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TRUST, CONTRIBUTION AND EQUITABLE ACCOUNTING: ANALYSING IMBALANCES IN CONTRIBUTION TOWARDS MORTGAGE PAYMENTS

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I. Introduction

A common feature of modern property acquisition is for parties who are domestic partners or family members or friends to finance the purchase through a secured loan taken out in joint names. Often, one party pays a larger share towards the mortgage instalments than the other. When the relationship breaks down, how are parties' beneficial entitlement determined? Should the imbalance in the mortgage payments be analysed using the resulting trust or common intention constructive trust or equitable accounting or a right to contribution? To add to the complication, can these doctrines operate where the parties took a conveyance in their joint names and declared in the conveyance that they hold it on trust for themselves as beneficial joint tenants?[1]

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[1] See e.g. S Gardner, 'Understanding *Goodman v Gallant*' (2015) Conv 199.

Unfortunately, the current case law has not been entirely clear and judges have used a myriad of doctrines such as the resulting trust, common intention constructive trust and equitable accounting in relation to such a fact pattern.[2] There has not been a systematic study in both the case law and academic literature on how these doctrines relate to each other. This has resulted in the jurisprudence in this area being extremely confused with the consequence of potentially inconsistent holdings. From a practical perspective, there is significant public interest for the courts to clearly articulate how an imbalance in contributions to mortgage repayments may be remedied at law or in equity, and to reach a consistent result because 'the overwhelming majority of houses and flats are acquired with the assistance of secured borrowing'.[3] In this area of law, subjective and uncertain rules governing the acquisition and quantification of property rights, both legal and equitable, have the potential of becoming a costly 'litigation generator' of domestic property disputes.[4] Regrettably, a consistent approach has not been achieved in the jurisprudence. It is with this background in mind that we proceed with our discussion of the various mechanisms used to address the issue of an imbalance in mortgage payments and present a proposed framework, which is in our view, is the most principled manner in dealing with this problem.

II. The Problem Defined and a Proposed Framework: Intention of the Parties as the Underlying Principle

[2] See P Sparkes, 'The Quantification of Beneficial Interests: Problems arising from Contributions to Deposits, Mortgage Advances and Mortgage Instalments' (1991) 11 OJLS 39; MP Thompson & M George, *Thompson's Modern Land Law* (Oxford: Oxford University Press, 2017) at 309–313.

[3] *Stack* v. *Dowden* [2007] 2 AC 432 at [117] (Lord Neuberger of Abbotsbury). For a similar observation in the Singapore context, see *Su Emmanuel* v. *Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [93].

[4] M Dixon, 'Editor's Casenotes' [2007] Conv 352.

We begin our analysis by defining a hypothetical scenario, to which we will apply the various legal and equitable doctrines discussed in this article:

> *A* and *B* are cohabitees in a domestic relationship. They bought a house for £250,000 and are registered as joint tenants. *A* and *B* provided the initial cash payment of £50,000 equally. *A* and *B* took out a joint mortgage loan over the property for the remaining £200,000. Over the next ten years, *A* single-handedly paid off the mortgage loan of £200,000. In repaying the loan, *A* had also paid the interest component of £50,000. The house is now worth £1.5 million. The relationship between *A* and *B* has now broken down.

What are the beneficial shares of *A* and *B* over the property in this scenario, and how should an imbalance in contribution to mortgage payments be dealt with under the law? This seemingly simple scenario raises a whole host of difficult questions relating to resulting trust, common intention constructive trust, right of contribution and equitable accounting.

Our overarching thesis is that the actual intention of the parties should be the primary driver in governing their beneficial entitlement to the property. Therefore, if there is an express declaration of a valid trust, either at the point of purchase or at any point before the relationship breaks down, which complies with the statutory formality rules, the express trust is conclusive of the parties' beneficial shares, and no common intention or resulting trust may arise contemporaneously or subsequently unless the trust is set aside by a recognised vitiating factor. Further, a resulting trust analysis is *prima facie* not relevant if the parties' intention as to their beneficial interest is clear at the time of registration of the property even if there is an imbalance in the contribution to the mortgage payments. Parties' beneficial interests in the property ought

to follow the manner in which they are registered especially where the parties were aware of the implications of their registered interests.[5] This is consistent with the overarching thesis that the actual intentions of the parties that matter. Hence, if parties consciously registered their interest in a certain percentage while contributing disproportionately to the mortgage payment, the implication is that their actual intention is for their interest to be expressed in the manner of registration. While the imbalance in contribution might not increase the beneficial interests, the amount might be recovered either via equitable accounting or a right to contribution. A resulting trust might only arise where there was an agreement between the parties, at the time of purchase, as to the manner in which they would repay the mortgage and there is no evidence that the party who paid for the larger share of the mortgage payments intended a gift to the other party.

The analysis above does not mean that a common intention constructive trust may not arise in appropriate circumstances. Consistent with the underlying principle that the intention of the parties should govern their beneficial entitlement, a common intention constructive trust may arise subsequently depending on the facts. Where there is no express declaration of a trust or agreement, the parties' beneficial interests may differ from their respective registered interests if, at any time after acquisition, a common intention is formed as between the parties to share the property in different proportions. The beneficial shares would then be determined with reference to the doctrine of common intention constructive trust, under which mortgage payments is one of many factors that will be considered.

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[5] *Marr v Collie* [2018] AC 631 at [49]. See also the analysis of Ben McFarlane, Nicholas Hopkins & Sarah Nield, *Land Law* (Oxford: Oxford University Press, 2nd edn, 2020) 148.

Finally, even if the parties' beneficial interests do not change via a resulting or constructive trust, the doctrine of contribution and equitable accounting may provide relief to the party who has contributed more to the mortgage payment. These are personal claims which does not change the beneficial interest of the parties.

At this juncture, it may be queried: is the proposed framework too refined and complicated? Should a choice be made to use a single doctrinal mechanism to deal with the problem at hand i.e. either the common intention constructive trust or the resulting trust? For example, if there is an imbalance in contribution to the mortgage payments, should this be analysed as automatically giving rise to an inferred common intention constructive trust? Or alternatively, could we characterise an imbalance in contribution to mortgage payments as increasing the beneficial entitlement by way of an extended view of the resulting trust? It is suggested that it is not possible to deal with this problem using solely the inferred common intention constructive trust or extended view of the resulting trust. The inferred common intention constructive trust is a search for the parties' shared intention;[6] an imbalance in contribution to the mortgage payments, by itself, should not automatically be viewed as establishing a shared intention to vary the beneficial interest.[7] In other words, an imbalance in contribution of mortgage payments, by itself, might not be sufficient to establish a shared intention to depart from the registered interest. However, even if the common intention is not established, the imbalance in contribution to mortgage payments may be recovered by way of equitable accounting or a right of contribution.[8] Similarly, an imbalance in contribution to the mortgage

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[6] See e.g. *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432 at [60]; *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776 at [34]. Due to constraints of space, this article will not consider whether it is legitimate to impute a shared intention on the parties.

[7] See e.g. *Fowler v Barron* [2008] EWCA Civ 377.

[8] The quantum may be very different depending on the doctrine used. If a change of beneficial interest is found and the property has appreciated significantly, this will yield a far larger sum than a personal right to contribution or equitable accounting.

payments, should not be viewed as changing the parties beneficial entitlement by way of a resulting trust especially when there is actual evidence that the parties intended to hold the property in a certain manner. In these circumstances, the actual intention of the parties should be given primacy and the beneficial entitlement of the parties should remain as per their actual intentions. Any imbalance in contribution to the mortgage payment should be addressed via a right to contribution or equitable accounting. Finally, the common intention constructive trust and resulting trust are fundamental different inquiries. The common intention constructive trust is a search for the parties' shared intention[9] whereas the resulting trust analysis is an inquiry into whether the imbalance in contribution to the mortgage payment is a recognized trigger for the trust to occur.[10] Further, the resulting trust doctrine focusses solely on financial contribution of the parties whereas the common intention constructive trust responds to a variety of factors. Therefore, a party may be entitled to a larger share under the common intention constructive trust as compared to an analysis using the resulting trust. For these reasons, all the doctrines discussed in this paper are useful, in appropriate circumstances, to deal with the problem at hand.

