# OUP Equity and Trusts Update (Winter 2022)

## ***Equity's Remedial Nature***

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Equity has always historically been, and continues contemporaneously to be, concerned with achieving 'justice' and 'fairness' in a dispute between parties. In its earliest days, it was concerned with the King, and then the Chancellor, exercising the Crown's residuum of justice and hearing appeals from the King's common law courts. Although the exercise of Equity would become standardised and transformed into an entire and stand-alone body of jurisprudence following the reforms initiated by Lord Nottingham in the 17th century, its remedial nature has always remained central to Equity even to this day.

Equity's remedial nature takes two different forms. The first, true remedies, include specific performance, injunctions, accounts of profit and recission. Through these wide-ranging equitable remedies, the courts are able to compel defendants to either act in a certain way or prevent certain behaviour. The second form, remedial mechanisms, are not true remedies. For example, the constructive trust, resulting trust and proprietary estoppel are not true remedies and are in instead equitable mechanisms through which the true beneficial owner of property can be identified. Though not true remedies, they do nevertheless provide remedial relief (particularly in the wider Common Law where the remedial constructive trust has been adopted by some jurisdictions[1]) to the claimant by allowing them to reclaim property or to acquire property promised to them – much in the same way that specific performance compels a contracting party to sell the 'thing' at the centre of the contract that consideration has been bargained for.

This update therefore focuses on some of the most recent cases within Equity's remedial elements. The first section considers two cases that dealt with true equitable remedies - the granting of an injunction. The first, *Technology Sourcing v Chadli*[2], was concerned with the application of an interim injunction requiring the deliverance of confidential information wrongly retained by a former employer. The second, *High Speed Two (HS2) Ltd v Persons Unknown*[3], concerned the application for an interim injunction restraining protestors from interrupting and disturbing work to construct the HS2 project. Complicating matters in *HS2*, however, was the large territorial area covered by the applied for injunction, and the inability to identify many of the protestors. Both cases therefore demonstrate the scope and challenges associated with applications for injunctions.

The second and third sections of this update deal with Equity's non-true remedies. In the second section, *Antonio v Williams*[4] dealt with an application under Inheritance (Provision for Family and Dependants) Act 1975 made by a 12-year-old child for whom no provision had been made in his aunt's, and *de facto* mother's, will. The final section concerns *Fattal v Fattal*[5], where a

[1] See *Hunter Engineering v Syncrude Canada Ltd* [1989] 57 DLR. The remedial constructive trust, although proposed by Lord Denning in the form of the 'new model' constructive in *Hussey v Palmer* [1972] 1 WLR 1286, has been rejected in England – *Grant v Edwards* [1986] Ch 638, per Nourse LJ at 647
[2] [2022] 6 WLUK 134
[3] [2022] EWHC 2360 (KB)
[4] [2022] EWHC 2383 (Ch)
[5] [2022] EWHC 950 (Ch)

non-traditional use of the common intention constructive trust was attempted, and a mistaken transfer of land was remedied.

Each of these recent updates will now be considered.

## Section 1
## **Equitable Remedies:** Injunctions in Action

As noted in the introduction to this update, equitable remedies are well known for their breadth and usefulness to claimants – particularly within the law of contract. Unlike the common law remedy for breach of contract, damages, which merely seeks to provide a monetary solution to the breach and that can in many instances be an unsatisfactory outcome, Equity provides a number of different and powerful remedies. This is seen most clearly with injunctions, where failure to abide by the terms constitutes contempt of court. So severe are the repercussions for committing contempt of court[6], that in *Sage v Hewlett Packard*[7] imprisonment for 12 months was ordered for failing to abide by the injunction's terms.

The primary alternative equitable remedy for breach of contract, specific performance, compels the contracting parties to complete their obligations, rather than merely pay damages to atone for the breach. This is a vital remedy should the subject matter of the contract be of unique[8], scarce[9], or of little economic value with only nominal damages due[10].

