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Comparing family property disputes in English and Singapore law: ‘context is everything’

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Abstract

This paper examines why Singapore law has not followed English law in the area of beneficial ownership of family property. It points out that the landmark cases in the two jurisdictions are underpinned by different family paradigms. The English landmark cases are based on the unmarried cohabitants paradigm and the legal rules that have emerged from these cases are aimed at, whether successfully or not, ensuring a fair division of the family home upon the breakdown of these relationships. In contrast, the Singapore seminal judgments are underlain by contests between children over their parents’ property which raised questions as to the parties’ true intentions and the legal techniques to determine that. In the main, this paper argues that the legal rules that emerge in a society are shaped by the conditions of that society: these rules are purpose-built to resolve the specific types of disputes that come through the judicial system, which are in turn moulded by the distinctive conditions of that society. The discussion also shows that whilst the courts in the two jurisdictions differ in the legal techniques which they apply to determine these disputes, they do not appear to differ greatly in their understanding of human interactions and complex family relationships.

Keywords: family property; trust; equity

Introduction

In *Stack v Dowden*, Baroness Hale famously said that in law, ‘context is everything’.¹ Although this statement was made with reference to the need to distinguish between the domestic and commercial contexts in the resolution of English family property ownership disputes, this paper argues that ‘context is everything’ when we try to gain a deeper understanding of English legal developments and the reasons why they have not been followed in other common law jurisdictions.

This paper examines why Singapore law has not followed English law in the area of beneficial ownership of family property, and what this analysis tells us about the transplantation of English legal doctrines in foreign societies. Singapore law makes an interesting comparative case study in this area of law because, as a legal system and society, Singapore shares many similarities with England and yet differs in important ways. First, being a former British colony and a common law jurisdiction with a small case load, the Singapore courts have traditionally followed English law in many respects, including the pre-*Stack* state of English law on beneficial ownership of family property. Hence, the Singapore court’s categorical rejection of the *Stack* approach was not a development that was to be

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¹[2007] UKHL 17, [2007] 2 AC 432 at [69].

expected. Second, Singapore, like England, is an advanced economy where private home ownership is possible. Yet, being an Asian society with its own legal, socio-economic and cultural conditions, the Singaporean societal context stands in clear contrast to the English societal context within which the *Stack* approach was developed. A comparative review of Singapore legal developments and the wider socio-economic environment within which these legal developments occur makes clear the close relationship between the societal context and the legal rules which regulate human interactions within that context. Whether English law is adopted in other common law jurisdictions is not simply a matter of the doctrinal merits of the English rules. Sociological² and comparative perspectives provide fresh insights on legal developments which a study of the legal rules in a single jurisdiction alone do not yield.

In the main, this paper argues that the legal rules that emerge in a society are shaped by the conditions of that society: these rules are purpose-built to resolve³ the specific types of disputes that come through the judicial system, which are in turn moulded by the distinctive legal, socio-economic conditions and the patterns of human interaction within that society. The insights obtained from a comparative review of family property disputes in England and Singapore through a combination of doctrinal and socio-legal inquiries are valuable in three ways. First, they facilitate scholarship that looks beyond mere doctrinal distinctions and merits and into 'context' factors – socio-economic conditions, legal norms, culture and policy factors – which would help us in evaluating the viability of legal transplants. Second, they illuminate assumptions underlying domestic English developments which we may not pause to reflect upon sufficiently when we are considering English developments on their own. Finally, they enable us to determine the value of divergent English law to other common law jurisdictions, and vice versa.

The discussion comprises four main parts. The first part, which follows this introduction, examines the doctrinal differences between English law and Singapore law in the area of beneficial ownership of family property. The second part points out that the type of family paradigms underlying the landmark decisions in the two jurisdictions are markedly different, and that the courts in each jurisdiction are thus grappling with different concerns. The English landmark cases are based on the unmarried cohabitants paradigm and the legal rules that have emerged from these cases are aimed at, whether successfully or not, ensuring a fair division of the family home upon the breakdown of these relationships. In contrast, the Singapore seminal judgments are underlaid by contests between children over their parents' property which raised questions as to the parties' true intentions and the legal techniques to determine that. The third part examines the probable salient socio-economic, cultural and legal conditions that may have contributed to or facilitated the divergent Singapore developments. The fourth part of the discussion, building on the analysis in the preceding parts, offers three reflections on English law. The analysis shows that even though the English and Singapore courts apply different legal techniques in determining the beneficial ownership of family property, they do not appear to differ greatly in terms of their understanding of human interactions and therefore what the just outcome of a case should be.

