was bought as their matrimonial home because she had planned to move to Hong Kong for residence after their marriage and she and the husband wished to have their own children. The property was bought in the sole name of the husband because she was then still living in Hangzhou and had not yet moved to Hong Kong. Before the husband bought the property, he was living on his own in Hong Kong in a smaller flat which he also owned. That flat was sold shortly after the acquisition of the property.

2.2 Shortly after the wife arrived in Hong Kong and lived in the property, she discussed with the husband about adding her name as a registered owner of the property (the discussion). However, this was not done and the matter was not pursued further by the wife because during the discussion the husband told her that it would be very troublesome and they would have to incur expenses to add the wife as a registered owner. Another reason was that the wife was acting under the belief that as she was the lawful wife, she would have a beneficial interest in the property regardless of whether she was added as a registered owner or not.

2.3 Two children were born of the marriage, a daughter in January 1990 and a son in November 1995. The family continued

to live in the property although since mid-1995 the marital relationship had deteriorated. In July 2008, the husband entered into a provisional agreement to sell the property to the purchaser for \$1.75 million. The wife was told by an estate agent that a provisional agreement had been signed. The formal agreement was signed in July 2008 and the wife, by her own admission, knew of the sale by 1 October 2008.

2.4 The husband told the wife he had bought other properties in Tai Po for the family to live in. But the wife refused to move to Tai Po. She also refused to move to a rented flat in North Point. The husband then leased back the property from the purchaser for a term of one year on 9 October 2008. The sale to the purchaser was completed on 29 October 2008. The wife and the children continued to live at the property and the husband continued to rent it until July 2010.

2.5 From late July 2010, the husband defaulted in the payment of rent. On 13 September 2010, the purchaser commenced proceedings in the Lands Tribunal against the husband to recover vacant possession of the property. Although the Lands Tribunal ordered that vacant possession of the property be delivered to the purchaser, it also allowed the wife to be joined as a party and stayed the order for possession on 25 January 2011.

2.6 On 20 January 2011, the wife commenced the present action and on 30 January 2011 commenced divorce proceedings in the Family Court against the husband (FCMC 1264/2011).

2.7 At the time of the trial below, both the Lands Tribunal and the Family Court proceedings were stayed. On the hearing of the appeal we were informed that the wife had since moved out of the property.

II. Nature of the wife's claim

3. The wife's claim to the property is that the husband held the property on a common intention constructive trust for himself and her, and the husband sold the property without her knowledge and consent. The purchaser did not inspect the property before the purchase and therefore had constructive notice of the wife's beneficial interest in the property.

III. The Judge's decision

A. The claim against the husband

4.1 The Judge held that the burden was on the wife who was not a registered owner to prove she has a beneficial interest in the

property. He found that the wife had failed to establish the common intention constructive trust either expressly or by inference.

A.1) Express common intention

4.2 In respect of the express common intention, the Judge held that the husband did not want to make the wife a co-owner of the property and the wife knew of this. This is what the Judge found:

[61] Having carefully reviewed the evidence, I find that there was a short conversation between the Husband and Wife shortly after December 1988. In this conversation, the Wife asked the Husband to add her name as a co-owner of the Property. The Husband refused and said to the Wife 'it's troublesome, have to pay' (好麻煩, 要加錢). The Wife did not have any substantive response and the conversation ended shortly thereafter. *I find that the Husband at the time did not want to make the Wife a co-owner of the Property, and that the Wife knew that this was the case. And that was the reason why the Wife never raised the subject with the Husband again. I do not think the words used by the Husband in fact led the Wife to believe that she was to have some interest in the Property.* These findings are made not on the basis of my assessment of the credibility of the Husband and Wife, but on the basis of the Wife's own evidence, namely that the reason why she believed at the time she had an interest in the Property was due to the fact that she was married to the Husband. *Even on her evidence, the Wife never said that she was led by the Husband's response in this short conversation into thinking that she had or would have an interest in the Property. Insofar as the Wife thought at the time that she had an interest in the Property, I find that her (erroneous) belief was not caused by what the Husband said to her during the short conversation shortly after December 1988.* (Emphasis added.)

A.2) Inferred common intention

4.3 The wife relied on the following matters in support of her case that the common intention can be inferred:

- 1) there was a marriage;
- 2) the wife made monetary contributions through the pooled family resources;
- 3) the husband abandoned the property after 2005;
- 4) the husband took away his hi-fi equipment from the property in December 2008; and

- 5) the wife's sister was allowed to stay at the property after its purchase.

4.4 The finding of the Judge on this issue is as follows:

- [91] In the light of my findings made about regarding the absence of any alleged pooled family resources, it seems to me that the Wife can only rely on two matters to support her case on detriment: (1) that she paid for some of the household expenses (ie expenses not related to the Property) prior to 1997; and (2) that she resigned from work in around September 1997.
- [92] In my view, neither of these matters (whether taken singly or together) can constitute reliance on the part of the Wife to establish a common intention constructive trust. As mentioned above, the sort of conduct sufficient to constitute detriment for the purpose of establishing a common intention constructive trust must be conduct on which the plaintiff could not reasonably have been expected to embark unless he/she was to have an interest in the property: see *Grant v Edwards* at 648G–H (Nourse LJ). The two matters relied upon by the Wife cannot be described as such conduct. Indeed, as the Wife herself said so in her cross-examination, the reason why she gave up her job in 1997 was to look after the children and to help them with their studies, and she did not want to regret for not having done so.
- [93] Accordingly, even if the Wife has established a common intention to share the Property beneficially (which she has not), I would not have been able to find that the Wife acted to her detriment in reliance on any agreement, arrangement or understanding that she would take a beneficial interest in the Property.

B. The claim against the purchaser

4.5 The Judge held that his finding on the lack of a common intention was sufficient to dispose of the wife's claim against the husband and the purchaser. However the Judge also addressed other issues concerning the purchaser.

B.1) The purchaser's constructive notice

4.6 The Judge held that the purchaser was not a *bona fide* purchaser for value without notice. The Judge held that if the land is occupied by a person jointly with the vendor, this occupation will be constructive notice of that person's rights such as any rights

stemming from a contribution to the purchase price: *Wong Chim-ying v Cheng Kam Wing* [1991] 2 HKLR 253 at 273C–G (Clough JA). The Judge further held that the purchaser had constructive notice of the wife's interest because of its failure to inspect the property:

[132(2)] I cannot accept that a purchaser's duties to make enquiries would be different where a 'sale-and-leaseback' arrangement is entered into between the purchaser and the vendor upon the completion of the sale and purchase. It is true that under such an arrangement, the vendor's capacity would change from a vendor to a tenant after the completion of the sale and purchase. However, that change tells the purchaser nothing as to who was in actual occupation at the time when the property was being purchased. Without an inspection of the property, the purchaser would not be in a position to know whether anyone with an unwritten equity (eg a beneficial interest under a common intention constructive trust) is in occupation. A purchaser who chooses not to inspect the property in accordance with ordinary practice must bear the consequences. As Shaw LJ said in *Midland Bank Ltd v Farmpride Hatcheries Ltd* (1981) 260 EG 493 at 496: '[if] a purchaser ... elects to proceed with the transaction upon the assumption that no adverse interest exists of which he is not told, he will generally do so at his peril if reasonable enquiry would have elicited that his assumption was ill-founded'.

B.2) The purchaser's defence

4.7 The Judge also found that the wife was aware of the sale at the latest on 1 October 2008 and the leaseback in October 2008. The purchaser contended that if the wife had a beneficial interest in the property, she had a duty to speak out in the circumstances of this case and having failed to speak out, she was estopped from asserting her interest. The purchaser also relied on waiver, acquiescence and laches.

4.8 The Judge found against the purchaser on all its defences. It is sufficient for this appeal to state the reason of the Judge why the defence of estoppel fails:

[148] ... It cannot be disputed that the Purchaser had a duty to make inquiry, including a duty to inspect the Property

(see Section G above). In view of this, *I do not think a duty to speak could be imposed on the Wife to inform the Purchaser of her interest in the Property. Given that the Purchaser had failed to inspect the Property in the first place (and had therefore acquired constructive notice of the Wife's interest in the Property), the Purchaser could not 'reasonably assume' (using the words of Lord Wilberforce in Moorgate v Twitchings) that the Wife would not claim an interest in the Property.* (Emphasis added.)

IV. Common intention constructive trust

1) *The parties' common approach*

5.1 Both Mr William Wong SC and Mr Justin Lam on behalf of the wife and Ms Audrey Eu SC and Mr Alan Kwong on behalf of the purchaser accepted common intention constructive trust is the basis of the wife's claim. The dispute is really on the extent of the application of this principle to the wife's claim.

2) *Contrast with the matrimonial regime*

5.2 Mr Wong recognised that had the wife proceeded under the matrimonial regime in ancillary relief proceedings and asserted her interest in the property, the task of ascertaining her interest by way of such an arduous route would not have been necessary. Under the matrimonial regime of *DD v LKW* (2010) 13 HKCFAR 537 which adopted the English *White v White* [2001] 1 AC 596 approach and based on the principle of fairness, the starting point of the wife's interest in the property would be of an equal share. However, the situation here is that the property had long been disposed of by the husband to the purchaser on 29 October 2008. The husband had used the proceeds of sale to purchase three other properties in Tai Po. One of these had since been sold by the husband. The wife has made a claim on the two remaining properties. The purchaser has also joined in the ancillary relief application in order to protect its interest in the event that it is found liable in this action.

5.3 In order for the wife to assert an interest in the property against the purchaser, as distinct from asserting a share in the existing matrimonial assets of both the husband and wife, the wife has to resort to the constructive trust route. This is the approach adopted in *Wong Chim Ying* where the wife who was the sole registered owner of a property disposed of it without the knowledge of her husband. More recently in *Abbott v Abbott* [2008] 1 FLR 1451, the Privy Council dealing with an appeal from the Eastern Caribbean Court of Appeal concerning the beneficial ownership of a former

matrimonial home registered in the sole name of the husband and other assets of a husband, the wife in the divorce proceedings likewise had to proceed by way of the constructive trust route because Antigua, the Caribbean country from where the appeal originated does not have the equivalent of the wide powers of property adjustment enjoyed by divorce courts in the United Kingdom. Property disputes have therefore to be resolved according to the ordinary law. As Baroness Hale of Richmond held:

- [4] ... It is now clear that the constructive trust is generally the more appropriate tool of analysis in most matrimonial cases.