Along with specific performance, the most important equitable remedy is the injunction. Injunctions, court orders that compel a party a party to undertake specific conduct, have many subcategories. The most foundational distinction is between mandatory and prohibitory injunctions. Under a prohibitory injunction, a party is compelled to refrain from certain conduct – for example being restrained from building on land should there be a dispute about whether a restrictive covenant limits the use of the land. Under a mandatory injunction, a party is required to perform certain conduct – for example, should it be established that a restrictive covenant did limit the use of the land and a building had been constructed, then being ordered to demolish the building[11]. The courts therefore have great scope in controlling the conduct of parties subject to a legal dispute.

Further distinctions within the law on injunctions relate to time. Whereas a perpetual injunction is granted after a full hearing and constitutes a full and final remedy (even though it may be time limited), an interim/interlocutory injunction is granted only to preserve the status quo until such time that a full trial can take place – thereby ensuring that its existence is time limited. Moreover, a *qui timet* injunction – whether it be mandatory or prohibitory – can be granted should it be threatened that conduct that infringes a claimant's rights will or could occur. Thereby, in addition to a range of conduct that can be ordered, the courts also have a high degree of flexibility concerning the length of time for which the injunction will be applicable.

[6] Contempt of Court Act 1981
[7] [2017] EWCA Civ 973
[8] *Falcke v Gray* [1859] 4 Drew 651
[9] *Sky Petroleum v VIP Petroleum* [1974] 1 All ER
[10] *Beswick v Beswick* [1968] AC 58
[11] *Broadland District Council v Brightwell* [2010] EWCA Civ 1516

It is within this context that two recent cases have dealt with the granting of injunctions. The first *Technology Sourcing v Chadli*[12], dealt with the granting of an injunction to compel the return of confidential documents. The second, *High Speed Two (HS2) Ltd v Persons Unknown*[13], dealt with restraining protests that interfered with the completion of the High Speed Two rail line. Each raises important points regarding the granting of injunctions.

1) *Technology Sourcing v Chadli* [2022] 6 WLUK 134

*Chadli* involved a dispute between a specialist IT recruitment company (Technology Sourcing) and its former market director for France – Chadli. Within the employment contract entered into between Chadli and Technology Sourcing were several duties placed upon Chadli, including:

- to perform their duties diligently;
- to promote Technology Sourcing's interests and reputation;
- to refrain from engaging in any other business activity which would create a conflict of interest or interfere with their duties;
- to not compromise, divulge, or use confidential information;
- to immediately deliver up all such information on termination of the employment contract; and
- to refrain from dealing with the Technology Sourcing's current or prospective clients for six months after termination.

As a result of these extensive contractual clauses, Chadli was subject to several restrictive covenants both during and after the cessation of their employment – particularly given that owing to their senior position, their attendance at confidential meetings, and their access to the client relations system, they had a large amount of confidential information at hand.

Chadli eventually resigned after what Technology Sourcing described as months of work that failed to meet the standards expected. As a precaution, they were placed on gardening leave. Upon their exit interview, they indicated that they intended to remain in the industry but remained hesitant and evasive as to their actual future plans. Consequently, a search of their emails took place, and several instances of unacceptable behaviour were discovered that breached their contractual obligations. These included:

- making contact with Technology Solutions' clients while on gardening leave;
- evidence of soliciting clients on Chadli's own behalf or that of a competitor;
- using their personal email address;
- sending candidate CVs to themself; and
- double deleting certain emails.

Despite this evidence, Chadli denied any wrongdoing nor having any confidential information. Upon request, Chadli also failed and refused to return any confidential information they retained.

To remedy these breaches, Technology Solutions sought an interim injunction compelling Chadli to abide by their contractual obligations and deliver up the retained confidential

[12] [2022] 6 WLUK 134
[13] [2022] EWHC 2360 (KB)

information. In applying for the injunction, Ellenbogen J in the High Court was required to apply the *American Cyanamid*[14] guidelines:

1) was there a serious issue to be tried;
2) were damages an adequate remedy;
3) where did the balance of convenience lie?