1. The legal rules

(a) *Pre-Stack v Dowden*

The post-colonial, vestigial ties between English law and Singapore law are evidenced by the pre-divergence position in both jurisdictions. *Pre-Stack*, English courts primarily used the equitable doctrines of the resulting trust, common intention constructive trust and proprietary estoppel to deal with disputes over the beneficial ownership of family property. The relationship and overlap between the

²Sociology of law literature establishes that law should be understood against the social environment. See for example KW Wedderburn 'Law as a social science' (1967) 9 *Journal of the Society of Public Teachers of Law* 335. In the area of family law, family justice and family homes, see for example M Maclean 'Semantics or sustainability: socio-legal research in family law, or sociology of law and family justice' (2017) 44 *Journal of Law and Society* S61; G Douglas et al 'Cohabitants, property and the law: a study of injustice' (2009) 72 *MLR* 24.

³That rules are shaped by the conditions of the society to *resolve* disputes does not mean that these rules necessarily (or successfully) address the underlying social issues.

different doctrines were never fully worked out;⁴ cases were resolved based on the doctrine(s) pleaded by the claimant. Nor was it clear whether cases involving properties purchased in one party's name (sole-name cases) were to be treated differently – and if so, how differently – from cases involving properties purchased in the joint names of the parties to the disputes (joint-names cases).⁵

What is clear is that pre-*Stack* English law privileged the position of the breadwinner. Under the principles of resulting trust, pre-*Stack* common intention constructive trust and proprietary estoppel, the range of conduct that is legally significant to generate a proprietary interest is narrow: express representations, express common intention, detrimental reliance and direct contributions to the purchase price. The focus is on unconscionable dealing with property, contribution to purchase price, economic partnership and agreement. Notably, although the pre-*Stack* common intention constructive trust applied a more flexible approach at the quantification stage by allowing English courts to consider all aspects of the dealings between the parties,⁶ the initial hurdle of establishing that one has acquired an interest in the property remained very high. Where an express common intention could not be established, which is frequently the case in the home setting, a common intention was generally to be inferred from direct contributions to the purchase price. In the seminal case of *Lloyds Bank plc v Rosset*, Lord Bridge famously said that 'it is at least extremely doubtful whether anything less will do'.⁷ In that case, the property was registered in the husband's sole name. There was no express common intention established between the married couple and the wife had made no direct contributions to the purchase price. The wife's contributions in the form of decorations and supervision of renovation works were held to be insufficient for the inference of a common intention to share the property beneficially. The pre-*Stack* rules were clearly focused on the property aspects of the disputes.

Under Singapore law, before the landmark decision of *Chan Yuen Lan v See Fong Mun*, there were few cases concerning the beneficial ownership of family property.⁸ Pre-*Chan Yuen Lan* decisions generally followed English law as a matter of convention. Similar principles of resulting trust,⁹ common intention constructive trust and proprietary estoppel were applied. As such, Singapore law may be said to suffer from similar weaknesses to English law. Cases involving common intention constructive trusts were particularly rare.¹⁰ In contrast, there were many more cases on presumed resulting trust, which provided opportunities for Singapore courts to make gentle modifications to English principles.¹¹

(b) Current English law: the *Stack* approach

English law took a different turn after the *Stack* and *Jones v Kernott*¹² line of cases. Three key cases which underline the *Stack* approach are discussed below.

The first case is *Stack*, which concerned a family home registered in the joint names of Mr Stack and Ms Dowden, an unmarried cohabiting couple. Ms Dowden contributed substantially more than Mr Stack towards the purchase of the property.¹³ Save for the property in dispute and associated endowment policies which were in joint names, they held separate bank accounts, made separate savings and investments. On their separation, Mr Stack sought an order for sale of the property and equal division of the proceeds. The House of Lords, by a majority, held that the common intention

⁴For comments on their interplay see *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at 785 (Lord Scott).

⁵*Stack*, above n 1, at [65].

⁶See *Midland Bank plc v Cooke* (1995) 27 HLR 733; *Oxley v Hiscock* [2005] Fam 211.

⁷*Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 133. Where a party's indirect contributions have enabled direct contributions to be made, a common intention to share the property may be inferred: *Le Foe v Le Foe* [2001] 2 FLR 920.

⁸[2014] SGCA 36, [2014] 3 SLR 1048 at [152].

⁹See *Lau Siew Kim v Yeo Guan Chye Terence* [2007] SGCA 54, [2008] 2 SLR(R) 108.

¹⁰*Ibid.*, at [98].

¹¹*Ibid.*

¹²[2011] UKSC 53, [2012] 1 AC 776.

¹³She contributed approximately 65% of the purchase price.

constructive trust, and not the resulting trust, applies in cases where the property is purchased for domestic consumer use. Under the common intention constructive trust framework, the default presumption is that the beneficial interests follow legal interests. In joint-names cases, where parties have not made an express declaration of trust, they are presumed to be joint tenants in equity. Exceptionally, this default presumption may be rebutted by evidence that the parties had a different common intention regarding their respective shares or that their common intention had subsequently changed.¹⁴ The legal inquiry in joint-names scenarios is thus focused on quantification (and not acquisition) of the beneficial interests. For sole-name cases, the legal owner is, by default, presumed to be the sole beneficial owner. The non-owner needs to prove that he/she has *acquired* a beneficial interest in the property before the inquiry turns to the issue of quantification.