5.4 She observed at [4] that there are two separate questions involved on this issue. First, was it intended that the parties should share the beneficial interest in a property conveyed to one of them only and second, if it was so intended, in what proportions was it intended that they share the beneficial interest? Earlier at [2], she stated that:

Nevertheless, the inferences to be drawn from the conduct of husband and wife may be different from those to be drawn from the conduct of parties to more commercial transactions.

5.5 Baroness Hale in her earlier decision in *Stack v Dowden* [2007] 2 AC 432 (HL) identified the onus of proof in joint name and sole name situations:

- [56] Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

3) *The development of law*

5.6 The modern development of the law on constructive trust is found in the earlier landmark cases of *Pettitt v Pettitt* [1970] AC 777, [1969] 2 WLR 966, *Gissing v Gissing* [1971] AC 886, *Lloyds Bank Plc v Rosset* [1991] 1 AC 107. More recently the highest courts in the United Kingdom and the Commonwealth have further elaborated on the common intention constructive trust principle in three cases: *Stack* (House of Lords), *Abbott* (Privy Council) and *Jones v Kernott* [2012] 1 AC 776 (Supreme Court).

5.7 In respect of the earlier approach it is sufficient first to refer to what Lord Diplock said in *Gissing* at 905:

A resulting, implied or constructive trust — and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and the *cestui que trust* in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

5.8 Then in *Rosset*, Lord Bridge of Harwich at p.132 referred to the distinction between express discussion by the parties on the shares and inference to be drawn in the absence of such a discussion:

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 reached between them that the property is to be shared beneficially*. The finding of an agreement or 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 or a proprietary estoppel*.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement 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*. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do. (Emphasis added.)

5.9 As observed by Lord Walker of Gestingthorpe in *Stack* at [15], the three earlier cases of *Pettitt*, *Gissing* and *Rosset* have these common features: the dispute was between a husband (or his secured creditor) and a wife; the property in question was in single legal ownership; and the matter relied on by the non-owner claimant was no more than relatively trivial work and expenditure on the property.

5.10 In respect of the trio of modern authorities, both *Stack* and *Jones* are concerned with the interest of cohabitants in a family home registered in their joint names. The dispute is on the proportion of their respective interest. In *Stack* at first instance, both were held to be entitled to an equal share. On appeal, the woman (defendant) was given 65% in view of the fact she paid all the mortgage payments and household bills. The House of Lords dismissed the claimant's appeal. In *Jones*, the County Court Judge found that the claimant was entitled to 90% of the property. The Court of Appeal ordered equal entitlement. The Supreme Court reversed the Court of Appeal and restored the original apportionment. *Abbott* deals with the interest of a wife in properties registered in the sole name of the husband. The important feature in that case is that the husband conceded that the wife has a beneficial interest in the properties.

4) Nature of contribution

5.11 Lord Walker in *Stack* at [26] commented on the view of Lord Bridge in *Rosset* that it is doubtful whether anything less than direct contributions to the purchase price (whether initial payment or mortgage instalments) may give rise to a constructive trust:

- [26] Lord Bridge's extreme doubt 'whether anything less will do' was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in *Gissing v Gissing* [1971] AC 886 (see especially Lord Reid, at pp 896G–897B, and Lord Diplock, at p 909D–H). It has attracted some trenchant criticism from scholars as potentially productive of injustice: see *Gray & Gray, Elements of Land Law*, 4th ed, paras 10.132–10.137, the last paragraph being headed 'A More Optimistic Future'. *Whether or not Lord Bridge's observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction*, while bearing in mind that the Law Commission may soon come forward with proposals

which, if enacted by Parliament, may recast the law in this area. (Emphasis added.)

5.12 At [31], Lord Walker further stated that:

In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties' common intention.

5.13 Baroness Hale in *Stack* at [60] stated:

... The law has indeed moved on in response to changing social and economic conditions. The search is 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.

5.14 Specifically Baroness Hale in *Stack* stated more factors than financial contributions may be relevant to divining the parties' true intention:

[69] In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each

is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

[70] This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.

5.15 In *Abbott*, Baroness Hale affirmed the need to consider the parties' "whole course of conduct" and the "holistic approach", views she had earlier expressed in *Stack*.

5.16 In *Jones*, Lord Walker and Baroness Hale in their joint judgment further elaborated on the applicable principles on disputes in respect of family homes in joint names and family homes in sole name. In respect of *joint* name homes, the principles are as follows. For ease of reading, I have arranged each of the five principles in separate paragraphs:

[51] In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

- (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
- (2) 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.

- (3) Their common intention is to be deduced objectively from their conduct:

“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”: Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906.

Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden* [2007] 2 AC 432, para 69.

- (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, ‘the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property’: Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, ‘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.
- (5) 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 (as in case (3)) or fair (as in case (4)).

5.17 In respect of *sole* name family homes, the joint judgment held that the principles are:

- [52] ... The starting point is different. *The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership.*

But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above. (Emphasis added.)

V. The present dispute

1) Factors in determining common intention

6.1 What divided the parties in this case is what are the relevant principles or factors to be applied on the first issue of whether a claimant has any interest at all in a property. Ms Eu for the purchaser submitted that the factors identified in [69] in *Stack* are only relevant to the issue of quantification of shares but not on the issue of the common intention on ownership. Mr Wong for the wife took a different view and submitted that those factors are applicable to ascertaining common intention on ownership as well. Although the answer to this question does not appear to be readily available in *Stack*, in my view, *Jones* provides the answer in [51] and [52] of the joint judgment that I have just referred to.

6.2 Reading [52] first, in a sole name case it was held that the first issue of whether it was the common intention that the other party has any beneficial interest in the property at all is to be deduced objectively from the conduct of parties. Similar words are used in [51(1)], [51(2)] and [51(3)] when dealing with joint name cases, namely, the common intention on beneficial interest is to be deduced objectively from the conduct of the parties ([51(3)]) and as to that, Lord Walker and Baroness Hale expressly stated that examples of the type of evidence which might be relevant to drawing such inferences are given in *Stack* at [69]. This means that examples of evidence used in *Stack* to draw inferences are equally applicable to the first issue of determining whether there was a common intention of beneficial interest under sole name cases as well.

6.3 Johnson Lam J (as he then was) in *Chan Chui Mee v Mak Chi Choi* [2009] 1 HKLRD 343 had also considered, in respect of the first issue, that the whole course of conduct in relation to the property must be taken into account in the inquiry:

[66] However, I accept the plaintiff's evidence that when the Property was acquired, the first defendant had told her the Property would be for the use of the family and it would be sufficient just to put down his name on the title

- deeds as he was the head of the family. Is this sufficient to satisfy the hurdle at the first stage?
- [67] By itself, such a statement is perhaps too equivocal to establish a common intention to share beneficial ownership between the plaintiff and the first defendant. But as held in *Stack v Dowden* and *Abbott v Abbott*, the parties' whole course of conduct in relation to the property must be taken into account in determining the shared intentions as to its ownership.

6.4 Two post-*Stack* English cases are heavily relied upon by Ms Eu but they were decided before *Jones* and did not discuss what are the applicable factors in determining the common intention issue. However they are illustrative of the reticent approach of the English courts in inferring common intention constructive trust based only on conduct even post-*Stack*. In *James v Thomas* [2007] 3 FCR 696 the parties formed a relationship and the claimant moved into a property owned by the defendant to live with the defendant as man and wife. The property was solely owned by the defendant from where he carried on business as an agricultural building and drainage contractor. The claimant assisted in the business and engaged in heavy work. She asserted an interest in the property by way of constructive trust. She pleaded that:

- [33] ... whenever the parties discussed carrying out improvements to the property and matters relating to the business, the defendant would say to the claimant 'this will benefit us both'.

6.5 Her claim was rejected. The Court of Appeal, *per* Sir John Chadwick at 705, held that:

- [24] ... More pertinently, if the circumstances so demand, a constructive trust can arise some years after the property has been acquired by, and registered in the sole name of, one party who (at the time of the acquisition) was, beyond dispute, the sole beneficial owner: *Gissing v Gissing* [1970] 2 All ER 780 at 786, [1971] AC 886 at 901, *Bernard v Josephs* [1982] 3 All ER 162 at 170, [1982] Ch 391 at 404. But, as those cases show, in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition.

6.6 He further held that:

[36] The judge did not find it necessary to address the question whether Miss James acted upon the assurances to her detriment. That is understandable, given that he held that the assurances were not sufficiently specific to found proprietary estoppel or constructive trust. In the circumstances that I share that view, I, too, find it unnecessary to address the question of reliance. But, for completeness, I should add that the factors which lead to the conclusion that the assurances were not intended or understood as a promise of some property interest lead, also, to the conclusion that it would be unreal to think that Miss James did what she did in reliance on such a promise. The true position, as it seems to me, is that she worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas were making their life together as man and wife. The Cottage was their home: the business was their livelihood. It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest.

...
[38] ... Her interest in the property (if any) must be determined by applying principles of law and equity which (however inadequate to meet the circumstances in which parties live together in the twenty-first century) must now be taken as well-established. Unless she can bring herself within those principles, her claim in the present case must fail. As Baroness Hale of Richmond observed in *Stack v Dowden* [2007] UKHL 17 at [61], [2007] 2 FCR 280 at [61] it is not for the court to abandon the search for the result which reflects what the parties must, in the light of their conduct, be taken to have intended in favour of the result which the court itself considers fair.

6.7 In *Morris v Morris* [2008] EWCA Civ 257 the claimant is the wife of the 1st defendant. The 1st defendant and his mother entered into a farming partnership. One of the assets of this partnership is a farm property solely owned by the mother. The wife assisted in the farming business and carried out improvements to the farm. She asserted that she had a beneficial interest in the farm by reason of constructive trust, alternatively proprietary estoppel. Her claim was rejected on appeal.