Ellenbogen J, applying the guidelines, first concluded that there was a serious to be tried. It was held owing to clear evidence that Chadli had double deleted emails without plausible justification, that there was a serious issue to be tried in respect of whether they had breached their duties of confidentiality and other contractual obligations. Moreover, as the potential loss incurred by Technology Solutions could not be determined and there was no evidence that Chadli was in a position to satisfy any award made against them, the only feasible remedy was the granting of the order. Finally, it was also held that the balance of convenience rested with granting the order to allow for the breaches to be fully investigated and to prevent destabilisation of Technology Solutions workforce.

*Chadli* demonstrates the lengths to which the courts are willing to go to protect an employer's confidential information that may have a profound impact upon their business. By requiring Chadli to deliver up the confidential information retained through an interim injunction, the courts are ensuring that delays and the time taken to get to trial will not impinge on the employer's ability to undertake their commercial activities – particularly where there is a risk to the overall effectiveness of the employment team.

2) *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB)

The second recent judgment to deal with an application for the granting of an injunction was *High Speed Two (HS2) Ltd v Persons Unknown.* Whilst *Chadli* dealt with breach of confidentiality, *HS2* dealt with trespass and nuisance, and dealt with the use of injunctions on a much greater territorial scope.

*HS2* concerned the flagship, but controversial, transport policy for successive Labour and Conservative governments to build a high-speed rail line from London to the Midlands, and eventually the North of England. The body established by Parliament to bring the policy to fruition, also named High Speed 2 (HS2), had been granted extensive powers to purchase and take possession of land necessary to construct the railway. Problematically though, numerous protestors had disrupted, and intended on continuing to disrupt, the construction of the railway. Therefore, HS2 sought an injunction restraining the protestor's ability to disrupt construction.

The first issue the High Court had to address was whether trespass had been committed. It was noted, relying on the similar but not identical case of *Manchester Airport plc v Dutton*[15], that the primary issue for bringing a trespass claim was whether the claimant (here HS2) had better right to possession than the protestors. This had been previously addressed in *Secretary of State for Transport and another v Persons Unknown (Harvil Road)*[16], where it was held that HS2 did have sufficient possession of the land to provide them with better title than the protestors

[14] *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1
[15] [2000] QB 133, at 147
[16] [2019] EWHC 1437 (Ch) at 7

and thereby the right to sue for trespass – that possession including the preparation of the land for the construction of HS2.

One of the defendants, however, rejected this, and submitted that HS2 had not yet taken possession of much of the land required to complete the project[17], and hence did not have a better right to possession. Thereby, it was submitted that a distinction between land where the works had already commenced and land where works were not due to be completed for an extended period should be drawn. However, this argument was rejected – the requirement in *Dutton* was merely that the claimant had better a better right to possession, and not that they had actually taken possession – and thereby drawing a distinction between the pieces of land was untenable[18], and HS2 had the right to apply for the injunction[19]. It was further held that despite the protestors possessing 'genuine and *bona fide* concerns about the HS2 project', they did not amount to a defence to the tort of trespass – indeed the 'Court should be slow to spend significant time entertaining these [submissions]'[20].

Regarding whether trespass had occurred, Knowles J found that 'the evidence is plentiful' that instances of trespass had occurred[21], with the following having occurred:

- breaching fencing and damaging equipment;
- climbing and occupying trees on trespassed land;
- climbing onto vehicles (aka, 'surfing');
- climbing under vehicles;
- climbing onto equipment, eg, cranes;
- using lock-on devices;
- theft, property damage and abuse of staff, including staff being slapped, punched, spat at, and having human waste thrown at them;
- obstruction; (somewhat ironically) ecological and environmental damage, such as spiking trees to obstruct the felling of them;
- waste and fly tipping, which has required, for example, the removal of human waste from encampments;
- protest at height (which requires specialist removal teams);
- and tunnelling[22].