On quantification, Baroness Hale set out a non-exhaustive list of factors that English courts may consider when inferring parties' intentions regarding their respective shares of the property.¹⁵ Some of these factors, such as parties' respective characters and whether they have children for whom they are obliged to provide, have little to do with the parties' dealings with the property. This list seeks to remedy the inadequacies of the pre-*Stack* approach by directing greater focus to the relational aspects of the dispute.

Applying the principles to the facts of *Stack*, the majority held that this was a 'very unusual case'¹⁶ in which the default presumption of equal sharing was rebutted, having regard to the parties' unequal financial contributions, their separate management of finances and responsibility for expenditure, and the lack of undertaking on Mr Stack's part for child minding. Ms Dowden was awarded a 65% share in the property.

The second case is *Laskar v Laskar*,¹⁷ which concerned a mother and a daughter purchasing the former's council flat in their joint names at a discounted purchase price that was available to her. A principal part of the purchase price was paid for through a mortgage loan taken out in their joint names; the remainder was paid for by the parties in roughly equal amounts. The property was let out as planned, and the rental income was used to pay the mortgage repayments, the repairs and other outgoings on the property. After a disagreement between the parties which led to the mother severing the joint tenancy, the daughter commenced proceedings to claim a beneficial interest in the property. Whilst accepting that the *Stack* approach could apply to other personal relationships beyond a sexual relationship,¹⁸ Lord Neuberger did not think that it applied to the case at hand because the property was 'primarily purchased' for investment purposes.¹⁹ A resulting trust analysis was applied instead, which led to the outcome that the daughter owned 33% of the property. Lord Neuberger also commented that if the *Stack* default presumption of equal sharing had applied, it would have been rebutted for numerous reasons, including the fact that the parties had kept their finances separate.²⁰

The third case is *Jones v Kernott*. Mr Kernott and Ms Jones, an unmarried cohabiting couple, purchased a family home in joint names. Upon their separation, Mr Kernott moved out and bought another house in his sole name, leaving Ms Jones to pay off the mortgage on the property herself (which amounted to 90% of the purchase price). Ms Jones commenced proceedings to determine the parties' respective interests in the jointly-owned property 15 years after their separation. She conceded that parties owned the property equally in equity at the point of separation but argued that their beneficial interests in the property had changed subsequently, in view of Mr Kernott's subsequent purchase of his own house and her contributions towards the jointly-owned property and the maintenance of their children. The UK Supreme Court held that where there is no express agreement on

¹⁴*Stack*, above n 1, at [68] (Lady Hale).

¹⁵*Ibid*, at [69].

¹⁶*Ibid*, at [92].

¹⁷[2008] 1 WLR 2695.

¹⁸*Ibid*, at [16].

¹⁹*Ibid*, at [15] and [17].

²⁰*Ibid*, at [18]–[19].

parties' respective shares in the property and it is impossible to infer a common intention, English courts may *impute* an intention to the parties.²¹ Applying the *Stack* principles (which were not challenged by the parties), the Court concluded that Ms Jones owned 90% and Mr Kernott owned 10% of the property. Where the Justices differed was whether the proportions of sharing were arrived at by way of an inference of intention or imputation of intention.

To summarise, thus, where a property has been acquired primarily for domestic consumer use, the *Stack* common intention constructive trust approach is applicable. However, the resulting trust analysis remains relevant in the commercial context or where the property is primarily purchased for a commercial purpose. The *Stack* approach is potentially applicable to all kinds of family relationships, beyond the unmarried cohabitation context. What remains unclear under English law is whether a 'holistic approach' will be applied to the anterior inquiry of the acquisition of interest. Although judicial remarks²² have been made that the law has 'moved on' from the restrictive 'direct contributions' rule laid down in *Rosset*, the state of the authorities does not yet clearly demonstrate that the hoped-for liberalisation has occurred in sole-name scenarios.²³

The *Stack* approach is far from perfect. The subsequent Privy Council decision in *Marr v Collie* appeared to signal a retreat from the *Stack* developments by identifying the central inquiry as being concerned with the parties' intentions.²⁴ *Marr v Collie* concerned a cohabiting couple who had, during the course of their 17-year relationship, systematically acquired 11 properties in joint names. One property was purchased as their family home, and the other 10 properties were purchased for investment purposes. Lord Kerr, who delivered the sole judgment, said that the *Stack* reasoning is not limited to the 'purely domestic setting'; it is equally applicable to the properties purchased by the parties in a personal relationship for investment purposes.²⁵ However, if the evidence as to the parties' intentions is available, the dispute ought to be resolved based on actual intentions, as opposed to 'the triumph of one intention over another'.²⁶ *Marr v Collie* thus indicates a greater leaning towards a fact-specific approach.²⁷ The centrality of the common intention constructive trust in resolving English domestic property disputes is really a redirection of the court's attention towards all relevant facts of the case, as opposed to focusing intensely on the property factors or parties' dealings at the point of acquisition of property. From this vantage point, *Marr v Collie*²⁸ is broadly consistent with the *Stack* approach, not an aberration.