6.8 The Court of Appeal, *per* Sir Peter Gibson, repeated what was said in *James*:

- [23] ... the first question being whether an agreement arrangement or understanding that the claimant was to acquire a beneficial interest in the land has been shown. The authorities make clear that a common intention constructive trust based only on conduct will only be found in exceptional circumstances.

6.9 The Court held that the claimant did not state any belief or expectation that she was entitled to an interest in the land. Further Sir Peter Gibson citing *James* held that:

- [25] Nor do I see that the conduct that is relied on by the claimant must lead to the conclusion that she was acquiring an interest in land. It has been said in a number of cases that the court should be cautious before finding that the activities of a wife or a cohabitant can only be explained on the footing that she believes that she was acquiring an interest in land.

2) Inference and imputation

6.10 There is discussion on the difference between inference and imputation of the common intention in respect of the second issue of quantification. It is sufficient to refer to the following in the joint judgment of Lord Walker and Baroness Hale in *Jones*:

- [31] In deference to the comments of Lord Neuberger and Rimer LJ, we accept that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. However, there are at least two exceptions. The first, which is not this case, is where the classic resulting trust presumption applies. Indeed, this would be rare in a domestic context, but might perhaps arise where domestic partners were also business partners: see *Stack v Dowden*, para 32. The second, which for reasons which will appear later is in our view also not this case but will arise much more frequently, is *where it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared. In those two situations, the court is driven to impute an intention to the parties which they may never have had.*
- ...

- [34] However, while the conceptual difference between inferring and imputing is clear, *the difference in practice may not be so great ... but rather that a finding as to subjective intention can only be made on an objective basis.* (Emphasis added.)

3) Detriment

6.11 Mr Wong further submits that detriment is no longer a component of the common intention constructive trust. There is certainly support for this view from Simon Gardner and Katharine Davidson QC in their paper “The Supreme Court on Family Homes” (2012) 128 LQR 178 at pp.178 to 179:

There are two questions. The first is whether the claimant is to have a beneficial interest of a greater size than his or her *prima facie* one: that is, in the sole name case, whether there is a constructive trust at all, under which the claimant has a beneficial interest; and in the joint names case, whether the prevailing constructive trust gives him or her a greater than 50 per cent beneficial interest. The second question, arising only if the first is answered in the claimant's favour, is what is the precise size of his or her resultant interest.

The first question is to be answered always by attending to the parties' genuine common intention, if any, as to the point in question, and never by imputing to them a non-genuine intention. This genuine common intention is to be discerned objectively from all manner of relevant evidence, as non-exhaustively described in *Stack v Dowden* at [69], and generalised as the parties' 'whole course of conduct in relation to [the property]' (at [60]). *By their conspicuous absence, we can conclude that there is no longer any requirement, so as to prove an implied common intention, to point to the claimant's direct financial contributions to the acquisition of the house; nor of detrimental reliance upon the common intention.* (Emphasis added.)

6.12 However on this point the Court of Final Appeal in *Luo Xing Juan v Estate of Hui Shui See* (2009) 12 HKCFAR 1 at 16, *per* Ribeiro PJ, has affirmed the requirement of detriment. Both *Stack* and *Abbott* were referred to the Court of Final Appeal. This is an approach this Court should follow:

- [38] Where a constructive trust is alleged to arise on the basis of the parties' common intention, it is the intention commonly held by the property owner and the claimant regarding their shared beneficial interests in the property that matters. *The trust is constituted by the claimant's detrimental reliance on their common intention and the*

unconscionability of the property owner departing therefrom.
(Emphasis added.)

4) Other jurisdiction

6.13 It is of note that the Singapore Court of Appeal in *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36 (a case not cited by the parties) after reviewing *Stack* and *Jones*, chose not to follow the constructive trust approach but instead chose to rely on resulting trust in deciding on the respective beneficial interest of a married couple in a property registered in the sole name of the wife but with the bulk of the purchase price coming from the husband. Neither of the parties had commenced matrimonial proceedings. The Court held that the starting point is that the parties' respective shares of the beneficial interest in the property at the time of its acquisition would be in the same proportions as their respective contributions to the purchase of the property. Nonetheless the Court will see if there is an express or an inferred common intention that the parties hold the beneficial interest in the property in a proportion which is different from the initial contributions.

6.14 However, as the parties before us have not argued that the constructive trust approach should not be adopted, I would not deal with the case further.

VI. The wife's appeal

1) Express common intention

7.1 Mr Wong challenged the Judge's finding on the lack of any express common intention on the part of the parties to confer an interest on the wife. He submitted that the Judge had ignored the wife's evidence in cross-examination that the husband justified his refusal to register her name by saying, "What's the problem with adding your name or not? What belongs to me belongs to you, I am also yours."

7.2 I accept that this is a very important piece of evidence and if it is accepted that the husband actually said those words, then it would have put a different complexion on the husband's excuse for not registering the wife's name because it was troublesome and required expenses. However this statement was not pleaded in the wife's statement of claim nor stated in her witness statement when dealing with the discussion and excuse by the husband. It was also not something that Mr Wong relied upon at the trial when he made his closing submission as something said by the husband. Mr Wong's case below was simply that it was the wife's understanding that the husband meant "that the Matrimonial Home would belong to both of them".

7.3 If this Court has to assess the credibility of this evidence, I would say immediately that it smacks very much of an afterthought. Had the husband actually said those words, then they should have featured most prominently at the forefront of the wife's claim because the words "what belonged to him also belonged to the wife" would be the best evidence in support of the express common intention of the parties on the beneficial interest of the wife.

7.4 The wife's understanding of the husband's meaning of those words would not have carried the matter further because she did not go on to say that because of what the husband told her, she was led to believe that she had an interest in the property. This was precisely what the Judge found:

[53] In her witness statement (in the same paragraph where she described the conversation with the Husband about the addition of name as a co-owner of the Property), she said irrespective of whether she was a registered owner, she believed that she would have some 'beneficial interest' in the Property by reason of her being the wife of the Husband. In her cross-examination, the Wife explained the use of the words 'beneficial interest' in her witness statement and said that those words were used by her lawyers. *She said that what she meant was that she believed that she was to have a share in the Property by reason of her marriage. There was no evidence from the Wife that she was led by the words uttered by the Husband in the conversation shortly after December 1988 into thinking that she had an interest in the Property.* (Emphasis added.)

7.5 In my view the Judge's conclusion that the husband at the time of the discussion did not want to make the wife a co-owner of the property and the wife knew that was the case is a matter this Court cannot lightly disturb. After all the Judge had before reaching this conclusion considered the two different meanings of the words uttered by the husband and the other evidence before he came to such a conclusion:

[59] (1) Looking objectively at the words uttered by the Husband during the conversation, it seems to me that those words are equivocal. On the one hand, it may be said that if the Husband truly thought that the Wife had no interest in the Property, he would have told her so directly and would not have just uttered the words. On the other hand, the words that were in fact said by the Husband may be taken to mean that he did not want to add the

Wife's name to the title of the Property and therefore told her not to hassle him and brushed her off.

7.6 The wife had relied heavily on *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch 638 to support her claim on express common intention. The Judge considered the relevance of these two cases. It is sufficient to refer to the Judge's summary and analysis of the cases:

- [55] In *Eves v Eves*, the parties lived together and intended to marry each other when they were free to do so. A house was purchased in the man's name. He told the woman that it was to be their house, but that it would have to be in his name alone as she was under the age of 21. This was an excuse to avoid a conveyance into joint names. She made no financial contribution, but did a great deal of work in the house and garden. After they parted, she successfully claimed a share of the beneficial interest in the house.
- [56] In *Grant v Edwards*, the defendant told the plaintiff with whom he was cohabiting that her name was not to go on to the title because, if the property were acquired jointly, it would operate to her prejudice in the matrimonial proceedings between her and her husband. The English Court of Appeal concluded that there was a common intention between the parties that the plaintiff was to have some sort of proprietary interest in the house.
- [57] It is true that the man in both *Eves v Eves* and *Grant v Edwards* gave an excuse for not having the house conveyed into joint names, and that the English Court of Appeal in both cases concluded that a common intention existed between the parties for the woman to have some beneficial interest in the house. However, it cannot be right to say that whenever a man makes an excuse for not wanting to convey a property into joint names, the court must necessarily find that there was a common intention between the parties that the property is to be shared beneficially. The fact that a man makes an excuse does not necessarily mean that he accepts that the woman should have a share in the property. Each case must turn on its own facts. This was made abundantly clear in *Stack v Dowden* at 459B and *Jones v Kernott* at 794F.

[58] One can understand why the excuse made by the man in *Eves v Eves* and *Grant v Edwards* led the English Court of Appeal to conclude that there was a common intention to share the house:

- (1) In *Eves v Eves*, the man told the woman that but for the fact that she was under 21, he would have put the house into their joint names:

“He told her that it was to be their house and a home for themselves and their children. He said that, as she was under 21, it could not be in joint names and had to be in his name alone; and that, but for her age, it would have been purchased in joint names.” [Lord Denning MR at 1340C–D]

“It is clear from the evidence, and was so found by Pennycuik V-C, that at the time of the purchase the defendant told the plaintiff that if she had been 21 years of age, he would have put the house into their joint names, because it was to be their joint home.” [Brightman J at 1343H]

- (2) Accordingly, on the facts of the case, the man clearly led the woman to believe that she was to have an interest in the house and the only reason why the house was not bought in joint names was that she was under 21. The basis for the court’s decision (Browne LJ and Brightman J) in favour of the woman rested upon the majority’s decision to draw an objective inference that there was an understanding that the woman was ‘intended to have some sort of proprietary interest in the house’ (see 1343E, 1344A–B and 1345B–E). Lord Denning MR reached his decision on the basis that the man ‘should be judged by what he told her — by what he led her to believe — and not by his own intent which he kept to himself’ (1342E–F).
- (3) In *Grant v Edwards*, similar reasoning was given by the English Court of Appeal:

Just as in *Eves v Eves* ..., these facts appear to me to raise a clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house; otherwise no excuse for not putting her

name onto the title would have been needed.
[Nourse LJ at 649B–C]

Whatever the defendant's actual intention, the nature of the excuse which he gave must have led the plaintiff to believe that she would in the future have her name on the title, and this in turn would justify her in concluding that she had from the outset some kind of right to the house. The case does not fall precisely within either of categories (b), (c) or (d) above, but the defendant's conduct must now preclude him from denying that it is sufficiently analogous to these categories to make the relevant principles apply. [Mustill LJ at 653E–G] ... the representation made by the defendant to the plaintiff that the house would have been in the joint names but for the plaintiff's matrimonial disputes is clear direct evidence of a common intention that she was to have an interest in the house ... [Sir Nicolas Browne-Wilkinson at 655G–H]

- (4) In both of these decisions, it seems to me that the courts wanted to ensure that the woman obtained the share in the property which she was led to believe by the man that she could have had. The same result could similarly have been achieved by applying the principles underlying the law of proprietary estoppel. Indeed, Sir Nicolas Browne-Wilkinson expressly referred to such a doctrine in *Grant v Edwards* at 656G–H as being 'closely akin to those laid down in *Gissing v Gissing*'. Be that as it may, even on the conventional common intention constructive trust approach, the courts in these two English cases inferred from the objective facts (including the making of the excuse by the man) that the man intended the woman to have share in the house, even though the man subjectively and in his own mind did not intend to do so.