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[9] See e.g. *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432 at [60]; *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776 at [34]. Due to constraints of space, this article will not consider whether it is legitimate to impute a shared intention on the parties.

[10] Due to constraints of space, this article will not consider the theoretical foundation of the resulting trust. For excellent work in this area see Robert Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997; William Swadling, "Explaining Resulting Trusts" (2008) 124 LQR 78; John Mee, "'Automatic' Resulting Trusts: Retention, Restitution, or Reposing Trust?" in *Constructive and Resulting Trusts* (Charles Mitchell ed) (Oxford & Portland, Oregon: Hart Publishing, 2009) ch 7; John Mee, "The Past, Present, and Future of Resulting Trusts" (2017) 70 CLP 189; James Penner, "Resulting Trusts and Unjust Enrichment: Three Controversies" in *Constructive and Resulting Trusts* (Charles Mitchell ed) (Oxford & Portland, Oregon: Hart Publishing, 2009) ch 8. Despite the controversy surrounding the theoretical foundation of the resulting trust, it is clear that a resulting trust may arise in certain circumstances when a person pays for the purchase price of a property. This is the focus of the inquiry in this article.

III. Express Trust to Hold in Equal Shares or Actual Intention to Hold Property Jointly[11]

In dealing with the issue of beneficial interest of the parties, the intention of the parties is paramount. Many disputes as to the beneficial shares in a home arise from the failure to expressly declare the beneficial interests.[12] If parties made an express declaration of trust,[13] either by duly completing the relevant box in the Land Registry's Form TR1,[14] or by executing a trust instrument that complies with the necessary formalities[15] as to how the beneficial interest is to be held, 'that will be conclusive and save all argument'.[16] In *Pankhania v. Chandegra*, Patten LJ observed that:[17]

> The judge's imposition of a constructive trust in favour of the defendant was therefore impermissible unless the defendant could establish some ground upon which she was entitled to set aside the declaration of trust contained in the transfer. He seems (in paragraph 2) to have misunderstood the significance of the transfer which not only

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[11] See the excellent analysis of Chris Bevan, "The search for common intention: the status of an executed, express declaration of trust post-Stack and Jones" (2019) 135 LQR 660.

[12] A Moran, 'Anything to declare? Express declaration of trust on Land Registry form TR1: the doubts raised in *Stack* v *Dowden'* [2007] Conv 364, 364.

[13] See Davis (as Trustee in Bankruptcy of Jackson) v. Jackson [2017] EWHC 698 (Ch); *Goodman* v. *Gallant* [1986] Fam 106.

[14] On form TR1 see A Moran, 'Anything to declare? Express declaration of trust on Land Registry form TR1: the doubts raised in *Stack* v *Dowden'* [2007] Conv 364.

[15] An express declaration of trust respecting any land must be 'manifested and proved by some writing signed by some person who is able to declare such trust': s 53(1)(b) of the Law of Property Act 1925.

[16] *Carlton* v. *Goodman* [2002] 2 FLR 259 at [44] (Ward LJ). See also the analysis of B McFarlane, N Hopkins & S Nield, *Land Law* (Oxford: Oxford University Press, 2nd edn, 2020) 148 – 149.

[17] *Pankhania* v. *Chandegra* [2012] EWCA 1438 at [16]. Cf. *Clarke v Meadus* [2013] WTLR. 199 at [40] where it was suggested that the court may be override the express trust by the doctrine of proprietary estoppel. However, it should be noted that since *Pankhania* is a Court of Appeal decision while *Clarke v Meadus* is a High Court decision, the former should take precedence. In commenting on *Clarke v Meadus*, M Pawlowski & J Brown, 'Joint Purchasers And The Presumption Of Joint Beneficial Ownership - A Matter Of Informed Choice?' (2017) Trust Law International 3 at 17, rightly points out 'there is much to be said for maintaining certainty and predictability in this area of law and informal variation (whether it be via a constructive trust or estoppel) should not be allowed to undermine the current practice of using the express trust as an effective means of defining co-ownership arrangements at the time of purchase'.

made both claimant and defendant legal owners of the property but also spelt out their beneficial interests.

In the absence of fraud or some vitiating factor,[18] an express declaration of trust will be treated as conclusive as to the parties' beneficial shares,[19] even though it may bear no necessary relation to their respective financial contributions.[20] Where there is a validly declared express trust, any imbalance in contribution to mortgage payments will have no effect on the declared beneficial shares, although it could give rise to a claim for contribution[21] or an equitable account[22] when the property is sold.

Similarly, if there is evidence of actual intention that the contributing party had intended to hold the property jointly despite an imbalance in contribution to mortgage payment, then this actual intention should be given effect. As Lord Kerr (delivering the decision of the Privy Council) said in *Marr* v. *Collie*:[23]

> If it the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish.

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[18] See A Chandler, 'Express Declarations of Trust, Rectification and Rescission: *Goodman* v. *Gallant* Revisited' (2008) 38 Fam Law 1210.
[19] *Goodman* v. *Gallant* [1986] Fam 106. See also *Pankhania* v. *Chandegra* [2012] EWCA 1438. See the excellent discussion in J Glister & J Lee, *Hanbury & Martin Modern Equity* (London: Sweet & Maxwell, 21st edn, 2018) [13-009]; M George & A Layard, *Thompson's Modern Land Law* (Oxford: Oxford University Press, 7th edn, 2019) at 297–298.
[20] *Turton* v. *Turton* [1988] 1 Ch 542.
[21] See Part VI below.
[22] See Part VII below.
[23] [2018] AC 613 at [54] (noted and critiqued by M George & B Sloan, 'Presuming too little about resulting and constructive trusts?' [2017] Conv 303.

It is only when parties' intention is unclear as to their beneficial interests that we turn to the doctrine of resulting trust.

IV. Resulting trust

In this part, we will attempt to demonstrate why, outside of a very narrow category of cases, that the resulting trust is usually an ill-suited device to deal with an imbalance in mortgage contributions.

A. Purchase money resulting trust

Some authorities[24] suggest that an imbalance in contributions to mortgage payments *could* give rise to a purchase money resulting trust. It is not possible to establish a resulting trust without first proving that a party has, in fact, made a contribution to the purchase price of the property.[25] Only contributions sufficiently 'referable to'[26] the acquisition of title may be taken into account. The purchase money resulting trust was explained by Eyre CB over two centuries ago in *Dyer* v. *Dyer*:[27]

> The clear result of all the cases, without a single exception, is that the trust of a legal estate . . . results to the man who advances the purchase money . . . It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence.

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[24] For example, *Diwell* v. *Farnes* [1959] 1 WLR 624; *Lim Geok Swan* v. *Lim Shook Luan* [2012] SGHC 18. Both cases are discussed at Part IVB below.
[25] J Mee, *Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999) at 46.
[26] *Burns* v. *Burns* [1984] Ch 317 at 329 (Fox LJ).
[27] (1788) 2 Cox Eq Cas 92 at 93. This passage was cited with approval by Lord Upjohn in *Pettitt* v. *Pettitt* [1970] AC 777 at 814.

A stated rationale of this doctrine is founded on the assumption that 'people who pay money normally expect to get something for it'.[28] Unless the facts establish that the purchase money was given to the legal owner by way of a gift or loan,[29] a resulting trust arises whenever 'a person acquires a legal estate but has not provided the consideration or the whole of the consideration for its acquisition, unless a contrary intention is proved'.[30] Subject to parties' agreement to the contrary, it is likely that each co-owner bears the burden of paying an equal share of the mortgage liability when they are joint tenants, and a share that is proportionate to their beneficial interest when they are tenants in common in equity.