(c) Current Singapore law approach: the Chan Yuen Lan framework

In *Chan Yuen Lan*, the Singapore Court of Appeal observed that the *Stack* approach was unsuitable for application in Singapore. The apex Singapore court considered that 'the position in England has developed in response to its changing economic and social landscape'²⁹ – namely, a rise in property prices and a 'dramatic increase' in the number of unmarried cohabitants over the last five decades.³⁰ The

²¹See *Jones v Kernott*, above n 12, at [47].

²²See for example *Stack*, above n 1, at [60] (Lady Hale) and [26] (Lord Walker); *Singh v Singh* [2014] EWHC 1060 (Ch) at [116].

²³See M Mills 'Single name family home constructive trusts: is *Lloyds Bank v Rosset* still good law?' (2018) *Conveyancer and Property Lawyer* 350; cf B Sloan 'Keeping up with the *Jones* case: establishing constructive trusts in "sole legal owner" scenarios' [2015] 35 *LS* 226.

²⁴*Marr v Collie* [2017] UKPC 17, [2018] AC 631.

²⁵*Ibid*, at [40].

²⁶*Ibid*, at [54].

²⁷M Yip 'Modern equity – at the edge of formal reasoning?' in A Robertson and J Goudkamp (eds) *Form and Substance in Private Law* (Oxford: Hart Publishing, 2019) ch 12.

²⁸It is currently unclear whether the approach in *Marr v Collie* will replace the *Stack* approach in English law. In *Thomas v Bulathwela* [2019] EWHC 3511 (Ch) at [25]–[26], counsel invited the court to make a ruling on whether the *Marr v Collie* approach was to be preferred but the court took the view that the parties had come to an agreement on the correct approach to take in the case, and a definitive ruling was thus avoided.

²⁹*Chan Yuen Lan*, above n 8, at [152].

³⁰*Ibid*, at [127] (emphasis added).

Singapore Court of Appeal further identified three legal drivers that led to the development of the *Stack* approach in English law: the failure to devise an appropriate statutory regime to deal with family home ownership disputes; the increasingly outdated assumptions which underlie the presumed resulting trust analysis; and the diminishing relevance of the presumption of advancement.³¹

Significantly, the Court, favouring Lord Neuberger's dissenting judgment in *Stack v Dowden*, laid down a multi-step framework to resolve property disputes (the *Chan Yuen Lan* framework³²) where parties have contributed unequally towards the purchase price and have not made any declaration of trust as to their respective shares in the property:

- (a) Is there sufficient evidence of the parties' respective financial contributions to the purchase price of the property? If the answer is 'yes', it will be presumed that the parties hold the beneficial interest in the property in proportion to their respective contributions to the purchase price (ie the presumption of resulting trust arises). If the answer is 'no', it will be presumed that the parties hold the beneficial interest in the same manner as that in which the legal interest is held.
- (b) Regardless of whether the answer to (a) is 'yes' or 'no', is there sufficient evidence of an express or an inferred common intention that the parties should hold the beneficial interest in the property in a proportion which is different from that set out in (a)? If the answer is 'yes', the parties will hold the beneficial interest in accordance with that common intention instead, and not in the manner set out in (a). In this regard, the court may not impute a common intention to the parties where one did not in fact exist.
- (c) If the answer to both (a) and (b) is 'no', the parties will hold the beneficial interest in the property in the same manner as the manner in which they hold the legal interest.
- (d) If the answer to (a) is 'yes' but the answer to (b) is 'no', is there nevertheless sufficient evidence that the party who paid a larger part of the purchase price of the property (X) intended to benefit the other party (Y) with the entire amount which he or she paid? If the answer is 'yes', then X would be considered to have made a gift to Y of that larger sum and Y will be entitled to the entire beneficial interest in the property.
- (e) If the answer to (d) is 'no', does the presumption of advancement nevertheless operate to rebut the presumption of resulting trust in (a)? If the answer is 'yes', then: (i) there will be no resulting trust on the facts where the property is registered in Y's sole name (ie Y will be entitled to the property absolutely); and (ii) the parties will hold the beneficial interest in the property jointly where the property is registered in their joint names. If the answer is 'no', the parties will hold the beneficial interest in the property in proportion to their respective contributions to the purchase price.
- (f) Notwithstanding the situation at the time the property was acquired, is there sufficient and compelling evidence of a subsequent express or inferred common intention that the parties should hold the beneficial interest in a proportion which is different from that in which the beneficial interest was held at the time of acquisition of the property? If the answer is 'yes', the parties will hold the beneficial interest in accordance with the subsequent altered proportion. If the answer is 'no', the parties will hold the beneficial interest in one of the modes set out at (b)–(e) above, depending on which is applicable.³³

Five distinctions can be made between the *Stack* approach and the *Chan Yuen Lan* framework (which has been followed and further clarified in later Singapore decisions). First, the dichotomous treatment of domestic and commercial contexts was rejected in *Chan Yuen Lan*.³⁴ The *Chan Yuen Lan* framework, echoing Lord Neuberger's dissenting judgment in *Stack*, admits an interplay between the resulting trust and the common intention constructive trust. Context operates more subtly under the *Chan*

³¹*Ibid*, at [129]–[132].