The second claimed wrong done to HS2 was nuisance. A public nuisance is "one which inflicts damage, injury or inconvenience on all the King's subjects or on all members of a class who come within the sphere or neighbourhood of its operation. It may, however, affect some to a greater extent than others"[23]. Whereas a private nuisance is any continuous activity or state of affairs causing a substantial and unreasonable interference with a claimant's land or his use or enjoyment of that land[24]. It was further noted by Knowles J that interfering with a claimant's right of access to its land via a public highway can constitute a private nuisance[25]. Consequently, owing to the protestors' actions restricting HS2's access to the land intended to

[17] *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB), at 57-58
[18] Ibid, at 78 and 152
[19] Ibid, at 151
[20] Ibid, at 80
[21] Ibid, at 154
[22] Ibid, at 156
[23] *Soltau v De Held* (1851) 2 Sim NS 133, at 142
[24] *Bamford v* Turnley (1862) 3 B & S
[25] *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29

be in their possession, a series of private nuisances had occurred[26] with many of the actions that constituted trespass also constituting a nuisance[27].

Notwithstanding the instances of trespass and nuisance committed by the protestors, the primary issue that required analysis in *HS2* was whether an injunction could be granted to prevent the wrongs from being committed again in the future. The High Court had the power grant an injunction under s37 Senior Courts Act 1981, and as clarified in *Lawrence v Fen Tigers*[28] (which overturned the established orthodoxy built around *Shelfer v City of London Electric Lighting*[29]) the presumption should be that an injunction will be granted where such a remedy is appropriate to bring the nuisance or trespass to an end.

As with the application for an interim injunction in *Technology Sourcing v Chadli* set out above, the application in *HS2* required the application of the *American Cyanamid*[30] principles of a) is there a serious issue to be tried, b) whether damages were an adequate remedy, and c) where does the balance of convenience lie. However, in applications regarding trespass, the 'Court must be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial'[31]. Consequently, the requirements to obtain an injunction preventing future trespasses is higher than standard interim injunctions.

A further and complicating factor was the lack of an identifiable set of defendants to whom a successful application could be made applicable to, as the identity of the protestors (particularly those potentially committing future acts) was unknown. In *Canada Goose*[32], the Court of Appeal provided a summary of the requirements to grant an injunction against unidentified individuals that was subsequently approved in *Barking and Dagenham*[33], and includes:

- There must be a 'sufficiently real and imminent risk of a tort being committed';
- Those defined as 'persons unknown' must be capable of being identified and then served;
- The prohibited conduct must related to the threatened tort;
- The terms of the injunction must be sufficiently clear and precise, and must be defined in terms of conduct rather than causes of legal action; and
- The injunction must have clear geographical and temporal limits.

In applying the requirements to the order sought by HS2, it was held that the injunction sought against 'persons unknown' had a clear end date of May 2023 that would see the order end if not renewed, and there were to be yearly reviews 'to determine whether there is a continued threat which justifies continuation of this Order'[34]. In regard the geographical extent of the proposed injunction, it was recognised that large areas were affected (given the scope of the HS2 project encompassing large parts of England), but that in *National Highways Limited v Persons Unknown and others*[35] and injunction was granted that covered 4,300 miles of roads.

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[26] *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at 86
[27] Ibid, at 159
[28] [2014] AC 822
[29] [1895] 1 Ch 287
[30] [1975] UKHL 1
[31] *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at 97, referencing *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, [44]-[48] (CA)
[32] *Canada Goose Retail Ltd v Persons Unknown* [2020] 1 WLR 2802
[33] [2021] EWHC 3081 (QB)
[34] *High Speed Two (HS2) Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at 109
[35] [2021] EWHC 3081 (QB) 24

Consequently, although geographically broad, there were clear limits to where the order could and could not apply.

In granting such a territorially expansive injunction, applicable to such a wide group of known and unknown individuals, *HS2* again demonstrates the lengths that the courts will go to protect an applicant's interests. Whereas *Chadli* demonstrated the use of delivering up documents against a single individual to protect an applicant's business and employee coherence, *HS2* demonstrates the use of an injunction in regard very large tracts of land, against a huge number of unknown peoples, to prevent trespass and nuisance that interferes with the fulfilment of a Government policy.