The issue here is whether mortgage payments may be properly regarded as contributions towards the purchase price of the property. If so, then in our hypothetical scenario *A* might argue that since she paid £225,000 out of the purchase price of £250,000, she is entitled to a beneficial share of 90% under a purchase money resulting trust. Professor John Mee describes a 'surprising'[31] lack of direct judicial consideration of this question. The traditional view is that mortgage repayments have no impact the parties' respective beneficial shares. The 'most authoritative statement of [this] orthodox position'[32] may be found in the High Court of Australia's decision in *Calverley* v. *Green*:[33]

> The payment of instalments under the mortgage was *not a payment of the purchase price but a payment towards securing the release of the*

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[28] J Mee, *Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999) at 36, citing K Gray, *Elements of Land Law*, 2nd edn (London: Butterworths, 1993). Cf. J Mee, "The Past, Present and Future of Resulting Trusts" [2017] 70 CLP 189 who now argues that the purchase price resulting trust is made irrelevant by the common intention constructive trust.

[29] M Dixon, *Modern Land Law* (London: Routledge, 11th edn, 2018) at 172.

[30] *Cowcher* v. *Cowcher* [1972] 1 WLR 425, 431, (Bagnall J). See also *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] AC 669, 708 (Lord Browne-Wilkinson).

[31] J Mee, *Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999) at 61.

[32] Ibid, 60.

[33] *Calverley* v. *Green* (1984) 155 CLR 242 at 257–58 (Mason and Brennan JJ) (emphasis added).

> *charge* which the parties created over the property purchased. It is understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of a home. *The purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed.*

The traditional view was defended by Matthews[34] who, after an extensive survey of the then-existing authorities, concluded that '[a]ll *subsequent* payments and contributions are irrelevant in considering the initial shares in the property under a resulting trust'.[35] This strict approach was applied in *Curley* v. *Parkes*,[36] where the claimant was denied any beneficial share (under a resulting trust) in a property purchased in the sole name of the defendant even though he contributed £9,213 under six mortgage instalments, because the payments were made 'after the completion of the purchase'.[37] Echoing the orthodox position in *Calverley* v. *Green*,[38] Peter Gibson LJ held that '[s]ubsequent payments of the mortgage instalments are not part of the purchase price already paid to the vendor, but are sums paid for discharging the mortgagor's obligations under the mortgage'.[39]

B. Extended resulting trust

Notwithstanding the strict position in *Curley* v. *Parkes*, a softer attitude in relation to mortgage payments and the resulting trust has been applied in some other cases. The strict approach in

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[34] P Matthews, 'Resulting trusts and subsequent contributions' (1994) 8 Trust L Int 43.
[35] Ibid, 46 (original emphasis).
[36] [2004] EWCA Civ 1515.
[37] Ibid, [19] (Peter Gibson LJ).
[38] (1984) 155 CLR 242.
[39] *Curley* v. *Parkes* [2004] EWCA Civ 1515, [14] (Peter Gibson LJ).

Curley v. *Parkes* may be contrasted with an earlier Court of Appeal decision in *Diwell* v. *Farnes*,[40] where a house was purchased in Mr Diwell's sole name, financed by a mortgage. Some mortgage instalments were paid by Mr Diwell's mistress,[41] Ms Farnes. When the house was sold after Mr Diwell's death, Ms Farnes successfully claimed a share of sale proceeds proportionate to her contributions to the purchase price of the house under a resulting trust.[42]

Mee refers to a resulting trust that regards mortgage payments as part of the purchase price as an 'extended resulting trust'.[43] This position has found favour with some judges and academics. In *Gissing* v. *Gissing*,[44] Lord Diplock noted that the 'economic realities'[45] where a property is purchased 'upon credit and that the purchase price is represented by the instalments by which the mortgage is repaid in addition to the initial payment in cash',[46] leads to 'an obvious temptation to bend the strict rules in order to provide a remedy to a claimant who has contributed . . . to the repayment of a mortgage'.[47] Dixon, who criticises that the orthodox position "is clearly [taking] a narrow view of resulting trusts',[48] argues that '[i]t takes only a little imagination to regard the mortgagee as the agent of the purchasers, paying at the time of purchase, with the mortgagee being repaid with as agent with interest by the contributors'.[49]

C. Negative Sentiments in Relation to the Extended Resulting Trust

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[40] [1959] 1 WLR 624. It might even be argued that *Curley* v. *Parkes* (n 36) was decided *per incuriam* because *Diwell* v. *Farnes* was not cited in argument. It is of interest that Lord Goff (before his elevation to the bench) appeared as counsel for the widow, Mrs Diwell.
[41] This fact is important because it precludes the operation of the presumption of advancement.
[42] *Diwell* v. *Farnes* [1959] 1 WLR 624 at 630 (Hodson LJ); 632–33 (Ormerod LJ). Willmer LJ concurred that the mistress was entitled to a beneficial interest based on her contribution to mortgage repayments, dissenting only on the issue of quantification.
[43] See J Mee, *Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999) ch 3.
[44] [1971] AC 886
[45] *Gissing* v. *Gissing* [1971] AC 886 at 906 (Lord Diplock).
[46] Ibid.
[47] J Mee, *Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999) at 61.
[48] M Dixon, *Modern Land Law* (London: Routledge, 11th edn, 2018) at 173.
[49] Ibid. See also M George & A Layard, *Thompson's Modern Land Law* (Oxford: Oxford University Press, 7th edn, 2019) at 262 - 265.

In *Stack* v. *Dowden*, Lord Neuberger appeared to have sympathy for the extended resulting trust saying that '[t]here is attraction in the notion that liability under a mortgage should be equivalent to a cash contribution',[50] and that if one party subsequently 'repays more of the mortgage advance, equitable accounting might be invoked to adjust the beneficial ownerships at least in a suitable case'.[51] However, Lord Walker and Baroness Hale, who were in the majority, were less enthusiastic in relation to the presumption of resulting trust and mortgage payments in *Jones v Kernott* saying:

> The time has come to make it clear…that in the case of the purchase of a house or at in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares.[52]

Similarly, in *Fowler v Barron*[53] the Court of Appeal opined, relying on *Stack v Dowden*, that the legal technique the court will use to ascertain the beneficial interest of joint owners who were co-habitees is that of the common intention constructive trust rather than the resulting trust. Therefore, as a matter of authority, the resulting trust route appears to be closed in relation to co-habitees.

Outside the context of joint owners who are co-habitees, there is still the possibility of the extended resulting trust surviving. Our view is that an extended resulting trust may only

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[50] *Stack* v. *Dowden* [2007] 2 AC 432 at [117] (Lord Neuberger).
[51] Ibid. With the greatest respect to Lord Neuberger, equitable accounting is a personal claim that is invoked to adjust how much each party receives out of the sale proceeds and cannot be used to 'adjust the beneficial ownerships'.
[52] *Jones* v. *Kernott* [2012] 1 AC 776 at [25].
[53] [2008] EWCA Civ 377.

operate if the parties' intention as to their beneficial interest is *unclear*. If parties' intention as to their beneficial interest is clear from the outset, then there is simply no room for the extended resulting trust to operate. As Chief Justice Sundaresh Menon (delivering the decision of the Singapore Court of Appeal) said in *Su Emmanuel* v. *Emmanuel Priya Ethel Anne*[54] in the context where the parties explicitly agreed on their beneficial interests that an extended resulting trust was 'wrong in principle',[55] because 'it would mean that the parties' interests under the resulting trust are in a state of flux, increasing or decreasing as the case may be when one party makes repayment of the mortgage'.[56] We are of the view that this reasoning must be correct. Or to put the inquiry in another way, there are two issues before an extended resulting trust may operate: (i) did the claimant make an imbalance in contribution to the mortgage repayments; and (ii) if so was the contribution made with the appropriate intention which may give rise to a resulting trust? If the parties' intention as to their beneficial interests was clear from the start, then it is highly unlikely that the contribution was made with the appropriate intention to change the beneficial interest between the parties via a resulting trust. Of course, if the parties subsequently came to a common intention to change the beneficial interest, then any imbalance in contribution to the mortgage repayments may be taken into account using the doctrine of the common intention constructive trust.