[59] In my view, the reasoning in *Eves v Eves* and *Grant v Edwards* is not applicable to the facts of the present case:

- (1) Looking objectively at the words uttered by the Husband during the conversation, it seems to me that those words are equivocal. On the one hand,

it may be said that if the Husband truly thought that the Wife had no interest in the Property, he would have told her so directly and would not have just uttered the words. On the other hand, the words that were in fact said by the Husband may be taken to mean that he did not want to add the Wife's name to the title of the Property and therefore told her not to hassle him and brushed her off.

- (2) However, on her own evidence, the Wife was not led by the Husband's words into believing that she would have an interest in the Property. I have already mentioned the Wife's evidence above and will not repeat it again.
- (3) In any event, the nature of the words used by the Husband is very different from that of the excuse made by the man in *Eves v Eves* and *Grant v Edwards*. In the two English cases, the nature of the excuse was such that the woman could well believe that her name would be added to the title of the property when the excuse given by the woman was no longer relevant (ie when she reached the age of 21 or when her matrimonial proceedings with the husband were over). However, the Wife could not in the present case have reasonably believed that the reasons given by the Husband would one day disappear and that her name would be added to the title of the Property in the future. As will be apparent below, I do not believe the Wife ever held such a belief.
- (4) In these circumstances, I cannot infer from the words uttered by the Husband that there was a common intention between the Husband and Wife that the Wife was to have some interest in the Property.

7.7 I would respectfully adopt the Judge's analysis. Whether the excuse made by the husband would lead to the conclusion of an express common intention on the beneficial interest of the wife is very much a fact-sensitive and contextual issue and in this case the Judge's conclusion that the husband by his words intended to brush off the wife is justified on the facts of this case.

2) Finding on the husband's credibility

7.8 Mr Wong had made the lack of finding by the Judge on the husband's credibility as the prominent feature of the wife's appeal. He submitted that the Judge's approach was fundamentally flawed. For example, the Judge proceeded to consider the wife's evidence in a vacuum without taking into account the husband's evidence or credibility:

- 1) In relation to the discussion, in holding that the husband did not want to make the wife a co-owner of the property and the wife knew that this was the case, the Judge stated at [61] of the judgment that "[t]hese findings are made not on the basis of my assessment of the credibility of the husband and wife, but on the basis of the wife's own evidence".
- 2) In holding that the money from the sister's loan was not applied towards the purchase of the property, the Judge stated at [69(5)] of the judgment that "[i]t is apparent from the next sub-paragraph that I have not found it necessary to place any weight on the Husband's evidence on the issue in order to arrive at my conclusion".

7.9 Other examples included the factual finding that the husband could afford to pay the mortgage without the wife's assistance. The Judge at [80] stated that:

Third, I am not satisfied on the evidence that the Husband needed the Wife's income to settle the mortgage instalments. If the Husband could afford paying the mortgage (*as he claimed he could and I do not have sufficient basis to disbelieve him on this point*), I find it inherently improbable that he would agree with the arrangement now contended by the Wife. (Emphasis added.)

7.10 Mr Wong submitted that the basis for the Judge to rely on the husband's evidence on that point was stated to be "the Husband's character and personality". As the Judge explained in [78], he considered that the husband "is a man of strong character" with "a big ego" and "in every respect a male chauvinist". This is in stark contrast to the Judge's fastidious approach when probing for inconsistencies in the wife's evidence.

7.11 In my view what Mr Wong attempts to do is to find a theme which is so crucial that it will undermine the finding of facts by the Judge who conducted the trial and who had the benefit of hearing and observing the witnesses before him at first hand and also the benefit of having the whole spectrum of the evidence unfolding before him. However, as repeatedly said by the highest authorities such as *Ting Kwok Keung v Tam Dick Yuen* (2002) 5

HKCFAR 336, the deference by an appellate court to finding of fact by the trial judge is based on principles and the well-established test is whether the finding is plainly wrong. In this case on the express common intention issue the Judge was clearly entitled to rely solely on the wife's evidence to make the necessary finding. The relevant material is the words uttered by the husband which were not challenged and the wife's understanding of those words. The husband's evidence on this topic adds nothing further.

3) *Inferring common intention*

7.12 I have to say this is a topic that vexed me most during the appeal. One can see immediately the artificial nature of the exercise. This is a married couple who had lived with their children in the property as their matrimonial home. Their marriage lasted 24 years before the wife commenced her divorce proceedings. The wife had worked for a substantial part of the marriage and she had also looked after the two children of the family. Had this been an ancillary relief application under the matrimonial regime, her entitlement to the matrimonial home would not have been less than a 50/50 share. No doubt the property had been disposed to a third party, namely, the purchaser. But the disposal only occurred in July 2008 when the parties were already married for 20 years. The relevance of the purchaser's interest in the analysis is only to the extent of whether the sale should be set aside but the crucial issue is still whether the wife has any beneficial interest in the property at all.

7.13 I have already stated that the *Stack* and *Jones* approach on the need to consider the overall circumstances is applicable to the issue of inferring common intention from the conduct of the parties. The difficulty is the extent to which one should consider the setting of a married couple and their matrimonial home on this issue. Specifically, what weight should one put on a matrimonial relationship in the analysis which, after all, under the modern approach of fairness in the matrimonial regime, demands no discrimination in terms of the nature of contribution by a married couple. Simon Gardner in his work entitled "Family Property Today" (2008) 124 LQR 422 discussed the implication of a married relationship at p.440:

Effectuating the implications of the parties' relationship

In the kind of situation with which we are concerned, C and D will generally be in some sort of family relationship. It may be right to give C an (enlarged) interest because that is what the relationship itself requires.

Say C and D are married or civil partners. Their relationship generates at any rate a moral obligation on each of them to share

their resources with the other. The resources in question here are of many different kinds, but one kind is material wealth. (With all my goods I thee endow ... for richer, for poorer ...) *There are of course various ways in which the obligation to share material wealth can be understood, but a central candidate is that such wealth should simply belong equally (during the currency of the relationship jointly) to the parties. It is this understanding that has in recent years been translated into a legal rule that, in the event of the relationship's dissolution, such of the parties' assets as are not required for more specific needs should be divided equally. This rule does not itself bite before dissolution, but its underlying logic clearly applies at that stage too, so it is right to expect a sister rule working on the same lines from the outset. (A law lacking such a rule, moreover, would perversely present an incentive to divorce.)* In the absence of statutory provision, this latter rule would naturally operate via a constructive trust over the assets of the wealthier party. (Emphasis added.)

7.14 On reflection, whilst it is tempting to do so, in my view, it is wrong in principle to elide the matrimonial regime with the constructive trust approach. The matrimonial regime is based on statute and supplemented by the common law which has been developed incrementally over decades before it reached the present status of using equal shares as the starting point. In the constructive trust approach, the matrimonial relationship is no more than one of the factors to be considered in the inference exercise. This factor should no doubt be given more weight because it is in the context of this relationship that the inference should be drawn but what one must not do is to too readily infer the existence of the common intention of a claimant's beneficial interest simply because of this relationship. Even in the light of *Stack* and *Jones* it is difficult to refute in principle what Lord Bridge said in *Rosset* at 130D:

I pause to observe that neither a common intention by spouses that a house is to be renovated as a 'joint venture' nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property.

7.15 Once this principle is recognised, there is very little Mr Wong can advance to challenge the finding by the Judge on the issue of common intention by inference. Mr Wong contends that in the present case, the relevant factors include: (1) the marriage between the husband and wife, (2) the acquisition of the property as the matrimonial home for their family/children, (3) the wife's financial contribution to the family to enable the husband to meet mortgage payments, (4) the funding of the purchase of the property through the loan from the wife's sister (albeit not a direct

contribution by the wife) and (5) the sister's occupation of the property after the purchase.

7.16 I have already addressed factors (1) and (2), namely, the relationship and use of the matrimonial home. The acquisition of the property as a matrimonial home does not add anything more to the analysis. In my view factors (4) and (5), namely, the loan from the sister and her occupation of a room in the property after the purchase also do not add much to the inference of the common intent.

7.17 Mr Wong's main criticism is that the Judge wrongly decided on the issue of the wife's contribution. He submits that the wife's contribution to household expenses enabled the husband to meet the mortgage payments, by relieving the husband's burden to provide for the family on other matters. The evidence shows that the wife made a substantial financial contribution to family expenses so as to enable the husband to meet the mortgage payments (ie relieving the husband's burden to pay for other family expenses), given the dire state of the husband's finances at the relevant time. He submits that whilst it is correct that the mere payment of household expenses is not an expenditure referable to the acquisition of the property, however, it is well established that the payment of household expenses which enables the other to pay the mortgage instalments is sufficient to establish an indirect contribution to the property: *Gissing* at 903B–C; *Burns v Burns* [1984] Ch 317 at 328H–329C, 330D.