## Section 2

**Wills and Provision after Death:** What is a Reasonable Provision between Aunt and *de facto* Son

*Antonio v Williams* [2022] EWHC 2383 (Ch)

Equity, as noted in the introduction, has a large remedial scope. In addition to providing the injunctive relief seen above, Parliament has also determined that Equity should assist in disputes arising from dependants not receiving adequate financial provision in a deceased family member's will – in effect remedying the lack of provision made to the dependant claimant. This was the central dispute in *Antonio v Williams*, which concerned the death of an aunt who, in her will, had not adequately provided for her nephew and *de facto* child – and also what a reasonable provision for a child was.

The claimant in *Antonio* was a 12-year-old boy (Ryan) who, when born, could not be taken care of by his mother. As a result, he was cared for from birth by his aunt until she passed away. Although his father was known, and had custody of Ryan after his aunt's death, he had previously been very distant and only made 'fleeting visits' to see his son – partially because he had spent 17 months in prison around the time of Ryan's birth. As a result, his father could only make a very limited contribution to Ryan's needs.

Although Ryan was the aunt's *de facto* child, and the aunt had provided for the majority of his everyday needs, no specific provision was made in her will for him[36]. Instead, there was a general intention that he be provided for – "my wish is for him to be provided with the same consistency and positive influence as I have provided him this far"[37] – but this was insufficient for provision to have been actively made in the will.

Given the lack of provision in the aunt's will, and the close relationship between her and the child, a claim was made under the Inheritance (Provision for Family and Dependants) Act 1975 to ensure that financial provision was made for Ryan.

Under s1(1)(e) Inheritance (Provision for Family and Dependants) Act 1975, 'any person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased' is eligible to claim for financial provision from the deceased's estate. Whilst the parties accepted that the child was eligible to bring a claim under the Act, as he had been

[36] *Antonio v Williams* [2022] EWHC 2383 (Ch) at 8
[37] Ibid, at 8

maintained by his aunt[38], it was disputed whether he was actually treated as her child. The High Court, however, concluded the evidence was clear that the aunt had taken on the position of parent and did treat the child as her child[39] – proving beyond doubt their eligibility to make a claim.

Under s2 Inheritance (Provision for Family and Dependants) Act 1975, for a provision order to be granted it must be shown that the will has failed to make adequate financial provision for the party who had previously been maintained – with s1(2)(b) defining this as meaning "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance".

In determining whether adequate provision was made, s3(1) provides the factors the courts must consider, although the Supreme Court in *Ilott v The Blue Cross*[40] clarified that a 'broad brush approach' was required from the courts to account for the variation in the factual matrices of cases. The factors set out in s3(1) include:

"(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant".

The High Court, given that no provision had been made under the aunt's will, held that there had been a failure to make adequate provision for Ryan[41]. It was found that owing to the parental relationship, the aunt's provision of Ryan's daily needs while alive, and his young age at the time of her death meaning that he had no financial resources, it was necessary to order that financial provision be made for him. Exacerbating this was the inability of the father to make the provision himself due to his limited means. Explicitly, it was stated:

> "Given his age of 12, and the significant period of time still to run before Ryan will have completed any higher or further education, I consider in the circumstances which I have already set out when considering the first of the

[38] Ibid, at 37
[39] Ibid, at 38
[40] [2017] UKSC 17 at 24
[41] *Antonio v Williams* [2022] EWHC 2383 (Ch) at 40

> two key questions, and applying the legal framework I have outlined, that a sum of £50,000 would represent reasonable financial provision for him. He has a long time to go before he should be expected to be earning and a substantial sum of that order is reasonably required to ensure he is maintained until that time given the limited means of his father."[42]

Consequently, Ryan was awarded £50,000 to provide for himself until he had completed any further or higher education. *Antonio* thereby demonstrates two important facets. Firstly, it demonstrates the ability for Equity, as amended by Parliament, to make provision for dependants who have had no provision made for them in deceased's will. Secondly, it helps demonstrate what a 'reasonable' provision for a child is. Ever since *Re Golay*[43], where it was held that a 'reasonable income' was sufficiently certain for the purposes of establishing the existence of certainty of subject matter, it has been unclear how 'reasonable' is to be applied in practice. Although not a definitive statement on what 'reasonable' means in practice due to the constantly fluctuating factual matrices of cases, *Antonio* does at least provide a demonstration and guidance on its potential meaning.