When viewed against the backdrop of formidable judicial authorities that repeatedly emphasise that the purchase money resulting trust crystallises at the time of acquisition,[57] we are of the view that the resulting trust is not the appropriate doctrine to be invoked to address an

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[54] [2016] 3 SLR 1222. See below, Part VID.
[55] Ibid, [92].
[56] Ibid.
[57] See, e.g. *Curley* v. *Parkes* [2004] EWCA Civ 1515 (Peter Gibson LJ), [18]; *Lau Siew Kim* v. *Yeo Guan Chye Terence* [2008] 2 SLR 108, [53] (V K Rajah JA); *Chan Yuen Lan* v. *See Fong Mun* [2014] 3 SLR 1048 (V K Rajah JA).

imbalance in contributions to mortgage repayments. The common intention constructive trust appears to be well-suited to dealing with the issue of imbalance in contribution to mortgage payments in appropriate circumstances.[58]

D. Mortgage payments referable to prior agreement

Mortgage repayments may be relevant if they were made on the basis of an agreement made, when the mortgage is taken out, as to how the mortgage will be repaid.[59] Put another way, actual mortgage payments could count as direct contributions to the purchase price without much conceptual difficulty 'where these were referable to, and in keeping with, a prior agreement between the parties as to who would be liable to repay the loan'.[60] Mee has argued that this approach clearly 'remains within the confines of the orthodox resulting trust since it is still possible to determine the beneficial interests of the parties at the time of purchase',[61] and we think that this argument is persuasive. However, outside of this narrow and specific category, we are of the view that the purchase money resulting trust and the extended resulting trust are ill-suited devices to deal with imbalances in mortgage contributions.

V. Common Intention Constructive trust

A common intention constructive trust may arise to address unequal contributions to mortgage payments in appropriate circumstances.[62] The common intention is to be deduced objectively

[58] J Mee, "The Past, Present and Future of Resulting Trusts" [2017] 70 CLP 189.
[59] See *Tahir v Faiz* [2019] EWHC 1627 (QB); *Barrett v Barrett* [2008] EWHC 1061 (Ch), [2008] 2 P&CR 17; *Lau Siew Kim* v. *Yeo Guan Chye Terence* [2008] 2 SLR 108 at [115] (V K Rajah JA); *Carlton* v. *Goodman* [2002] FLR 259; *Re Share (Lorraine)* [2002] 2 FLR 88 (Ch) at [11]; *Carlton* v. *Goodman* [2002] FLR 259 at [22].
[60] *Carlton* v. *Goodman* [2002] FLR 259; *Su Emmanuel* v. *Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [89].
[61] J Mee, *Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999), 52.
[62] The literature on the common intention constructive trust is voluminous. It is beyond the scope of this article to be able to deal with all the controversies surrounding the common intention constructive trust.

from the parties' conduct.[63] In other words, the making of mortgage repayments within the domestic context is one of many factors that the court is entitled to take into account when determining the common intention of the parties. A claimant who pays a disproportionate share of the mortgage payments may be entitled to an enhanced beneficial share under a common intention constructive trust if this establishes that this was indeed the common intention of the parties. For example, in *Jones v Kernott*[64] the fact that Mr Kernott subsequently did not contribute to the mortgage instalments after he left the property was one of the factors which gave Ms Jones a larger share in the property pursuant to an ambulatory common intention constructive trust.

However, just because there is an imbalance in the contribution to mortgage instalments does not automatically mean that there is the common intention for one party to have a larger share. In a domestic context, especially where parties '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',[65] 'the arithmetical calculation of how much was paid by each is also likely to be less important'.[66] In such a case, apart from 'mercenary considerations', open-ended factors such as 'individual characters and personalities' and 'natural love and affection' may be taken into account by the court.[67] An illustration of this is the case of *Fowler v Barron*[68] where Mr Barron paid the deposit and all the mortgage instalments. Miss Fowler's income was spent on herself, the children, holidays and special occasions. Despite this, the Court of Appeal held that this did not provide a basis for departing from the presumption of joint beneficial

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[63] *Gissing* v. *Gissing* [1971] AC 886, 906 (Lord Diplock), followed by the Supreme Court in *Jones* v. *Kernott* [2012] 1 AC 776 at [51] (Lord Walker and Lady Hale).
[64] [2012] 1 AC 776.
[65] *Stack* v. *Dowden* [2007] 2 AC 432 at [60] (Baroness Hale).
[66] Ibid.
[67] Ibid.
[68] [2008] EWCA Civ 377 (noted N Piska, 'Two Recent Reflections on the Resulting Trust' (2008) Conv 441).

ownership since the evidence demonstrated that the couple 'treated their incomes and assets as one pool from which household expenses will be paid.'[69]

The analysis above is premised on the fact that the parties did not explicitly declare a trust at the time the property was acquired. If the parties declared a trust as to their beneficial entitlement, then the common intention constructive trust is inappropriate, unless the trust is set aside by fraud, mistake or some vitiating factor. Any imbalance in contribution towards the mortgage payments should be dealt with by a right to contribution or via the process of equitable accounting.[70]

VI. Right of contribution

A. Nature of the right

Although an imbalance in contributions do not, in the absence of a prior agreement or a subsequent common intention, generally affect beneficial shares, it does not follow that the fact of an imbalance in contribution is 'irrelevant',[71] or that there is 'no remedy in respect of these repayments'.[72] Conventionally, the remedy available to a claimant who paid a disproportionate share of the mortgage payments is a right of contribution.[73] Cooke explains the concept of contribution elegantly: if *A* and *B* owe £2 to *C*, and *A* pays the £2, he can claim £1 back from *B*, and that 'the right is so obvious and of such long standing that its origins are rarely quoted'.[74]

[69] Ibid at [46].
[70] See *Culliford* v. *Thorpe* [2018] EWHC 426 (Ch).
[71] *Su Emmanuel v. Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [94].
[72] Ibid.
[73] For an excellent and detailed analysis of contribution, see C Mitchell, *The Law of Contribution and Reimbursement* (Oxford: Oxford University Press, 2003).
[74] E Cooke, 'Equitable accounting' [1995] Conv 391, 396. See also PH Winfield, 'Equity and Quasi-Contract' (1948) 64 LQR 46 at 49.

Contribution claims at common law 'have a long history',[75] being bottomed on a 'fixed principle of justice, and … not founded in contract'.[76] A right to contribution arises at law where 'one of several persons has paid more than his proper share towards discharging a common obligation',[77] and in equity 'when a liability of one of several to pay more than his share has been ascertained'.[78] The difference is 'immaterial'.[79] In *Muschinski* v. *Dodds*,[80] Gibbs CJ of the High Court of Australia held that when parties are under a common obligation to pay the debt, 'the general principle *applicable both in law and equity* [obliges] them to bear the burden equally with the consequence that, if one discharged more than his or her proper share, he or she could call upon the other for contribution'.[81] The right of contribution has been held to apply as between mortgagor and co-mortgagors.[82]

B. Restitution for unjust enrichment

It appears that the right of contribution is best explained as a restitutionary claim to reverse unjust enrichment.[83] In *Lumley* v. *Robinson*,[84] Aldous LJ stated that '[i]t is a basic principle of law that joint and joint and several debtors have a restitutionary right of contribution amongst themselves'.[85] A claim in unjust enrichment requires the claimant to show that (i) the defendant received an enrichment; (ii) at the claimant's expense; and (iii) there is an unjust factor.[86] The