7.18 As submitted by Ms Eu there is ample evidence that the husband did not need any assistance from the wife to repay the mortgage loan:

- 1) The husband paid HK\$200,000 odd as the initial payment for acquiring the property (the total sale price was HK\$500,000). Notably, around the time when the property was purchased in June 1988 the husband sold his former home in North Point at HK\$301,000 receiving substantial sale proceeds.
- 2) The monthly mortgage repayment in respect of the property (for which the husband was solely responsible) was only HK\$2,200.
- 3) Around 1987, the husband was earning monthly income of HK\$5,500. Around 1989, the husband was earning monthly income of HK\$8,000 odd.
- 4) Moreover, the husband sublet the rooms in the property. In the first two years, he earned monthly rental of HK\$3,000. Subsequently, he earned monthly rental of HK\$5,000. The wife admitted that the husband alone handled the subletting.

7.19 On the contrary, the wife admitted she never had any joint bank account with the husband, and all her salaries were paid into her own bank account. She never claimed that she had to use any part of the money in her account for payment towards the property or that the husband requested her to do so. The wife also admitted all the mortgage instalment payments and all the expenses relating to the property were paid by the husband. In the premises, as found by the Judge, the alleged “joint pool assets” simply did not exist.

7.20 In my view, dealing with Mr Wong’s criticism, the Judge had actually addressed the issue of contribution:

- [84] Mr Wong submitted that the Wife must have paid some household expenses. I have no reason to doubt this. However, I do not think this is a sufficient basis to infer that the Husband and Wife each intended to have a beneficial interest in the Property. This is because the mere payment of household expenses is not an expenditure that is referable to the acquisition of the property: see *Burns v Burns* [1984] Ch 317 at 328H–329C (Fox LJ); *Grant v Edwards* at 647B. I understand from Mr Wong’s submissions that this proposition was accepted by the Wife.
- [85] For these reasons, I cannot infer from the Wife’s payment of household expenses (ie expenses not related to the Property) that there was a common intention between the Husband and Wife that the Property was to be shared beneficially.

7.21 Fox LJ in *Burns* at 330 stated that:

There remains the question of housekeeping and domestic duties. So far as housekeeping expenses are concerned, I do not doubt that (the house being bought in the man’s name) if the woman goes out to work in order to provide money for the family expenses, as a result of which she spends her earnings on the housekeeping and the man is thus able to pay the mortgage instalments and other expenses out of his earnings, it can be inferred that there was a common intention that the woman should have an interest in the house — since she will have made an indirect financial contribution to the mortgage instalments. But that is not this case.

During the greater part of the period when the plaintiff and the defendant were living together she was not in employment or, if she was, she was not earning amounts of any consequence and provided no money towards the family expenses. Nor is it suggested that the defendant ever asked her to.

He provided, and was always ready to provide, all the money that she wanted for housekeeping. The house was not bought in the contemplation that the plaintiff would, at some time, contribute to the cost of its acquisition. She worked to suit herself. And if towards the very end of the relationship she had money to spare she spent it entirely as she chose. It was in no sense 'joint' money. It was her own; she was not expected and was not asked to spend it on the household. (Emphasis added.)

7.22 The words that I have emphasised in Fox LJ's judgment is apposite to the situation of the wife in the present case.

4) The wife failed to prove her interest

7.23 In my view and with regret, under the present law, and based on the factual finding of the Judge, the wife has failed to establish a claim to the property. Her remedy is really to pursue in the matrimonial regime a share of the two flats in Tai Po which were bought by the husband with the proceeds of sale of the property. This being the case the issue of the quantification of the wife's interest in the property does not arise.

VII. The purchaser's challenge

1) Estoppel

8.1 In the Court below the purchaser contended that the wife was estopped from asserting her claim against the purchaser in that the wife had a duty to inform the purchaser of her interest in the property. The Judge rejected the purchaser's contention because the purchaser had failed to inspect the property in the first place (and therefore acquired constructive notice of the wife's interest) and therefore could not reasonably assume that the wife would not claim any interest in the property. This ruling proceeds on the assumption that the wife was successful in her primary case on the property. The purchaser renews the challenge before us.

2) The principles

8.2 Ms Eu relies on proprietary estoppel by reason of the failure of the wife to speak up and she submits that the cases on this topic include references to acquiescence, waiver etc. Ms Eu has summarised the relevant principles in this area which I would gratefully adopt:

- 1) An estoppel by silence, inaction or acquiescence arises where "a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring

the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations” and this has been approved as the general principle underlying “estoppel by acquiescence”: see *Spencer Bower on the Law Relating to Estoppel by Representation* (4th ed., 2004) para.III.4.3, at p.48, citing *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 903F (per Lord Wilberforce). See also *Lee Bing Chueng v Secretary for Justice* [2013] 3 HKC 511 at [40]–[45] (DHCJ Marlene Ng).

2) A duty to speak, such as to found an estoppel on silence will arise in circumstances:

- (1) “[w]here a person, having a title or right to property of any kind, perceives that another person is innocently, and ignorant, conducting himself with reference to the property in a manner inconsistent with such right or rights”: see *Spencer Bower on the Law Relating to Estoppel by Representation* (4th ed., 2004), para.III.4.4(1);
- (2) “[w]here an owner becomes aware that someone is attempting to dispose of his property”, and in such circumstances “he is bound to assert his rights and, if he fails to do so, he may be estopped against the disponent”. “His silence may be a representation either that he has no title or that the person dealing with the property has his authority”: see *Handley on Estoppel by Conduct and Election* (2006), para.3-012; or
- (3) “[w]hen anything in order to a purchase is publicly transacted, and a third person, knowing thereof, and of his own right to the lands intended to be purchased, doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser ... and in such cases infancy ... shall be no excuse”: see *Savage v Foster* (1722) 9 Mod Rep 35, 37 (see also *Spiro v Lintern* [1973] 1 WLR 1002, 1010F–1011D).

3) Discussion

8.3 The Judge’s reasoning has semblance (although not entirely) of the reasoning of the first instance decision of Godfrey J which was referred to in the Court of Appeal judgment in *Wong Chim Ying* at 276:

(4) *Estoppel: Apparent Ownership*

This point was only faintly argued and is not of any substance. Before Godfrey J the argument seems to have been confined to estoppel. He dealt with it as follows:

“The plaintiff contended that the husband was estopped from asserting his rights as against her, since he had clothed the wife with all the indicia of title which enabled the wife to hold herself out to the plaintiff as the beneficial owner. *But this is misconceived. If the plaintiff has no notice (actual or constructive) of the husband's rights, she would have taken free of those rights without need for recourse to the doctrine of estoppel. If she did have notice (actual or constructive) of those rights, she cannot claim to have been misled by the husband's conduct into believing that he had no such rights.*”

On appeal the emphasis was on the doctrine of apparent ownership on the basis that the husband had held out the wife to the whole world as the owner of the flat and had in fact connived in her dealing with the property as if it were her own. *Abigail v Lapin* [1934] AC 491 (PC) and *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371 (CA) were cited in support of this proposition. However in view of the *dictum* of Lord Wright in *Abigail v Lapin* (which was concerned with land held under the Torrens systems of registration) at p.506 to the effect that the doctrine of apparent ownership did not apply where a purchaser or mortgagee was affected by actual or constructive notice of a prior interest, Mr Chan conceded that if this court held that the plaintiff had constructive notice of the husband's rights in the present case, then his argument could not succeed. We have so held. (Emphasis added.)

8.4 In my view the mere fact that the purchaser in the present case had constructive notice of the wife's interest at the time of purchase does not necessarily mean that estoppel is inoperative. This case is different from *Wong Chim Ying* because the wife here knew of the sale to the purchaser and the leaseback (as found by the Judge) and yet she had chosen not to speak up until 27 months later.

8.5 As pointed out by Ms Eu the effect of constructive notice by the purchaser of the wife's interest operates to displace the purchaser's priority over the property. Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, 195 observed:

The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice) ...

8.6 But it does not mean that the wife's priority can never be lost, estopped and/or waived. The following supports this view:

- 1) *Goo & Lee on Land Law in Hong Kong* (3rd ed., 2010), at p.312 states "... [I]f the person in occupation of the land deliberately withholds information about his interest, the purchaser will not be fixed with constructive notice of that person's equitable interest. He may also be estopped from relying on constructive notice as a defence to the purchaser's claim of unencumbered title."
- 2) *Snell's Equity* (32nd ed., 2010) para.4-049 states that "(c) Fraud, estoppel and gross negligence. Fraud, estoppel or circumstances giving rise to gross negligence are sufficient to displace a prior interest as with completing legal and equitable interests ..."
- 3) *Lewin on Trusts* (19th ed., 2014) para.33-023 states that "The priority accorded to an equitable interest which was first in time can be lost by conduct of its owner such as to make it inequitable to rely on this priority." Such "pre-existing equitable title ... may ... be defeated by conduct, by representations, by misstatements of a character which would operate and ensure to forfeit and take away the pre-existing title ..." (citing *Shropshire Union Railways and Canal Co v R (on the Prosecution of Robson)* (1874-75) LR 7 HL 496, 506-507, per Earl Cairns LC).

8.7 In my view the wife must have had a duty to speak up once she realised that the husband had agreed to sell the property to the purchaser and further agreed with the purchaser to lease back the property. As a result of her silence the purchaser had completed the sale. The purchaser must have been prejudiced by the wife's conduct when it could have sought to rescind the sale if the wife had informed it of her interest.

8.8 There are arguments before us as to whether the purchaser can rely on other matters in support of its estoppel defence which were not pleaded, such as the purchaser being forced to participate in the present action because by the wife's application to set aside the sale, it is also forced to intervene in the matrimonial proceedings so as to assert an interest in the two Tai Po flats bought with the proceeds of sale of the property in the event the sale is set aside;

the husband's admission that he had used up the sales proceeds of the third Tai Po flat which he had disposed of; the husband is not in a good financial state and another Tai Po flat is subject to a charge registered by a bank/credit card company which has obtained judgment against the husband. Although Ms Eu submits that these matters were referred to in the purchaser's closing submission below, the Judge only addressed the issue of the wife's silence after she had knowledge of the sale and leaseback. In my view this Court should likewise only consider the matter that the Judge himself had considered. But even on that matter alone my view is that the estoppel defence is established.