³²The *Chan Yuen Lan* framework has been applied in subsequent Singapore cases.

³³*Chan Yuen Lan*, above n 8, at [160].

³⁴*Ibid*, at [152].

Yuen Lan framework: it would be easier to rebut the presumption of resulting trust in the domestic context as compared with the commercial context.³⁵

Second, under the *Chan Yuen Lan* framework, the overall emphasis is on the parties' intentions and the availability of evidence that reveals these intentions. In this respect, it is similar to the *Marr v Collie* approach. Where they differ is in the presumptions that are brought into play in the absence of any evidence as to the parties' actual intentions. Although the presumption of resulting trust analysis constitutes the starting point of analysis under the *Chan Yuen Lan* framework, it would not take an exceptional case to depart from it. The Singapore courts would first consider 'the actual intentions and desires of the transferor'.³⁶ The relegation of the presumption of advancement to the fifth step in the framework further underscores the diminishing importance of presumptions in the resolution of property disputes under Singapore law.

Third, in respect of the common intention constructive trust analysis, post-*Chan Yuen Lan* cases demonstrate that Singapore law does not sharply distinguish between sole-name cases and joint-names cases. In *Ng So Hang*, the Singapore High Court held that a property being registered in joint names without more does not lead to the automatic presumption that the parties are to equally share the property in equity.³⁷ The parties might have opted for joint tenancy to enable the operation of the right of survivorship without intending to share the property equally while both parties are still alive. In the subsequent case of *BUE v TZQ*, the High Court relented somewhat and said that in the absence of evidence to the contrary, 'ordinarily, the indication of joint tenancy on the transfer document might have been taken as evidence' of an intention to share the property equally during their lifetime.³⁸ Notably, under Singapore law, if a property is registered in joint names without indicating the manner of holding, the parties are *presumed* to hold as joint tenants.³⁹ In such cases, the Singapore courts would, *a fortiori*, be reluctant to presume equal sharing in equity, given that the joint tenancy arose by reason of a statutory presumption as opposed to the parties' choice.

Fourth, as to establishing a proprietary interest through the inference of a common intention, the Singapore Court of Appeal recently affirmed in *Geok Hong Co Pte Ltd v Koh Ai Gek* that Singapore law has *hardly* moved on from the *Rosset* approach.⁴⁰ Indeed, Singapore courts treat almost all of 'the whole course of dealing' between the parties as merely background information.⁴¹ Subsequent contributions to the property in the form of renovations⁴² may be insufficient to acquire an interest in the property unless there is a common intention to that effect.⁴³ The contributor in such cases may seek equitable accounting instead.

Finally, the Court of Appeal in *Chan Yuen Lan* commented that Singapore law would not impute to the parties a common intention that they never had based on what the court considers to be fair in the circumstances.⁴⁴

2. The family paradigm underlying the landmark decisions

Conventional lines of doctrinal inquiry may lead to the conclusion that English law favours upholding individual justice in the case at the expense of certainty, whereas Singapore law privileges certainty at the expense of flexibility. One may also take the view that the Singapore Court of Appeal had rightly

³⁵Ibid, at [157].

³⁶Ibid, at [51].

³⁷[2018] SGHC 162 at [46]–[47].

³⁸[2018] SGHC 276, [2019] 3 SLR 1022 at [57].

³⁹Land Titles Act (Cap 157, Rev Ed 2004), s 53(1).

⁴⁰[2019] SGCA 15, [2019] 1 SLR 908 at [80]–[81].

⁴¹*Ng So Hang*, above n 37, at [56]–[57]. However, the court accepted (at [106]) that a common intention can be inferred from indirect financial contributions which enabled direct contributions to be made to the purchase price.

⁴²*Geok Hong Co*, above n 40, at [82]–[83].

⁴³For a detailed discussion, see HW Tang and K Low (eds) *Tan Sook Yee's Principles of Land Law* (Singapore: LexisNexis, 4th edn, 2019) paras 7.84–7.88.

⁴⁴*Chan Yuen Lan*, above n 8, at [160].