## Section 3

***Trusts**: The use of the Common Intention Constructive Trust in Instances of Mistake*

*Fattal v Fattal* [2022] EWHC 950 (Ch)

Following on from the previous Update published in Summer 2022, which focussed on the common intention constructive trust, *Fattal v Fattal* provides a unique example of the non-traditional uses of the common intention constructive trust – where rather than determining the beneficial interest of property upon the breakdown of a domestic relationship, it was used to help determine the beneficial ownership of property transferred by mistake.

For ease, the summary of the common intention constructive trust provided in the Summer update is repeated:

"As established in *Gissing v Gissing*[44], and expanded on in *Lloyds Bank v Rosset*[45], a non-legal owner can establish a beneficial interest in the family home through a common intention constructive trust. These constructive trusts take two forms: the expressed common intention constructive trust, in which the legal owner represents that the claimant has or is to have an interest in land and the claimant then acts to their detriment as a consequence of this representation; or the inferred common intention constructive trust, in which the claimant contributes to the purchase price of the property but is not registered on the legal title. In both circumstances, the representation of the legal owner (whether that be expressed or inferred from their conduct of allowing a contribution to the purchase price) combined with the detriment (whether that be purely financial or domestic contributions) makes it unconscionable for the legal owner to renege on their representation, and so a beneficial interest is acquired by the claimant with the size of this interest determined by the court if no agreement is present."[46]

[42] Ibid, at 51
[43] [1965] 1 W.L.R. 969
[44] [1970] UKHL 3
[45] [1990] UKHL 14
[46] Stubbins M, OUP Summer Update – Equity and Trust, (June 2022)

Unlike the Summer 2022 update, however, which was mostly concerned with determining the respective *shares* of the property, *Fattal* concerned the *acquisition* of a beneficial interest. The following principles, summarised in *Fattal* by Deputy Master Hansen, applied[47]:

"(i) Where there is sole legal ownership the starting point is sole 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;

(ii) The conclusion that equity follows the law can, however, be displaced by showing that the parties had a different common intention when the property was first acquired or that they formed a different common intention at a later date, providing of course there is detrimental reliance;

(iii) This displacing common intention may be express or inferred ("deduced objectively from their conduct");

(iv) The relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that person's words or 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;

(v) Each case will turn on its own facts. 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;

(vi) Many more factors than financial contributions may be relevant to divining the parties' true intentions, including 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 one of their sole names; the purpose for which the home was acquired; the nature of the parties' relationship; 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;

(vii) The express or inferred common intention usually will also determine the size of the shares of the co-owners. The court should give effect to the intention thus discovered. If, however, there is no evidence to this effect, the court may impute an intention so as to ensure that the co-owners obtain that share which the court considers fair having regard to the whole course of dealing between them and the property."

*Fattal* itself concerned the identification of the true beneficial owner of a Regent's Park penthouse flat in London. The original owner, a businessman (William) purchased the flat in 1972 using his own funds. After the purchase, William lived in the flat with his brother, Elias,

[47] *Fattal v Fattal* [2022] EWHC 950 (Ch) at 81

for several years. Both preceding and following the purchase the brothers were business partners, and made a substantial amount of money – so much so that William, when claiming he beneficially owned the flat, stated he would not necessarily have noticed the transfer of £400,000[48] - "a transfer to me of £400,000 was not in those days that significant a sum to me in terms of my personal wealth at the time, and it isn't really something I would have noticed…"

By 1990, William wished to move out of the flat and begin a family with his wife. While Elias also got married, this was short lived and lasted only 7 months before being annulled, and so he remained living in the flat by himself. Around this period William submitted that he made a proposal to Elias that the latter could purchase the flat for around £400,000 – the market value at the time. Elias, however, submitted that William stated he would transfer the property after a valuation had been received. This latter submission was rejected by Deputy Master Hansen, who held that a proposal had been made by William to sell the flat for £400,000[49] – a clear agreement and basis for a transaction, but importantly this was not a binding agreement between the brothers to buy or sell the property as there was no writing (which is required by s2 Law of Property (Miscellaneous Provisions) Act 1989).