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[75] C Mitchell, *The Law of Contribution and Reimbursement* (Oxford: Oxford University Press, 2003) at [4.08].
[76] *Deering* v. *The Earl of Winchelsea* (1787) 2 Bos & Pul 270 at 272 (Eyre CB).
[77] *Davies* v. *Humphreys* (1840) 6 M & W 153 at 168–9.
[78] See *Wolmershausen* v. *Gullick* [1893] 2 Ch 514; *McLean* v. *Discount & Finance Ltd* (1939) 64 CLR 312 at 341.
[79] Albion Insurance Co Ltd v. Government Insurance Office of NSW (1969) 121 CLR 342, 351 (Kitto J).
[80] (1984–85) 160 CLR 583.
[81] Ibid, 596 (emphasis added).
[82] *Re Mainwaring* [1937] 1 Ch 96 at 102 (Lord Wright MR).
[83] *Lavin* v. *Toppi* [2015] HCA 4 at [41]; *Burke* v. *LFOT Pty Ltd* (2002) 209 CLR 282 at 299. See also C Mitchell, *The Law of Contribution and Reimbursement* (Oxford: Oxford University Press, 2003) at [3.01].
[84] [2002] EWCA Civ 94.
[85] Ibid, [12] (Aldous LJ).
[86] *Banque Financière de la Cité* v. *Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 (Lord Steyn); *Benedetti* v. *Sawiris* [2014] 1 AC 938 at [10] (Lord Clarke); *Menelaou* v. *Bank of Cyprus* [2016] AC 176 at [18] (Lord Clarke). See generally, C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 9th edn, 2016).

first two requirements pose no significant difficulties, because money is 'the simplest and most common example of an incontrovertible benefit',[87] and 'it is nearly always impossible'[88] to for a defendant to deny that he has been enriched through being relieved from an obligation to pay money.[89] The more difficult issue concerns the relevant unjust factor for a contribution claim. In *Brook's Wharf and Bull Wharf Ltd* v. *Goodman Bros*,[90] Lord Wright MR explained that:[91]

> The essence of the rule is that there is a liability for the same debt resting on the [claimant] and the defendant and the [claimant] has been *legally compelled* to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or *pro tanto* . . .

While Professors Burrows[92] and Virgo[93] take the view that contribution claims fall under the unjust factor of 'legal compulsion', this ground has been criticised as 'not sufficient to explain every [contribution] award',[94] such as in a case where the claimant makes the mortgage payments voluntarily. Professor Mitchell prefers to treat the unjust factor as a policy-motivated one, since recognising this unjust factor ensures that the 'equity as between [co-owners] is not defeated by the caprice of the [mortgagee]'.[95] It is beyond the scope of this paper to attempt to resolve this uncertainty in relation to the unjust factor. Be that as it may, there is unanimity that there is a right to contribution when a claimant discharges a disproportionate share of the mortgage debt.

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[87] G Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2015) at 79.
[88] C Mitchell, *The Law of Contribution and Reimbursement* (Oxford: Oxford University Press, 3rd edn, 2003) at [3.15]
[89] G Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd edn, 2015) at 77.
[90] [1937] 1 KB 534.
[91] Ibid, 544 (emphasis added).
[92] A Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011), ch 17.
[93] G Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2015) ch 10.
[94] C Mitchell, *The Law of Contribution and Reimbursement* (Oxford: Oxford University Press, 2003) at [3.27].
[95] *Burke* v. *LFOT Pty Ltd* (2000) 178 ALR 161 at 190 (Full Court of the Federal Court of Australia).

C. Evaluation

The upshot of framing a claim based on unjust enrichment is that the claim succeeds if all the elements of the claim are present. Subject to any prior agreement to the contrary,[96] or any recognised defences, such as the change of position defence,[97] a claimant is generally able to recover the full extent of his or her excess mortgage repayments as a matter of right, and will not be subject to the court's discretion in refusing to award equitable remedies. The claimant seeking a contribution enjoys considerable ease of proving his or her case using 'the solid tug of money',[98] since evidence of his or her mortgage payments alone is conclusive, and the court will not be required to take into account discretionary factors.

Applying these principles to our hypothetical scenario, since *A* had single-handedly discharged the entire mortgage loan of £200,000 (plus the interest component of £50,000) even though *A* and *B* were jointly liable under the debt, *A* will be able to claim under a right to contribution against *B* for half of £250,000, or £125,000. Hence, if the house is sold for £1.5 million, *A* will receive half of the sale proceeds, being £750,000, plus her contribution claim of £125,000, making £875,000. It will be noticed that this amount is significantly lesser than an enhanced 90% beneficial interest under an extended resulting trust, which would have yielded £1.35 million.

However, the claim for contribution may not be as straightforward as it seems. For example, let us say that the evidence shows that *B* gave money to *A* every month to pay off the mortgage

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[96] *Muschinski* v. *Dodds* (1984–85) 160 CLR 583 at 596 (Gibbs CJ), citing J Chitty, *Chitty on Contracts: General Principles* (London: Law Book Co, 25th edn, 1983), [1213].
[97] See generally E Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009), A Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011), ch 21; and G Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2015) ch 25.
[98] *Hofman* v. *Hofman* (1965) NZLR 795 at 800 (Woodhouse J).

loan. In such circumstances, *A* will not be entitled to a claim a right of contribution from *B*. A more complicated scenario would be where *B* makes contributions to the household expenses which enabled *A* to pay the mortgage. Or *A* and *B* contributed to a joint fund where all the household expenses including the mortgage repayments are met. It could be argued that no right of contribution arises because an objective inference of the facts demonstrate that *A* did not intend to seek repayment or intended to make a gift to *B* in repaying the debt. In these circumstances, we cannot escape the inquiry as to what was *A's* intention in paying the money to *B*.

VII. Equitable accounting

Another right that fairly closely resembles the right of contribution is the 'well-established, but perhaps not so well-understood'[99] right to seek an equitable account upon sale.[100] Equitable accounting has been 'consistently applied by the English courts to account for mortgage payments'.[101] Whereas the right to seek contribution for mortgage payments may be 'enforced independently of sale',[102] the right to an equitable account may only be exercised when property is sold, either by agreement or by court order.[103] As between the two, equitable accounting is definitely the more commonly sought remedy, judging from the number of judicial authorities touching on each. *Prima facie*, there does not seem to be anything which

[99] E Cooke, 'Equitable accounting' [1995] Conv 391 at 403.
[100] The differences between these two rights are not always made clear. Discussions of equitable accounting often refer also to authorities that deal with the right of contribution: see for example, E Cooke (n 74), 395–97; H Conway, 'Partition Actions and Accounting Adjustments Between Co-owners' (1999) 7 Aust Prop LJ 207 at 227.
[101] *Su Emmanuel* v. *Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [97] (Sundaresh Menon CJ), citing *Davis* v. *Vale* [1971] 1 WLR 1022; *Leake (formerly Bruzzi)* v. *Bruzzi* [1974] 1 WLR 1528; *Bernard* v. *Josephs* [1982] 1 Ch 391; *Marsh* v. *Von Sternberg* [1986] 1 FLR 526; *Re Gorman (a Bankrupt)* [1990] 1 WLR 616; *Re Pavlou (a Bankrupt)* [1993] 1 WLR 1046.
[102] E Cooke, 'Equitable accounting' [1995] Conv 391 at 392.
[103] For example, under the Law of Property Act 1925, s 30; or the Married Women's Property Act 1882, s 17.

stops a claimant from relying on a claim for contribution instead of invoking equitable accounting, even if the property is to be sold. However, since the result of relying on equitable accounting and a claim for contribution would likely be the same, it is hard to see why a claimant would choose to rely on a claim for contribution instead of equitable accounting especially when there are more judicial authorities on equitable accounting.