(and very firmly) indicated, by way of seriously considered obiter, that Singapore law would not follow the *Stack* approach because the latter is simply unsound.⁴⁵

This paper suggests an alternative perspective to appraise the Singapore developments. Setting aside the comparative doctrinal merits of the two approaches, this paper argues that the difference in approach is likely shaped by the kind of disputes – those underpinned by different socio-family issues – that come before the English and Singapore courts. This is not an instance of Singapore law deliberately choosing what it perceives to be a better doctrinal solution or wanting to be different from English law. Singapore law simply crafted a solution that is tailored to the circumstances of the disputes that the local courts face. This explanation may be easily missed, because the *Chan Yuen Lan* decision only identifies the conditions of contemporary English society and says little regarding how the conditions of contemporary Singaporean society differ and in what ways these differences contribute to a different approach.

Crucially, without proper investigation, there may be a temptation to attribute the difference in legal approach to the perceived differences between Asian and Western societies.⁴⁶ To some extent, such temptation has been encouraged by judicial sentiments to a similar effect expressed by both English⁴⁷ and Singapore courts.⁴⁸ However, given the diversity in race, religion and culture amongst Asian countries, ‘Asian culture’ and ‘Asian values’ are not monolithic concepts that can be singularly or sharply defined. Further, Hong Kong courts have unhesitatingly embraced the *Stack* approach and have demonstrated sympathy⁴⁹ towards the application of the ‘whole course of dealing’ approach to determine the acquisition of proprietary interest.⁵⁰ That the two Asian societies have many similarities yet the courts in each jurisdiction have reacted differently to the *Stack* approach strengthens the argument here that cultural contrast alone cannot explain the divergent paths that English and Singapore law have taken in the area of family property ownership. In this connection, the Hong Kong judiciary’s continued faithful adherence to English law in the era of ‘one country, two systems’ reflects its deep-seated mistrust towards the Chinese political regime and its desperate need to hold on to the ‘rule of law’ in the regulation of the Hong Kong society.⁵¹

A more fruitful approach is to start by examining the family paradigm that underlies the seminal developments in each jurisdiction. This helps to unpack the assumptions that underlie the legal solution adopted by each jurisdiction. The word ‘family’ embraces many different family models⁵² and must be understood in its proper context.⁵³ In modern societies, other than the traditional nuclear family, we see single-parent households, childless households, reconstituted family households, multi-generational households, and skip generation households. Some of these family arrangements will become more commonplace as cohabitation and divorce become increasingly common and issues such as low fertility and an ageing population become more acute in the coming years.⁵⁴ The relational dynamics, norms and expectations would also differ across the different kinds of family relationships.⁵⁵ There is a danger in underthinking and overgeneralising what ‘family’ means.

⁴⁵See W Swadling ‘The common intention constructive trust in the House of Lords: an opportunity missed’ (2007) 123 Law Quarterly Review 511; J Mee ‘*Jones v Kernott*: inferring and imputing in Essex’ (2012) Conveyancer and Property Lawyer 167.

⁴⁶Cf M Chen-Wishart ‘Legal transplant and undue influence: lost in translation or a working misunderstanding?’ (2013) 62 ICLQ 1.

⁴⁷*Favor Easy Ltd v Wu* [2011] EWHC 2017 (Ch) at [6].

⁴⁸*Lau Siew Kim*, above n 9, at [61].

⁴⁹*Mo Ying v Brillax Development Ltd* [2015] HKEC 583 at [7.12] (obiter).

⁵⁰M Lower ‘Marriage and acquisition of a beneficial interest in the family home in Hong Kong’ (2016) Conveyancer and Property Lawyer 453.

⁵¹See further ‘Hong Kong bar pleads with foreign judges to keep serving’ (*Financial Times*, 6 October 2020).

⁵²A Brown *What is the Family of Law?: The Influence of the Nuclear Family* (Oxford: Hart Publishing, 2019) p 193.

⁵³*Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 at 41 (Lord Nicholls).

⁵⁴See *Doing Better For Families* (OECD, 2011); *The Future of Families to 2030* (OECD, 2011).

⁵⁵See C Vogler ‘Managing money in intimate relationships: similarities and differences between cohabiting and married couples’ in J Miles and R Probert *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Oxford: Hart Publishing, 2009) ch 4.

(a) English landmark cases: unmarried cohabitants

It is indisputable that the *Stack* approach is based on the family paradigm of unmarried cohabitants. In *Stack v Dowden*, the separated couple had cohabited for 27 years and had four children. In *Jones v Kernott*, Jones and Kernott had lived together for eight years and five months and had two children together. Post-*Stack* and *Jones v Kernott*, a stream of family home ownership disputes arising between separated unmarried cohabitants continues to come before the English courts.⁵⁶ Indeed, population statistics reveal that the ways people choose to live together in the UK have been changing: cohabitation is the fastest growing family arrangement,⁵⁷ with the number of cohabiting couples having more than doubled over the last 20 years.⁵⁸ Cohabitation is also increasingly ‘a setting for childbearing’.⁵⁹