The legal ownership of the property remained unchanged until 2014, although some discussions as to the property's ownership did occur – particularly in regard to the potential tax arrangements that could be entered into by the brothers. The transfer itself occurred in January 2014, and no consideration was provided at the time of conveyance from William to Elias. The ownership of the house remained uncontroversial until 2017, when the brothers fell out over Elias' treatment of William's granddaughter, and an ongoing and bitter feud erupted between them, with William claiming that the flat had been transferred by accident (as the £400,000 had not been transferred) and so consequently was held on trust for him by Elias.

Unlike in the traditional common intention constructive trust, in which a long-term domestic partner or spouse is seeking to claim a beneficial interest in property they never held legal title in, *Fattal* concerned an attempt to reacquire property previously owned by the claimant and willingly (if not mistakenly) transferred – a novel use of the common intention constructive trust.

In applying the law on common intention constructive trusts set out at the beginning of this section, Deputy Master Hansen began by charting the history of the property's ownership from William's initial ownership in 1972[50]. Given that William originally purchased the property in his sole name, the presumption in *Stack v Dowden*[51] meant that it was presumed that he was the sole beneficial owner also at the time of the purchase. It was thereby incumbent on Elias to show that this presumption had been rebutted.

Notwithstanding Elias' submission that the presumption had been rebutted, it was held that this had not in fact occurred[52]. It was found that the William had covered the costs of acquiring and refurbishing the property with his own moneys, and that William also redeemed the mortgage with his own moneys[53]. Although Elias lived in the property with William for many years until 1990, and did pay some of the property's outgoings, this was treated as being "the least one

[48] Ibid, at 100
[49] Ibid, at 31
[50] Ibid, at 82
[51] [2007] UKHL 17
[52] *Fattal v Fattal* [2022] EWHC 950 (Ch) at 96
[53] Ibid, at 89

might have expected giving that he was living in the Property rent-free for many years."[54] Hence, in terms of acquisition and improvement, Elias failed to make any contribution.

In regard the subsequent conduct, it was noted that the courts are slow to recognise any agreement concerning the property except for where there is an express post-acquisition agreement[55]. This applied presently also, as Elias failed to prove that any agreement existed between the brothers[56]. It was held that although the property was treated as a home for both of the brothers, this was not an agreement as to ownership[57] nor any detriment incurred by Elias – indeed he benefited greatly by residing at the property on non-commercial terms.

Although Elias had not acquired a beneficial interest through a common intention constructive trust either at the time of purchase or subsequently, it was held that there was a genuine agreement to allow him to acquire the property for £400,000[58] and that it was for William to prove that the payment had not been made[59]. It was held, however, that there was sufficient evidence that Elias had never paid the £400,000, with William's evidence being more persuasive as to the turn of events.

Given that there was a fundamental mistake at centre at the transfer of the property, the relevant principles that applied in making it correct to grant relief were[60]:

(1) a donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift:
(2) a mistake is to be distinguished from mere inadvertence or misprediction:
(3) forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake:
(4) it does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong:
(5) equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability:
(6) the evaluation of unconscionability is objective:
(7) the gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition:
(8) the court needs to focus intensely on the facts of the particular case.

Hence, because William only transferred the property on the mistaken belief that Elias had transferred the £400,000, and that allowing Elias to retain the property would result in great

[54] Ibid, at 90
[55] *James v Thomas* [2007] EWCA Civ 1212, per Chadwick LJ
[56] *Fattal v Fattal* [2022] EWHC 950 (Ch) at 92
[57] *O'Neill v Holland* [2020] EWCA Civ 1583 at 40
[58] *Fattal v Fattal* [2022] EWHC 950 (Ch) at 92
[59] Ibid, at 101, referencing *Stephens v Cannon* [2005] EWCA Civ 222
[60] Ibid, at 119 referencing *Van der Merwe v Goldman* [2016] 4 WLR 71

objective injustice, it was correct that the relief be granted[61] and Elias be required to transfer the legal title to the property back to William[62].