A. *Rationale of equitable accounting*

Unlike contribution, where the elements of the claim are clearly defined,[104] equitable accounting comprises 'a body of (non-binding) guidelines or rules of convenience'.[105] It should not be seen as 'a rigid process',[106] but rather, as a process where the court endeavours to do 'broad justice or equity as between co-owners'[107] by adjusting 'the financial burdens and benefits of land shared by co-owners'.[108]

Upon a partition or sale, the practice of equitable accounting[109] arose to remedy inequities that flowed from certain 'inconvenient'[110] incidences of co-ownership. First, before the development of the law of unjust enrichment, a co-owner could not compel other co-owners to contribute towards voluntary repairs and improvements to the property,[111] including where one of the parties may have paid the whole or a disproportionate part of the mortgage instalments. This is premised on the reasoning that where a co-owner 'has no opportunity to of exercising

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[104] See above, Part VI.
[105] *Murphy* v. *Gooch* [2007] EWCA Civ 603 at [10].
[106] *Su Emmanuel v. Emmanuel Priya Ethel* Anne [2016] 3 SLR 1222 at [95].
[107] *Byford* v. *Butler* [2003] EWHC 1267 (Ch) at [40].
[108] J McGhee et al, *Snell's Equity* (London: Sweet & Maxwell, 33rd edn, 2015) at [20–080]. The same equitable accounting principles apply to both a beneficial joint tenancy and a beneficial tenancy in common: *Re Pavlou* [1993] 1 WLR 1046 at 1048 (Millett J).
[109] For an excellent account of the history of equitable accounting, see H Conway, 'Partition Actions and Accounting Adjustments Between Co-owners' (1999) 7 Aust Prop LJ 207 at 208–212.
[110] *Leigh* v. *Dickeson* (1884) 15 QBD 60 at 69 (Lindley LJ).
[111] Ibid.

any option [to accept or decline a benefit] . . . he will be under no liability'.[112] However, it should be noted that this has changed with the modern development of the law of contribution. Secondly, in the absence of actual or constructive ouster, an occupying co-owner was not accountable for his sole occupation or for receiving rents or profits,[113] since it was the act of exclusion that was 'seen as a trigger for liability to pay an occupation rent'.[114] Where any increase in value is realised upon an actual sale, these objections fall away, and equitable accounting may be conducted because 'one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value.'[115]

B. Adjustments for outgoings

Equitable accounting is not the same as ascertaining beneficial entitlement.[116] Centuries of judicial development have 'distilled four distinct matters'[117] that form the subject of equitable accounting: (i) expenditure on repairs and improvements; (ii) adjustment of liability for mortgage payments; (iii) apportioning rent and profit received from third parties; and (iv) charging an occupation rent where there is ouster.[118] The former two aspects deal with the outgoings; whereas the latter two deal with income from the property. In the Singapore Court of Appeal decision of *Su Emmanuel* v. *Emmanuel Priya Ethel Anne*,[119] an equitable account was unusually taken solely on the basis of adjusting for unequal mortgage payments. In that

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[112] *Leigh* v. *Dickeson* (1884) 15 QBD 60 at 65 (Brett MR).
[113] See *Fisher* v. *Wigg* (1700) 1 Salk 391; *Fisher* v. *Prosser* (1774) Cowp 218.
[114] S Bright, 'Occupation rents and the Trusts of Land and Appointment of Trustees Act 1996: from property to welfare?' [2009] Conv 378 at 386.
[115] *Leigh* v. *Dickeson* (1884) 15 QBD 60 at 67 (Cotton LJ).
[116] E Cooke, 'Equitable Accounting – Some Recent Decisions in Northern Ireland' (2001) 23 Dublin Uni LJ 188 at 189.
[117] Ibid.
[118] See generally, E Cooke, 'Equitable Accounting' [1995] 391; and H Conway, 'Co-Owners and Equitable Accounting: A Comparative Commonwealth Analysis', in E Cooke (ed.), *Modern Studies in Property Law: Volume 3* (Oxford: Hart Publishing, 2005), ch 6.
[119] [2016] 3 SLR 1222.

case, the property was originally purchased in the joint names of *X* and *Y*, an estranged married couple. When *X* and *Y* fell behind on their mortgage repayments, it was agreed that *Y*'s sister, *Z* (the claimant), would buy over a 49% interest in the property from *Y*, and as a result *X*, *Y* and *Z* became registered tenants in common.[120] *Z*'s purchase of practically the entirety of *Y*'s share was financed by a fresh mortgage which redeemed the original mortgage, under which all three parties were named as co-mortgagors. *Z* serviced every mortgage instalment on her own, and after about six years *Z* applied to court for an order for sale, and a declaration that based on her *actual* contributions towards the mortgage instalments, she had an enhanced 70 per cent beneficial interest in the property.

At first instance, the Singapore High Court held that '[o]ver and above [*Z*'s] legal interest of 49% in the property, [*Z*] had an equitable interest equivalent to the further sums she had paid towards the property, to her detriment and for which [*X* and *Y*] had been unjustly enriched',[121] and ordered that *Z* was to receive 70% of the sale proceeds. On appeal, the Singapore Court of Appeal firmly rejected the possibility the *Z* could claim enhanced beneficial interest under a resulting[122] or constructive[123] trust, holding that *Z* was 'both legally and beneficially entitled'[124] only to a 49 per cent interest.

Nevertheless, the Court of Appeal found that because *Z* had paid more than 85% of the mortgage instalments even though the parties' understanding was that she was only responsible for 49%, the doctrine of equitable accounting was engaged. The appellate decision is significant because it restates as part of the *ratio decidendi* of the case a number of important principles.

[120] X, Y and Z's shares were 50%, 1% and 49% respectively.
[121] *Emmanuel Priya Ethel Anne* v. *Su Emmanuel* [2015] SGHC 172 at [56] (Lai Siu Chiu SJ).
[122] Su Emmanuel v. Emmanuel Priya Ethel Anne [2016] 3 SLR 1222 at [81].
[123] Ibid, [84].
[124] Ibid, [85].

First, the basis for equitable accounting could rest either on the right of contribution[125] between 'joint and joint and several debtors';[126] or on the principle in *Leigh* v. *Dickeson*[127] where mortgage payments are treated 'as improving the equity of redemption'.[128] Secondly, 'a right to equitable accounting may be excluded by express or implied agreement'.[129] Thirdly, 'the extent to which each party is expected to contribute to mortgage repayments [depends] on the common understanding or agreement between the parties at the time the mortgage is taken out'.[130] Fourthly, '[i]f there is a *material* departure from that common understanding, and one party repays more of the mortgage than was initially envisaged, then equitable accounting may be brought into play'.[131] Fifthly, 'the basis underlying the remedy of equitable accounting is a notional request to *contribute* so as to restore the parties to what had been their common understanding'.[132] Sixthly, 'there is no reason to draw a distinction between mortgage payments which go towards capital and those which go towards interest',[133] because 'both these payments ultimately preserve or enhance the equity of redemption'.[134]

As would be expected, given that the value of the property had increased by more than two-fold, from S$530,000 at the time of purchase to a present value of S$1.25 million, the claimant in *Su Emmanuel* v. *Emmanuel Priya Ethel Anne*[135] recovered significantly lesser under an

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[125] See Part VI above.
[126] *Muschinski* v. *Dodds* (1984–85) 160 CLR 583 at 596 (Gibbs CJ). See also B. Edgeworth, *Butt's Land Law* (Sydney: Thomson Reuters, 7th edn, 2017), 237.
[127] (1884) 15 QDB 60.
[128] *Su Emmanuel* v. *Emmanuel Priya Ethel Anne* [2016] 3 SLR 1222 at [101]. The second basis is significant because it 'could have a bearing on whether the court may order an account for the interest element in mortgage repayments'.
[129] Ibid, [104], citing *Muschinski* v. *Dodds* (1984–85) 160 CLR 583.
[130] Ibid, [105].
[131] Ibid (original emphasis).
[132] Ibid (emphasis added).
[133] Ibid, [102].
[134] Ibid, [103], citing *Re Pavlou* [1993] 1 WLR 1046, 1050 (Millett J). In previous cases, when allowing the recovery of the interest element of mortgage payments, the court would often apply a set-off against any occupation rent chargeable for sole occupation by the co-owner paying the mortgage: *Suttill* v. *Graham* [1977] 1 WLR 819 at 824 (Ormrod LJ).
[135] [2016] 3 SLR 1222.

equitable account, i.e. S$74,586,[136] as compared to if she were entitled to an enhanced 70% beneficial interest, i.e. 70% minus 49%, in other words 21%, of the present value of S$1.25 million, being S$262,500.