However, unlike the marital context, in which Parliament has intervened to confer on the courts a statutory discretion to reallocate the married couple’s assets on divorce,⁶⁰ no such legislative intervention has been made in the context of unmarried cohabitants. This meant that a stark distinction is drawn between two types of horizontal relationships: marriage and non-marital cohabitation. The latter relationship is treated as being more akin to ‘legal strangers’⁶¹ because separated unmarried cohabitants are generally left to the devices of property law to redress the financial consequences of the breakdown of their relationship. Even if the law should distinguish between marriage and non-marital cohabitation so as to respect an individual’s choice of family structure, the question remains as to what distinctions should be made. Importantly, as Joslin has pointed out in relation to the US legal framework, the law ‘presumes that the limited set of recognized decision points – transition to marriage (or the failure to do so) and entrance into an agreement (or the failure to do so) – are deliberately made, mutual decisions’.⁶² Indeed, the Law Commission of England and Wales similarly warned against placing too much weight on party autonomy, because in reality, cohabitants’ choices are far more limited.⁶³ It may be that parties do not get married because one partner refuses to do so.

As Lady Hale reflected extra-judicially, ‘Parliament may do nothing, but a judge must always do something, even if it is not at all clear what he or she should do’.⁶⁴ The *Stack* approach essentially makes the point that non-marital cohabitants are not to be treated as legal strangers. Given that the family home is likely to be one of the most, if not the most, substantial family assets, the English courts’ attention gravitated towards the financial consequences faced by the various family members in the broken family structure rather than to hard-nosed property law principles. The dichotomous treatment between commercial and domestic consumer cases, the presumption of equal beneficial ownership in joint-names cases and the inclination towards the ‘whole course of dealing’ approach attest to that affirmation. The ‘whole course of dealing’ approach in particular allows the court to review parties’ model of family economy across the full span of their relationship, in contrast with the narrow decision points allowed under the pre-*Stack* approach. Most homes, as Lord Walker acknowledged extra-judicially, are now purchased with mortgages, and unmarried cohabitants’ contributions to mortgage repayment could depend on ‘wholly unpredictable matters’ concerning their

⁵⁶See for example *Fowler v Barron* [2008] EWCA Civ 377; *Aspden v Elvy* [2012] EWHC 1387 (Ch); *Barnes v Philipps* [2016] 2 FLR 1292; *Graham-York v York* [2015] EWCA Civ 72, [2016] 1 FLR 407.

⁵⁷Cohabiting couples fastest-growing family type, says ONS’ (*The Guardian*, 7 August 2019), available at <https://www.theguardian.com/uk-news/2019/aug/07/cohabiting-couples-fastest-growing-family-type-ons> (last accessed 11 March 2021).

⁵⁸Unmarried couples in the UK pay the price of an outdated system’ (*Financial Times*, 10 October 2019).

⁵⁹A Berrington and J Stone ‘Cohabitation trends and patterns in the UK’ ESRC Centre for Population change Report (February 2015), available at <https://eprints.soton.ac.uk/374132/1/Cohabitation%2520trends%2520and%2520patterns%2520in%2520the%2520UK.pdf> (last accessed 11 March 2021).

⁶⁰Matrimonial Causes Act 1973, Pt II. For civil partners who parted ways, see Civil Partnership Act 2004, Sch 5.

⁶¹CG Joslin ‘Autonomy in the family’ (2019) 66 *UCLA Law Review* 912. See further CG Joslin ‘Family choices’ (2020) 21 *Arizona State Law Journal* 1285 at 1288–1289.

⁶²Joslin (2019), above n 61, at 966. Joslin’s empirical research points to the opposite in many cases.

⁶³Law Commission ‘Cohabitation: the financial consequences of relationship breakdown’ (Law Com No 307) paras 2.54–2.58.

⁶⁴B Hale ‘Fifty years of the Law Commissions: the dynamics of law reform now, then and next’ in M Dyson et al (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (London: Hart Publishing, 2016) p 24.

financial positions and sharing of parental responsibility throughout the course of their relationship.⁶⁵ Drawing on statistical data on the UK population, Barlow argues that women often take on the homemaker role and men take on the breadwinner role in the relationship not because these are freely-made choices.⁶⁶ These choices, on Barlow's analysis, are probably the result of the gender pay gap, costs of childcare and the differences in societal expectations of 'a good mother' and 'a good father'.⁶⁷

Although there may be genuine debates as to whether all cohabiting relationships should be treated as marriage analogues, it can hardly be said that the relationships in *Stack* and *Jones v Kernott* are not akin to marriage.⁶⁸ For this reason, it is unsurprising that the *Stack* approach is redolent of the family law approach. It moves away from prioritising discrete decisional points to favouring a connected and holistic view of how a family functions across a period of time. Hayward described the *Stack* approach as a process of 'familialisation' of property law,⁶⁹ and Dixon firmly rejected a property law characterisation of the *Stack* principles.⁷⁰ Similarly, Gardner and Davidson explained the *Jones v Kernott* decision on the basis of a material communality driver, a concept that is applicable to marriages and civil partnerships.⁷¹

(b) Singapore landmark cases: children fighting over assets acquired by parents

In contrast, the family relationships upon which seminal Singapore decisions (including *Chan Yuen Lan*) were delivered did not concern unmarried cohabitants. These cases involved children fighting over parents' assets or were shaded by such a contest. The family patterns of three Singapore landmark cases are examined below: *Lau Siew Kim*, *Chan Yuen Lan* and *Geok Hong Co*.