*Fattal* thereby demonstrates the potential for the use of the common intention constructive trust in non-traditional means. Although *Marr v Collie*[63] stated that the common intention constructive trust could be utilised in non-traditional contexts, it itself was only concerned with its utilisation in a commercial context. *Fattal,* however, demonstrates that the common intention constructive can[64] be utilised between siblings and where complex familial agreements are entered into, and also how mistaken transfers can be rectified.

An additional, but controversial issue raised by *Fattal*, however, relates to the resulting trust. In tandem with holding that the property should be retransferred to William owing to a fundamental mistake, Deputy Master Hansen held that alternatively, William also owned the property beneficially owing to the imposition of a gratuitous transfer resulting trust[65].

The law on gratuitous transfers of personal property is clear, and where there is a gratuitous transfer of such property in the absence of an intention to make a gift or a loan, Equity will impose a resulting trust[66]. The law on gratuitous transfers of land, however, is much more contentious, and two schools of thought exist. The first, which the author has previously endorsed[67], argues that the presumption of imposing a resulting trust upon the gratuitous transfer of land has been abolished by s60(3) Law of Property Act 1925. The second school, expressed most recently in *National Crime Agency v Dong*[68] and *Ali v Dinc*[69], argues that the presumption has not been abolished. Although not possible to rehearse the arguments fully here, it must be noted that the comments in *Ali v Dinc* were strictly *obiter,* and the issue remains unresolved until firm comment is made by the Court of Appeal or Supreme Court. Thereby, it is submitted that there is a very good chance that the imposition of a resulting trust upon the gratuitous transfer of land has been abolished owing to the express wording of the s60(3) that *prima facie* abolishes the presumption. Should this be the case, then the Deputy Master Hansen's conclusion would be inconsistent with the statutory provision.

More problematic, however, is the existence of a clear intention on the part of William to dispose of the beneficial interest. The presumption of a resulting trust is rebutted should it be evidenced that there is a loan[70] or gift[71] intended by the transferor. It has also been held that where property is gratuitously transferred by mistake, a resulting trust can also be imposed[72]. However, as noted by Lord Goff in *Westdeutsche,* such an imposition in instances of mistake is impossible if there is a clear intention to transfer the property[73] – i.e. that the transferor

[61] *Pitt v Holt* [2013] 2 AC 108
[62] *Fattal v Fattal* [2022] EWHC 950 (Ch) at 120
[63] [2017] UKPC 17
[64] Although was not in the instant case
[65] *Fattal v Fattal* [2022] EWHC 950 (Ch) at 116 and 121
[66] *Re Vinogradoff* [1935] WN 68
[67] Stubbins M, *The Gratuitous Transfer and Petrodel: Reform or no Reform?,* (2016) Trusts & Trustees 22 (5) 516
[68] [2017] EWHC 3116 (Ch)
[69] [2020] EWHC 3055 (Ch)
[70] *Re Sharpe* [1980] 1 WLR 219
[71] *Re Young* [1885] 28 Ch D 705
[72] *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 at 118, referencing *Re Diplock [1948] Ch 465*
[73] *Westdeutsche Landes Bank v Islington* [1996] AC 669 at 690

intended the recipient to receive the beneficial interest[74]. Thereby, the mistaken transfer gratuitous resulting trust is only available in genuine mistakes such as *Chase Manhattan* – where there is no intention at all to transfer the beneficial title, and the transfer was never intended to occur. In *Fattal,* it is therefore submitted that no resulting trust could have been imposed given the clear intention on the part of William to transfer the beneficial interest property, even though he was mistaken as to the context and factual matrix. Even though the £400,000 had not been transferred, and thereby the transfer was predicated on a mistake, William had evidenced a clear intention to transfer the beneficial interest (seen in the execution of the transfer deed), and thereby no gratuitous transfer resulting trust could be imposed.

*Fattal* therefore demonstrates an important characteristic of the law on resulting trusts - there remains a number of contentious issues that have yet to be resolved, and judicial guidance from the senior courts is required.

[74] Webb C, *Intention, Mistakes and Resulting Trusts* in Mitchell C, *Constructive and Resulting Trusts,* (Oxford, OUP, 2010) at 315