C. Adjustments for Income

Apart from adjusting for various outgoings such as repairs, improvements and mortgage payments, the process of equitable accounting also takes into account any imbalances in the apportionment of rent and profits received by any of the co-owners,[137] as well as any occupation rent that may be chargeable.[138]

At common law, as a result of having unity of possession,[139] co-owners have the right to possess,[140] as well as the use and enjoyment of,[141] the entire property. Voluntarily non-occupation by a co-owner is simply treated as choosing not to exercise his or her right to occupy[142] and does not trigger the equitable accounting rules.[143] However, where a co-owner is physically excluded or even 'constructively' ousted[144] from the property, he or she will be entitled to an appropriate occupation rent. Based on Conway's impressive comparative survey

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[136] Ibid, [121].

[137] A co-owner's right to an account for rent or profits used to be found in the Administration of Justice Act 1705, but the Act was repealed by the Law of Property (Amendment) Act 1924 because joint-owners were made trustees, and equity supplied the duty to account: E Cooke (n 74), 398.

[138] See generally, H Conway *Co-ownership of Land: Partition Actions and Remedies* (Dublin: Bloomsbury Professional, 2nd edn, 2012) ch 11; and also H Conway 'Co-Owners and Equitable Accounting: A Comparative Commonwealth Analysis', in E Cooke (ed.), *Modern Studies in Property Law: Volume 3* (Oxford: Hart Publishing, 2005).

[139] K Gray & SF Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th edn, 2009), [7.4.22].

[140] *Henderson* v. *Eason* (1851) 17 QB 701 at 720 (Parke B).

[141] *Bull* v. *Bull* [1955] 1 QB 234 at 237 (Denning LJ).

[142] *McKay* v. *McKay* [2008] NSWSC 177, [46].

[143] H Conway, *Co-ownership of Land: Partition Actions and Remedies* (Dublin: Bloomsbury Professional, 2nd edn, 2012) at [11.18].

[144] See K Gray & SF Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th edn, 2009) at [7.4.36]; and H Conway, *Co-ownership of Land: Partition Actions and Remedies* (Dublin: Bloomsbury Professional, 2nd edn, 2012) at [11.23]. Constructive ouster could occur where a co-owner had created intolerable living conditions for the others by engaging in unreasonable behaviour, for example, *Baker* v. *Baker* [1976] 3 WWR 492.

of the Commonwealth authorities,[145] when one co-owner seeks a right to contribution in respect of mortgage payments, the court may, when taking an equitable account, credit the interest element of the mortgage payment against an occupational rent where the claimant has enjoyed sole possession of the land[146] where it is 'necessary to do equity between the parties'.[147] The practice in the English courts appears to apply 'a rule of convenience',[148] where the court takes separate accounts the payment of mortgage capital and interest, and credits the interest component against a notional occupation rent so that the two sums effectively cancel each other out.[149]

D. *Example of equitable accounting in action*

The various aspects of equitable accounting came into sharp focus in the recent case of *Davis (as Trustee in Bankruptcy of Jackson)* v. *Jackson*.[150] In 2003, Mrs Jackson purchased a property in her sole name using her own funds. Three days after purchase, Mrs Jackson for 'wholly unclear'[151] reasons executed a trust deed, declaring that she held the property on trust for herself and her estranged husband Mr Jackson in equal shares.[152] Under the same deed, Mr Jackson undertook to pay half of the mortgage payments by countersigning.[153] Sometime in 2007, when Mrs Jackson experienced cash-flow problems, the property was re-mortgaged and the new lender required the title to the property to be transferred into the couple's joint names,

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[145] See for instance, *Leake* v. *Bruzzi* [1974] 1 WLR 1528; *Bernard* v. *Josephs* [1982] 1 Ch 391; *Forgeard* v. *Shanahan* (1994) 35 NSWLR 206; *Osachuk* v. *Osachuk* (1971) 18 DLR (3d) 413.
[146] H Conway, 'Co-Owners and Equitable Accounting: A Comparative Commonwealth Analysis', in E Cooke (ed.), *Modern Studies in Property Law: Volume 3* (Oxford: Hart Publishing, 2005) at 125–26.
[147] *Re Pavlou* [1993] 1 WLR 1046 at 1048 (Millett J).
[148] *Re Gorman (a Bankrupt)* [1990] 1 WLR 616 at 626 (Vinelott J).
[149] H Conway, 'Co-Owners and Equitable Accounting: A Comparative Commonwealth Analysis', in E Cooke (ed.), *Modern Studies in Property Law: Volume 3* (Oxford: Hart Publishing, 2005), 126.
[150] [2017] EWHC 698 (Ch) (Snowden J).
[151] Ibid, [6].
[152] Ibid, [3].
[153] Ibid, [4].

and for both of them to be liable for repayment of the new mortgage loan.[154] A Land Registry TR1 form was executed, containing a declaration that the parties held the property on trust for themselves as joint tenants, even though in reality Mr Jackson never lived at the property, nor did he make any payments under the mortgage.[155] When Mr Jackson was made a bankrupt five years later, his trustee in bankruptcy applied to court for an order for sale, and a declaration that Mr Jackson was entitled to one-half of the equity of the property. Mr Justice Snowden granted the orders, subject to an equitable account.[156]

In his masterly survey of existing authorities, Snowden J affirmed that '[t]he principles of equitable accounting were developed by the courts of equity to enable an adjustment to be made to the division of the net proceeds of sale of a co-owned property in appropriate cases'.[157] As regards payments in respect of improvements, even though Mrs Jackson paid all of the outgoings and some items of repair and maintenance, Snowden J gave no credit because these payments did not contribute to any increase in the capital value of the property.[158] In contrast, on the issue of mortgage repayments, Snowden J accepted that 'credit will normally be given for mortgage payments in respect of capital, and [sometimes] for the interest element',[159] and gave Mrs Jackson full credit for all monies that she continued to pay until the property was sold.[160] Finally, on the issue of occupation rent, Snowden J held that it was not 'in accordance with equity or justice'[161] to charge Mrs Jackson with an occupation rent because 'at no time . . . was there any agreement or expectation either that Mr Jackson would have a right to occupy

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[154] Ibid, [7].
[155] Ibid, [8]. This would have precluded any claim under an implied trust: see Part III above.
[156] Ibid, [20].
[157] Ibid, [30], citing *Murphy* v. *Gooch* [2007] EWCA Civ 603 (Lightman J).
[158] Ibid, [33], relying on *Re Pavlou* [1993] 1 WLR 1046 (Millett J).
[159] *Byford* v. *Butler* [2004] 1 FLR 56 at [23] (Lawrence Collins J).
[160] Davis (as Trustee in Bankruptcy of Jackson) v. Jackson [2017] EWHC 698 (Ch) at [35].
[161] Ibid, [75].

the [p]roperty, or that Mrs Jackson would have to pay rent to anyone for her occupation of it'.[162]

The outcome of the last issue turned on whether the Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA') provided 'an exhaustive regime',[163] such that 'the older principles developed in the case law on equitable accounting are no longer applicable'.[164] Snowden J, in an illuminating and enlightened analysis, answered this question in the negative, distinguishing powerful contrary *dicta* in *Stack* v. *Dowden*[165] on the basis that the case did not involve a trustee in bankruptcy,[166] and concurring with academic opinion[167] that 'there is nothing in the preamble to TOLATA to suggest that it was intended entirely to abolish the principles of equitable accounting…'.[168] There is much to be said for agreeing with Snowden J's reasoning that, since Mr Jackson had 'contributed nothing other than his willingness to assume personal liability for the re-mortgage',[169] charging Mrs Jackson with an occupation rent would result 'in an unjust windfall for Mr Jackson's creditors'.[170] Hence, it is submitted that the general discretionary equitable accounting principles distilled from 'cases decided under the old law'[171] remain relevant today, operating alongside the TOLATA statutory regime,