4) *Shield or sword?*

8.9 In the Court below the purchaser relied on both estoppel by representation and proprietary estoppel. The Judge held that the three broad elements of both types of estoppel are the same but he held proprietary estoppel cannot be used as a defence and he confined his discussion on estoppel by representation. In my view the Judge was wrong when he said proprietary estoppel operates only as a defence. First, to fit estoppel into different compartments may not be of use. As Scarman LJ (as he then was) held in *Crabb v Arun District Council* [1976] Ch 179 at 193:

... I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance.

8.10 Second, while proprietary estoppel is usually used as a "sword" to found a cause of action, it does not mean it cannot also be used as a "shield" to defend a claim. In *Rose v Stavrou* [2000] L & TR 133, 141, Neuberger J (as he then was) held that:

There was some argument as to whether the estoppel was a promissory estoppel or a proprietary estoppel. I am not sure that it matters very much which it is. Classifications of estoppels sometimes can be of more interest to academic lawyers than anyone else. The reason why so much was made of it being a promissory estoppel was two-fold. The first is that if it is a promissory estoppel it is only a shield and not a sword and Mr Joseph says that, therefore, the claimant cannot seek a declaration on the face of it. I do not accept that. *It seems to me that a person who claims to have the benefit of a promissory estoppel, although he cannot found it as a basis for claiming damages, or something like that, is perfectly entitled to seek the assistance of the court as to the extent of his right or defence under the estoppel in question.* I know of no authority which would hold

otherwise and I would find it surprising if there were. (Emphasis added.)

8.11 In my view the same parity of reason applies to the present case as well.

8.12 In the circumstances I would hold that the wife would be precluded from setting aside the sale to the purchaser in the event she could establish an interest in the property.

VIII. Conclusion

9. Accordingly the appeal is dismissed.

IX. Costs

1) Costs below

10.1 The Judge ordered the wife to pay the costs of the husband and the purchaser. The Judge further granted certificate for two counsel to the purchaser. The wife challenges the costs order.

10.2 The wife argued before the Judge that the purchaser should pay two-thirds of her costs or alternatively to deprive the purchaser of all or some part of its costs on the basis that of the three distinct issues at the trial, namely (1) the common intention construction trust issue, (2) the *bona fide* purchaser issue and (3) the estoppel, waiver, acquiescence and laches issue, the purchaser had failed on issues (2) and (3).

10.3 The Judge rejected this contention. He adopted the general rule that costs should follow the event and issues (2) and (3) were all part of the purchaser's defence to the wife's claim and not separate and distinct in themselves so that the decision of them constituted an "event".

10.4 In my view an order for costs is discretionary and the Judge's reasoning cannot be faulted particularly now that on appeal the purchaser has succeeded on the estoppel issue as well.

2) Costs of the appeal

10.5 There will be an order *nisi* that the wife is to pay the husband and purchaser's costs of the appeal. There will be certificate for two counsel to the purchaser.

10.6 The wife's own costs are to be taxed according to the Legal Aid Regulations.

Yuen JA

11.1 I agree with the reasons given in Cheung JA's judgment for the dismissal of the wife's appeal based on common intention

constructive trust. It is trite to say that each case must be decided on its own facts but in cases where, because of the parties' close relationship, contemporaneous documents recording their intentions are unlikely to exist, there is all the more reason for an appellate court to defer to a trial judge's findings of fact made after he had seen and heard the witnesses giving evidence in court.

11.2 In the present case, it is important to note that the wife asked the husband if her name could be added as a registered owner of the property in December 1988 — soon after she arrived in Hong Kong. At that time, they had *not* lived together for any length of time (as she had been living on the mainland and he in Hong Kong), they had *no* children and she had made *no* financial contributions whether to the acquisition of the property or to the family. After the husband made an excuse not to add her name, the wife did not make any further inquiries or take any steps to press for her name to be added as a registered owner — because she assumed she already had an interest in the property simply by reason of her status as his wife. Further, and importantly, there was no evidence that her thinking, or the husband's, changed at any time in the years before he sold the property.

11.3 These facts are entirely consistent with the conclusion that no common intention constructive trust was ever intended. The wife's assumption that she had acquired a beneficial interest in the family home simply by reason of marriage to the title holder is not supported in law. (Of course if they had divorced before the sale of the property, then her claim to a right in the subject property would have been resolved within the family law regime).

11.4 In the absence of evidence of mutually intended "cooperative endeavour", and in the light of the evidence that the wife had proceeded on the basis of her incorrect assumption, there was a certain degree of artificiality in the argument that the parties had intended to create a common intention constructive trust. The court must be careful to guard against finding such a trust too easily in the absence of an express intention or very clear evidence of an inferred intention. After a thorough consideration of the evidence, the Judge came to the conclusion, correctly in my view, that these parties had never intended to create a common intention constructive trust.

11.5 I then come to the estoppel argument (which is advanced on the assumption that the wife had been able to prove that a common intention constructive trust had been created such as to give her a beneficial interest in the property).

11.6 In 1980 the House of Lords held in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 that in the case of a property held in the name of the husband, the wife who had contributed to the purchase price and had thereby acquired a beneficial interest in

the property had an “overriding interest” which took priority over a bank to whom the husband had charged the property. The bank had not inspected the property before lending money on the security of the charge and was thus not aware of the wife’s interest, and the wife testified that she was not aware of the charge. *Boland* was followed by this Court (*Clough and Penlington JJA* and *Mayo J*) in *Wong Chim Ying*.

11.7 In the present case the purchaser had failed to inspect the property before purchase and must be fixed with constructive notice of the wife’s interest. However that is not to say that her claim is unassailable. Her right to the interest, like all legal and equitable rights, can be waived. And like all claimants, she may find that she is estopped from asserting her rights by reason of her conduct.

11.8 In this respect, the following passage in *Gray and Gray, Elements of Land Law* (5th ed., 2008) is instructive (para.8.2.108, footnotes not included):

A further curtailment of the *Boland* ruling has been brought about by estoppels founded on the implied waiver of rights. Courts will not allow a trust beneficiary to remain deliberately silent about his or her equitable rights at the date of a transaction of sale or charge, only to assert these rights later as having priority over a third party who has dealt in good faith with the sole registered proprietor. In this context, of course, the applicability of estoppel doctrine depends vitally on the trust beneficiary’s awareness of the relevant disposition. Where a beneficiary had no contemporaneous knowledge that the registered proprietor was dealing with his title, the courts have allowed the beneficiary to retain the protection of her overriding interest. But where such knowledge was present, the courts have ruled that trust beneficiaries — usually members of the registered proprietor’s family — are estopped from overriding the priority of the disponee. Any other approach ‘would go near to saying that our system of conveyancing permits a mortgagor to obtain money under a false pretence’. Thus, for instance, in *Paddington Building Society v Mendelsohn* a beneficial co-owner was deemed, by non-disclosure of her rights to a mortgagee, to have conceded priority to the latter.

11.9 The evidence in the present case was that the wife had been informed of the husband’s sale of the property some four weeks before completion. Yet she had stood by and let her husband complete the sale and receive the proceeds from a third party who had parted with the purchase money in good faith. Her explanation was that she had wanted to save her marriage; in other words, she chose to go along with the husband’s decision to sell the property and in return (to comply with her wish to continue living in North Point) he rented the property back for her to continue living there.

That was a course that the wife chose with knowledge that the sale had not yet been completed and despite her belief that she had a beneficial interest in the property.

11.10 In those circumstances, I take the view that a court might well have found that the wife had waived her rights to the proprietary interest she had in the property and/or had failed to come to the court with clean hands.

11.11 I too would dismiss the wife's appeal and make the orders in [9], [10.5] and [10.6] of Cheung JA's judgment.

Kwan JA

12. I have had the benefit of reading in draft the judgments of Cheung JA and Yuen JA. I respectfully agree that the wife's appeal should be dismissed in that she had failed to establish a common intention constructive trust for the comprehensive reasons given in their judgments. I also agree with the orders Cheung JA proposed to make on costs. That being the case, it is not strictly necessary to deal with the purchaser's contention in its respondent's notice that the Judge should have held that the wife is estopped from asserting any interest in the property.

13. But as Cheung JA had dealt with in full the submissions on estoppel, and in deference to the arguments made to us by the parties, I wish to say a few words of my own. For my part, I would have upheld the defence of estoppel, on more restricted grounds, based on the defence as pleaded and the Judge's findings.

14. The Judge found that the wife knew about the sale of the property by the husband on 1 October 2008 at the latest ([138] of the judgment) and that she knew in October 2008 or shortly thereafter that there was some lease arrangement in respect of the property ([141]). He found that between 18 July 2008 (the date of the provisional agreement for sale and purchase) and 29 October 2008 (the date of completion of the sale and purchase), the wife was told by the estate agent that the property was sold by the husband and the provisional agreement had been signed ([126]). The purchaser entered into an agreement with the husband to lease back the property to him for a year on 9 October 2008.

15. It was pleaded in the defence that the wife knew before the completion of the sale and purchase that a purchaser would purchase the property and that she could continue to stay on because the husband managed to reach agreement with the purchaser to have the property leased back to him (defence, para.20(3)), that the wife knowingly and unreasonably chose not to take any action to stop or restrain the completion of the sale and purchase or to warn the purchaser (para.20(4)), that by her conduct she had approved of or acquiesced in the sale to the purchaser (para.20(5)), and that it would be inequitable and unjust for her to assert or enforce her

interest in the property as the purchaser had altered its position to its detriment (para.20(7)).