[162] Ibid.
[163] *French* v. *Barcham* [2009] 1 WLR 1124 at [18] (Blackburne J).
[164] Davis (as Trustee in Bankruptcy of Jackson) v. Jackson [2017] EWHC 698 (Ch) at [43].
[165] [2007] 2 AC 43 at [94] (Baroness Hale); [150] (Lord Neuberger).
[166] Davis (as Trustee in Bankruptcy of Jackson) v. Jackson [2017] EWHC 698 (Ch) at [47].
[167] S Bright, 'Occupation rents and the Trusts of Land and Appointment of Trustees Act 1996: from property to welfare?' [2009] Conv 378, *cf* K Gray & SF Gray, *Elements of Land Law*, (Oxford: Oxford University Press, 5th edn, 2009) at [7.4.38].
[168] Davis (as Trustee in Bankruptcy of Jackson) v. Jackson [2017] EWHC 698 (Ch) at [45].
[169] Ibid, [77].
[170] Ibid. In this regard, English law 'remains distinctly creditor oriented despite best efforts of the courts and Parliament to safeguard innocent family members from the worst consequences of the acts of their partners': M Davey, 'Insolvency and the family home' [2000] Insolv L 2, 15.
[171] *Stack* v. *Dowden* [2007] 2 AC 432 at [94] (Baroness Hale).

although admittedly 'it would be a rare case where the statutory principles would produce a different result from that which would have resulted from the equitable principles'.[172]

E. Two personal remedies compared

It should be apparent from the foregoing discussion that there is a substantial degree of overlap, both in terms of the methodology employed when calculating the adjustment[173] and the type of evidence needed to sustain the claim, between the right of contribution and equitable accounting. This has led Cooke to observe that the right to recover expenditure on repairs, improvements and mortgage payments under an equitable account 'might be described as obligations to reimburse'.[174] Some authorities similarly refer to the 'right of contribution' when taking an equitable account,[175] and often the outcome will be the same in both cases, although not invariably so. In *Davis (as Trustee in Bankruptcy of Jackson)* v. *Jackson*,[176] Snowden J found that 'applying [unjust enrichment] principles [would have given] the same result as [he] reached applying equitable principles',[177] perceptively observing that:[178]

> What might bring the principles of unjust enrichment into play would be if the property had been bought on mortgage, and a co-owner was to seek to retain all of the benefits of an increase in value of the property in circumstances in which he had not made a proportionate contribution to the mortgage payments that prevented the property from being

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[172] Ibid, [150] (Lord Neuberger).
[173] It has been said that 'it is very easy to get the maths wrong here': E Cooke, 'Equitable Accounting – Some Recent Decisions in Northern Ireland' (2001) 23 Dublin Uni LJ 188 189.
[174] E Cooke, 'Equitable accounting' [1995] Conv 391, 403.
[175] See *Scapinello* v. *Scapinello* [1968] SASR 316 at 318 (Bright J); *Re Gorman (a Bankrupt)* [1990] 1 WLR 616 at 626 (Vinelott J).
[176] [2017] EWHC 698 (Ch).
[177] Ibid, [88].
[178] Ibid, [86] (original emphasis in italics; emphasis added by underlining).

> repossessed and sold whilst its value increased. That would be an unjust enrichment, but in my view the extent of the enrichment *at the claimant's expense* would be limited to the mortgage payments which had in effect been made on behalf of the defendant, and any remedy in unjust enrichment would be limited to those amounts.

Given the high degree of similarity between the right of contribution founded on unjust enrichment, and the rules of equitable accounting for mortgage overpayments, a case may be made for the rules in common law and equity to be assimilated. Burrows has argued that, where 'common law and equity co-exist coherently, but . . . there is nothing to be gained by adherence to those historical labels',[179] then these labels, which are unhelpful, 'could, and should, be excised at a stroke'.[180]

However, we are of the view that, as a matter of principle and policy, the different labels should be retained for the following reasons. First, a claim founded on unjust enrichment is subject to the defence of change of position, but this defence does not apply to equitable accounting. In contrast, equitable accounting, being an equitable remedy, is subject to the discretion of the court.[181] Secondly, a claim for contribution to mortgage payments only forms one of four aspects of an equitable accounting claim, and absorbing only one aspect into the common law would still require a claimant to seek an equitable account for adjustments in the other aspects. It may very well be that 'the old rules of equitable accounting devised by the Court of Chancery [are] unjust and ill-equipped to deal with the modern realities of co-ownership',[182] but law

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[179] A Burrows, 'We Do this at Common Law but that in Equity' (2002) 22 OJLS 1 at 5.
[180] Ibid, 15–16.
[181] See Part VIIA above.
[182] H Conway, Co-Owners and Equitable Accounting: A Comparative Commonwealth Analysis', in E Cooke (ed.), *Modern Studies in Property Law: Volume 3* (Oxford: Hart Publishing, 2005) at 129.

reform in this regard is a matter for the legislature to consider and judges remain constrained by established practice derived from precedents. As was illustrated in *Davis (as Trustee in Bankruptcy of Jackson)* v. *Jackson*,[183] the issue of the interaction between a statutory regime and the common law is by no means easy to reconcile. Thirdly, a contribution claim may be made anytime, but an equitable account may only be taken when the property is sold. Fourthly, a claim for contribution, bring a claim to reverse unjust enrichment, is arguably[184] subject to a limitation period of six years[185] from the date of enrichment,[186] accruing afresh with the payment of each mortgage instalment.[187] Limitation could be an issue the payments are made over a substantial number of years.[188] In contrast, since the right to an equitable account only accrues at the point of sale,[189] neither a statutory limitation period nor the doctrine of laches is applicable.

In light of these substantive differences, we are of the view that a right of contribution and equitable accounting should continue to be kept separate, although the law of contribution should continue to inform and influence the exercise of the court's discretion when taking an equitable account.

VIII. Conclusion

[183] [2017] EWHC 698 (Ch).
[184] The Limitation Act 1980 does not contain any specific provision for unjust enrichment claims. Virgo has argued that, as a matter of policy, a limitation period should be applicable: G Virgo (n 87), 735.
[185] In *Re Diplock* [1948] 1 Ch 465 at 514 (Lord Greene MR), actions for money had and received, formerly called actions on the case, were held to fall under 'actions founded on simple contract' in Limitation Act 1939, s 2(1)(a), the predecessor of Limitation Act 1980, s 9.
[186] H McLean, 'Limitation of Actions in Restitution' (1989) CLJ 472 at 475.
[187] E Cooke, 'Equitable Accounting – Some Recent Decisions in Northern Ireland' (2001) 23 Dublin Uni LJ 188 at 190.
[188] Ibid.
[189] Ibid.

In this paper we have examined the complex interplay between various legal and equitable doctrines and the issue of disproportionate contributions towards mortgage payment by a claimant. We have suggested a framework to analyse this tricky issue. First, if there is an express declaration of trust, then the parties' intention is conclusive of the beneficial shares. Second, a resulting trust is *prima facie* not relevant in analysing an imbalance in contribution of mortgage payments unless there was an agreement between the parties, at the time of purchase, as to the manner in which they would repay the mortgage. Third, if there is a common intention between the parties to share the property in different proportions as compared to their registered proportions, then a common intention constructive trust comes into play. Hence, the beneficial shares would be determined with reference to the doctrine of common intention constructive trust, under which mortgage payments are merely one of many factors that will be considered. If there is no common intention constructive trust, any disproportionate contributions to mortgage payments may, if these contributions are not made as a gift to the other party, be recovered by a claimant from the defendant by seeking a right of contribution. This right of contribution is a personal claim which arises to prevent the other defendant's unjust enrichment and does not change the beneficial interests of the parties. Finally, even if no right of contribution is asserted during the currency of the co-ownership, the disproportionate contribution to mortgage payments must be factored in when the property is sold by way of a process known as equitable accounting. This process is undertaken only if there is no common intention constructive trust or no evidence that the mortgage payments were meant to benefit the other co-owner. Like the right of contribution, equitable accounting does not change the beneficial interests of the parties. In the process of equitable accounting, there should not be any distinction made between payments to capital and interest unless the contributing co-owner had the benefit of staying exclusively on the property and had effectively ousted the other co-owner. In such circumstances, the court *may*, at its discretion, order the co-

owner who stayed on the property exclusively an occupation rent provided it is just and equitable to do so. Such an occupation rent could be, but need not be, set off against the contributions to the interest component of mortgage payments.