16. Like the Judge, I do not find it necessary to differentiate between estoppel by representation and proprietary estoppel in this instance as the broad elements required to found estoppel by either route would appear to overlap. He held that the purchaser had failed to establish the existence of a representation in that by the silence or inaction of the wife, the purchaser could not “reasonably assume” (using the words of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 903F) that she would not claim an interest in the property, given that the purchaser had constructive notice of her interest as it had failed to inspect the property in the first place ([148]).

17. It seems to me that the Judge was in error in the above holding.

18. In the earlier part of his judgment in *Moorgate Mercantile* at 902H to 903B, Lord Wilberforce had said this:

English law has generally taken the robust line that a man who owns property is not under any general duty to safeguard it and that he may sue for its recovery any person into whose hands it has come ... He is not estopped from asserting his title by mere inaction or silence, because inaction or silence, by contrast with positive conduct or statement, is colourless: it cannot influence a person to act to his detriment unless it acquires a positive content such that that person is entitled to rely on it. In order that silence or inaction may acquire a positive content it is usually said that there must be a duty to speak or act in a particular way, owed to the person prejudiced ...

19. And in a subsequent passage at 903F to G relied on by both Mr Wong and Ms Eu, Lord Wilberforce continued as follows:

What I think we are looking for here is an answer to the question whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the ‘acquirer’ of the property, would expect the ‘owner’ acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known to, and discoverable by, the ‘acquirer’ and whether, in the face of an omission to do so, the ‘acquirer’ could reasonably assume that no such title was claimed.

20. Applying the law as stated above, on the facts of this case, I am of the view there was “positive conduct” of the wife to found representation, alternatively her silence or inaction had acquired a “positive content” in that not only had she raised no objection to the sale, she had permitted or consented to the husband entering

into a leaseback arrangement with the purchaser. Asking the question of the reasonable man, given this additional factor, the purchaser could “reasonably assume” that no adverse title or interest would be claimed as whoever might have an interest in the property was content to have the property leased back to the husband.

21. The judge did not discuss the elements required for estoppel other than the requirement of a representation. But I see no difficulty with the purchaser satisfying the other elements and no suggestion was made by any party that they could not be fulfilled.

Reported by Sarah Cheng

STAR PLAY DEVELOPMENT LTD v BESS FASHION MANAGEMENT CO LTD A

COURT OF FIRST INSTANCE
ACTION NO 4726 OF 2001
MA J
28 MAY, 7 JUNE 2002

 B

Civil Procedure – Stay of execution pending appeal – Appeal against order for possession – Principles for exercise of discretion – Rules of the High Court O 59 r 13(1) C

民事訴訟程序 – 暫緩執行以待上訴裁定 – 針對管有令提出上訴 – 行使酌情權的準則 – 《高等法院規則》第59令第13(1)條

The plaintiff landlord and the defendant tenant entered into a tenancy agreement in respect of premises in Kowloon for a term of two years from 1 January 1999. On 12 April 2001 the plaintiff's solicitors served a notice to quit on the defendant for the termination of the tenancy on 31 October 2001. The premises were not delivered up on the due date. The plaintiff commenced proceedings for vacant possession, mesne profits and damages and obtained summary judgment from a master. The defendant appealed unsuccessfully before Ma J (see [2002] 1 HKC 708). The defendant filed a notice of appeal against the judge's decision and applied for a stay of execution of the order for possession of the premises. D

Held, granting stay of execution for actual possession of the premises until the determination of the appeal or until further order: F

(1) An appeal would not operate as a stay of execution of proceedings: O 59 r 13(1). Unless a party could justify its claim, a stay of execution would not be ordered (paras 6-7). G

(2) In order to justify a stay of execution, one had to demonstrate that good reasons existed. Relevant factors included whether the absence (or existence) of a stay would render an appeal nugatory (thus bringing into focus the relative prejudice that may be caused to the appellant and to the respondent by a stay of execution) and the merits of the appeal (para 8). H

(3) As to whether an appeal would be rendered nugatory, the court must first have regard to the nature of the order that was the subject matter of the appeal. If the order appealed against was a money judgment, the court would require evidence as to why the levying of execution would result in the appeal being rendered nugatory. The requisite quality of the evidence would depend on the nature of the order or judgment appealed against. Where it was said that the levying of execution would result in financial ruin or serious financial consequences for the appellant, the court would require good evidence to support the contention. A bare assertion was not enough. On the other hand, an appeal being rendered nugatory did not mean in all cases that without a stay, the appellant might face financial ruin. It would be sufficient to demonstrate that the failure to I

A grant a stay would have a serious deleterious effect. *Caine Tai Investment Co Ltd v Ayala International Finance Ltd & Anor* [1983] 1 HKC 163; *World Trade Centre Group Ltd v Resourceful River Ltd* (CACV 70/1993, 12 May 1993, unreported) and *Ketchum International plc v Group Public Relations Holdings Ltd* [1997] 1 WLR 4 considered (paras 9(1)-(4)).

B (4) The existence of an arguable appeal (ie an appeal with reasonable prospects of success) was the minimum requirement before a court would even consider granting a stay. Conversely, the existence of a strong appeal or a strong likelihood that the appeal would succeed, would usually by itself enable a stay to be granted because this would constitute a good reason for a stay. Where there existed only an arguable appeal, the appellant would need to provide the court with additional reasons as to why a stay was justified, for example, that an appeal would be rendered nugatory. Correspondingly, where it could not be shown that an appeal would be rendered nugatory if a stay were not granted, the court would require the appellant to demonstrate strong grounds of appeal or a strong likelihood of success. *World Trade Centre Group Ltd v Resourceful River Ltd* (CACV 70/1993, 12 May 1993, unreported); *Winchester Cigarette Machinery Ltd v Payne (No 2)* (Eng CA, The Times 15 December 1993, unreported); *Mabul Properties Corp v Ahmed* (Eng CA, 24 June 1987, unreported); *Fung Wai Kwong William v Insider Dealing Tribunal* [2001] 1 HKC 44 considered (paras 9(6)-(8)).

E (5) Bearing in mind that the successful party should not be deprived of the fruits of his success, it was always relevant to consider the prejudice that would be caused to the successful party (the respondent in the appeal) in the event a stay was granted and if necessary, to impose conditions so as to minimise the prejudice caused to him. *Winchester Cigarette Machinery Ltd v Payne (No 2)* (Eng CA, The Times, 15 December 1993, unreported) considered (paras 9(9)-10).

F (6) There should be a stay of execution for the *actual* possession of the premises. The court was unimpressed with the defendant's assertion that it would be in financial ruins if a stay were not granted. The only fact that saved the day for the defendant was that if a stay of execution was not granted, it would lose possession of the premises. From the plaintiff's point of view, in obtaining a stay, the defendant would be entitled to remain in possession of the premises until at least the hearing of the appeal, and this was a legitimate grievance, but it was not one which would cause undue hardship or prejudice to the plaintiff (paras 11-13).

Obiter

H (7) The word 'actual' was used deliberately to allow the plaintiff to complete all procedures for levying execution with the bailiff up to but excluding the actual possession of the premises. Thus the plaintiff was, to an extent, protected against any delay arising from the appeal, in the event that it was ultimately decided in its favour (para 14).

Cases referred to

I *Caine Tai Investment Co Ltd v Ayala International Finance Ltd & Anor* [1983] 1 HKC 163 (CA)
Fung Wai Kwong William v Insider Dealing Tribunal [2001] 1 HKC 44 (CA)
Ketchum International plc v Group Public Relations Holdings Ltd [1996] 4 All ER 374, [1997] 1 WLR 4 (CA)

- Mabul Properties Corp v Ahmed* (Eng CA, 24 June 1987, unreported) (CA) A
Winchester Cigarette Machinery Ltd v Payne (No 2) (Eng CA, The Times, 15 December 1993, unreported) (CA)
Wilson v Church (No 2) (1879) 12 Ch D 454, 41 LT 296 (CA)
World Trade Centre Group Ltd v Resourceful River Ltd (CACV 70/1993, 12 May 1993, unreported) (CA) B

Legislation referred to

Rules of the High Court (Cap 4A) O 59 r 13(1)

[Editorial note: 'In the subsequent case of *Wenden Engineering Co Ltd v Lee Shing Yue Construction Co Ltd* [2002] HKCU 846 (HCCT 90/1999, 17 July 2002, unreported), Ma J (as he then was) reiterated his observations in this case. Neither judgment has previously been reported, but both have been referred to in many subsequent cases.' — WS Clarke. For discussion of the discretion to stay execution pending appeal, see WS Clarke *Hong Kong Civil Court Practice* (LexisNexis Butterworths), commentary under O 59 r 13.] C
D

Summons

This was an application by the defendant, Bess Fashion Management Co Ltd, for stay of execution of an order granting summary judgment to the plaintiff, Star Play Development Ltd, for possession of premises. The facts were adequately stated in the following judgment. E

Richard Khaw (Johnson Stokes & Master) for the plaintiff.
Josiah Lee (Fung Wong Ng & Lam) for the defendant.

Ma J: The application before the court

1. On 25 February 2002, I dismissed the defendant's appeal from the Order of Master Ho granting summary judgment to the plaintiff whereby the defendant was required to deliver up vacant possession of the premises known as Shops G06-07, G/F, Hollywood Plaza, Nathan Road, Kowloon (the Premises) [see [2002] 1 HKC 708]. F
G

2. In summary:

- (1) The plaintiff was the landlord and the defendant, the tenant of the Premises under a tenancy agreement dated 5 October 1999 (the Tenancy Agreement). The original term under the Tenancy Agreement was two years from 1 November 1999. H
- (2) The Tenancy Agreement contained an option exercisable by the defendant whereby the tenancy of the Premises could be extended by a one year. The main question in the action was whether the Tenant had exercised the option. The plaintiff contended that the defendant had not. For its part, the defendant argued that it had, alternatively that the plaintiff was estopped from contending otherwise or had waived its rights; in the further alternative, that an oral agreement had been made whereby the tenancy was extended by two years. I

- A (3) I held against the defendant on all three defences.
3. The defendant has appealed by a notice of appeal dated 14 March 2002 in relation to the first two defences. I am informed that the appeal is fixed for hearing on 17 October 2002.
- B 4. By a summons also dated 14 March 2002, the defendant applied for a stay of execution on Master Ho's said Order. On 28 May 2002 at the resumed hearing of the summons, I made an order granting a stay of execution for the *actual* possession of the Premises until the determination of the said appeal or until further order, with costs in the appeal. I also
- C made an order regarding payments to be made by the defendant for the use and occupation of the Premises in the interim.
5. I now give the Reasons for this decision. I will also presently explain the significance of the phrase 'actual possession' in the order.
- D *Stay of execution: the applicable principles*
6. Though in the court's discretion whether or not to grant a stay, it is important to bear in mind that the starting point is RHC O 59, r 13(1):
- E 'Except so far as the court below or the Court of Appeal or a single judge may otherwise direct —
- (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;
- F (b) no intermediate act or proceeding shall be invalidated by an appeal.'
7. In other words, unless the defendant can justify a stay of execution, one will not be ordered. The practice of the court is that justification can be demonstrated only if good reasons exist.
- G 8. Good reason can exist in a variety of forms. It will be wrong to set out any exhaustive definition of what would constitute good reasons, but, commonly, reference is made to factors such as whether the absence (or existence) of a stay would render an appeal nugatory (thus bringing into focus the relative prejudice that may be caused to the appellant and to the
- H respondent by a stay of execution), and the merits of the appeal.
9. In the context of these two factors, I would make the following observations:
- I (1) In determining the question whether or not an appeal would be rendered nugatory, the court must of course first have regard to the nature of the order that is the subject matter of the appeal. If the order appealed against is a money judgment, the court will require evidence as to why the levying of execution will result in the appeal being rendered nugatory, such as, for example, an appreciable risk that the respondent to the appeal would not be able to repay in the

event of a successful appeal. Sometimes, though, the nature of the order will by itself almost be determinative of the question. Where the relevant order is, for example, an injunction (and particularly so if it is a mandatory injunction), it may well be that, without a stay, an appeal would be rendered nugatory in the event of a successful appeal. Similarly where, as in the present case, the relevant order is one for the possession of premises, again it can readily be appreciated that without a stay of execution, more often than not, it is likely than an appeal would be rendered nugatory: see *Ketchum International plc v Group Public Relations Holdings Ltd* [1997] 1 WLR 4, at 10H.

- (2) That said, whatever the nature of the order or judgment appealed from, the court will still require evidence as to why an appeal will be rendered nugatory in the event of a stay not being granted. The requisite quality of the evidence will, of course, depend on the nature of the order or judgment appealed against.
- (3) I now deal with a common facet relied on in any argument relating to an appeal being rendered nugatory, namely that of financial ruin or serious financial consequences. Where, as in the present case, it is said that the levying of execution would result in financial ruin or serious financial consequences for the appellant, the court will require good evidence to support this contention, such as the production of accounts or other documents to justify the assertion. A bare assertion is unlikely to meet with much sympathy where more substantial evidence is available: see the observations of Mr Justice Litton, JA in *World Trade Centre Group Ltd v Resourceful River Ltd* (CACV 70/1993, 12 May 1993, unreported) Court of Appeal, at 3-4.
- (4) An appeal being rendered nugatory does not mean in all cases that without a stay, the appellant faces financial ruin or the loss of all his property. Demonstrating that the failure to grant a stay would have a serious deleterious effect is enough: see *Caine Tai Investment Co Ltd v Ayala International Finance Ltd* [1983] 1 HKC 163, a decision of the Court of Appeal which made reference to *Wilson v Church (No 2)* (1879) 12 Ch D 454.
- (5) How relevant then is the court's consideration of the merits or strength of the appeal? In my view, while it is impractical and even undesirable for the court in dealing with an application for a stay of execution, to go deeply into the merits and strengths of an appeal, it must however form a preliminary view of these aspects. This I believe to be an inevitable consequence of the starting point I have earlier mentioned in referring to O 59, r 13(1).
- (6) The existence of merely an arguable appeal cannot *by itself* amount to sufficient reason to justify a stay. It can be put this way: the

A

B

C

D

E

F

G

H

I

- A existence of an arguable appeal (that is, one with reasonable prospects of success) is the minimum requirement before a court would even consider granting a stay. In other words, however exceptional the circumstances may be otherwise justifying a stay of execution, if the court is not convinced that there exist arguable grounds of appeal, no stay will be granted.
- B
- C (7) Conversely, however, the existence of a strong appeal or a strong likelihood that the appeal would succeed, will usually by itself enable a stay to be granted because this would constitute a good reason for a stay: see *World Trade* at 2; *Winchester Cigarette Machinery Ltd v Payne (No 2)* (15 December 1993, unreported), English Court of Appeal (a case referred to by the Court of Appeal in *Fung Wai Kwong William v The Insider Dealing Tribunal* [2001] 1 HKC 44).
- D
- E (8) In most cases, the court will not be dealing with the extreme situations I have referred to. Often, it will be faced with simply the existence of an arguable appeal. Here, it becomes necessary for the appellant to provide additional reasons as to why a stay is justified. The demonstration of an appeal being rendered nugatory is one example, albeit a common one. Here, where it is demonstrated that an appeal would be rendered nugatory if a stay was not granted, the court may require no more than the existence of an arguable appeal. Correspondingly, where it cannot be shown that an appeal would be rendered nugatory if a stay were not granted, the court will require, in the absence of any other factors, the appellant to demonstrate strong grounds of appeal or a strong likelihood of success. This I understand to be the sentiment found in authorities such as *World Trade* at 2 (in a passage cited with approval by the Court of Appeal in *Fung Wai Kwong William* at 48) and *Mabul Properties Corp v Ahmed* (24 June 1987, unreported), English Court of Appeal.
- F
- G
- H (9) I have so far referred to the position of the appellant. It is important to stress that the court must not at any stage forget the position of the successful party. It is always relevant to consider the prejudice that would be caused to the successful party (the respondent in the appeal) in the event a stay is granted and if necessary, to impose conditions so as to minimise the prejudice caused to him. *A fortiori*, the court must consider any contention that the appeal would be rendered nugatory to him (in the event the appeal is dismissed) should a stay of execution be imposed.
- I
10. Ultimately, the court embarks on a balancing exercise and uses its common sense, but bearing in mind at all times the starting point that the successful party is not to be deprived of the fruits of his success: see

Winchester Cigarette Machinery, per Ralph Gibson LJ.

A

The present case

11. The defendant contends (in an affidavit of one of its directors) that if a stay were not granted, its business would be ruined as it would lose virtually 30-40% of its business turnover. I am not impressed by what were really bare assertions of financial ruin. No financial documents were exhibited to justify the assertion. I repeat here to the comments of Mr Justice Litton JA in *World Trade Centre*.

B

12. The only fact that saved the day for the defendant was that if a stay of execution was not granted, it will lose possession of the Premises. Were it to succeed in the appeal (and ultimately in the trial of the action), it would have been entitled to remain in the Premises for another year by reason of the exercise of the option. The plaintiff was unable to say (although this was hinted at in its written submissions) that if the appeal was allowed, the defendant would somehow be allowed back into the Premises. Indeed, I perceive, the whole point of levying execution was to enable the plaintiff to let the Premises to another tenant.

C

D

13. However, I have not ignored the plaintiff's position in the event of a stay being granted. I fully appreciate that from the plaintiff's point of view, in obtaining a stay, the defendant has succeeded in the action proper to an extent, namely, that it will remain in possession of the Premises until at least 17 October 1992, which is just shortly before the time when the tenancy would expire on the basis that the option was validly exercised. This is a legitimate grievance, but one which does not in my view cause undue hardship or prejudice to the plaintiff, for in the event the plaintiff succeeds in the appeal (or in the action as the case may be), it would be entitled to mesne profits and damages arising from the defendant's wrongful occupation of the Premises.

E

F

14. Finally, I turn to one aspect of the terms of the Order I have made. They refer to the stay of execution for the 'actual' possession of the Premises. I have used this word deliberately. I was informed by Mr Khaw (for the plaintiff) that in levying execution for possession of premises, a number of procedures involving the bailiff have to be completed before actual possession is obtained. By using the word 'actual', I intended that the plaintiff would then be free to complete all procedures up to but excluding the actual possession of the Premises. In this way, the plaintiff is to an extent protected against any delay arising from the appeal in the event that it is ultimately decided in its favour.

G

H

Reported by PY Lo

I

HIGHER RIGHTS OF AUDIENCE ASSESSMENT
IN RESPECT OF CIVIL PROCEEDINGS
THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that for the mini-trial conducted at the assessment, only one witness for each party will actually be physically present for examination purposes.

The Issues at Trial

This is the trial of Cleaver Luk's counterclaim against his ex-wife Wendy Sham for a declaration that the Property was held in constructive trust in equal shares between them.

There are two main issues in Cleaver Luk's counterclaim:

- (A) Given that the Property was and is at all material times in Wendy's sole name, has Cleaver succeeded in rebutting the presumption that Wendy is the sole beneficial owner of the Property?
- (B) If the answer is "yes", has Cleaver demonstrated that he is entitled to 50% beneficial interest in the Property?

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini-trial on the day of the assessment itself when you arrive and register.

Plaintiff's witness

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

-
1. Cleaver Luk; and
 2. Wesley Potter, long-time political consultant and betting agent / bookie to Cleaver Luk.

Defendant's witness

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Wendy Sham; and
2. Scarlett Law, Wendy Sham's current partner.

You can assume:

- i. the witnesses will give evidence at trial in the order listed above.
- ii. the witnesses who will not appear "live" at the mini-trial will have given/will give evidence in terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

However, for the avoidance of doubt, you may make use of the Affirmations in the interim application for the purpose of this exercise.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)
- examine in chief (max 10 minutes) the witness who will give "live" oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that his/her statement does not stand as evidence in chief
- cross-examine (max 15 minutes) the opponent's witness who is attending the trial to give "live" oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness's statement does not stand as evidence in chief.

-
- deal with any intervention made by the advocate representing the opposing party
 - make any interventions, as you think appropriate, to the questioning of the witnesses by the advocate representing the opposing party
 - deal with any judicial interventions and questions as and when they arise