Lau Siew Kim was handed down eight months after *Stack*, but *Stack* was not referred to in the judgment. The facts of *Lau Siew Kim*, as opposed to the legal principles, are of interest to the present discussion. The dispute concerned two properties (one of which was the matrimonial home) registered in the joint names of a married couple, Yeo (husband) and Lau (wife). Upon Yeo's death, by the operation of the rule of survivorship, Lau became the sole registered owner of the properties. Yeo's estranged sons brought proceedings in court, seeking a declaration that Lau (their stepmother) held the properties on a resulting trust for Yeo's estate, under which they were beneficiaries. The case was fought on the basis of the presumptions of resulting trust and advancement. Yeo was not able to testify, as he had passed away by the time of trial, and presumptions were thus relied upon to deduce Yeo's likely intentions.⁷² Significantly, the actual battle was between Yeo's sons and their stepmother, although the legal analysis focused on the dealings between Yeo and Lau.

Six years later, in *Chan Yuen Lan*, VK Rajah JA revisited his judgment in *Lau Siew Kim*. By this time, English law on family homes has been fundamentally reformed by the *Stack* approach, and *Chan Yuen Lan* presented a ripe opportunity for the Singapore Court of Appeal to consider whether it should follow English law in this regard. *Chan Yuen Lan* concerned a dispute between husband and wife, each claiming to be the absolute beneficial owner of a property registered in the wife's sole name that was substantially paid for by the husband. The wife signed a power of attorney three days before the completion of the purchase of the property, granting her husband and their

⁶⁵R Walker 'The changing face of trust law' (2017) 31 Trust Law International 19 at 29.

⁶⁶A Barlow 'Solidarity, autonomy and equality: mixed messages for the family?' (2015) 27 Child and Family Law Quarterly 223 at 230–233.

⁶⁷Even in same-sex cohabiting relationships, most of these factors remain relevant, save that any wage gap is not attributed to gender.

⁶⁸They are, however, not to be placed on the same footing as marriages, see *Stack*, above n 1, at [69] (Baroness Hale); *Jones v Kernott*, above n 12, at [19] (Lord Walker and Lady Hale).

⁶⁹A Hayward "Family property" and the process of "familialisation" of property law' (2012) 24 Child and Family Law Quarterly 284.

⁷⁰M Dixon 'Editor's notebook: the still not ended, never-ending story' (2012) Conveyancer and Property Lawyer 83 at 86.

⁷¹S Gardner and KM Davidson 'The future of *Stack v Dowden*' (2011) 127 Law Quarterly Review 13. See also S Gardner 'Family property today' (2008) 124 Law Quarterly Review 422.

⁷²*Chan Yuen Lan*, above n 8, at [51].

eldest son full powers to take charge of, manage and improve the property. Unusually, the couple had lived apart for over 20 years at the time of trial, although they remained married and had no intention to divorce. Relevantly, the property was purchased after the husband had moved out to live with his mistress. The husband sought a declaration that he was the owner of the property in equity, claiming that the wife's alleged financial contribution to the purchase was an interest-free loan to him and that the property was registered in the wife's name to enable her to flaunt it to her friends. The wife contended that the house was the husband's appeasement offering over his extramarital affair. The dispute was fought strictly on the principles of resulting trust, as the couple had declined to consider the doctrine of common intention constructive trust.⁷³ Further, the Court of Appeal observed that the real litigants in the case were the couple's two sons (who stood on opposing sides) and that the 'respective cases put forth by [the husband and the wife] were largely an attempt by [the two sons] to reconstruct versions of the material events which would be favourable to their cause based on whatever documentary evidence there was available'.⁷⁴ Both husband and wife were in their eighties at the time of trial. In other words, underlying the dispute between the couple was a contest between their two sons over family property. The court therefore approached the evidence of the couple and their sons 'with extreme caution'.⁷⁵

The Singapore Court of Appeal's opportunity to consider the common intention constructive trust only arose more recently in *Geok Hong Co*,⁷⁶ a dispute concerning a property registered in the name of the family-owned company. This company was managed by the patriarch, Mr Tan, and subsequently by his children. Mr Tan's third son (TTL) and his family had been residing in the property as their family home for many years. In TTL's version of the facts, approximately 40 years ago, Mr Tan (a majority shareholder of the company at that time) had orally represented to TTL that the property would be purchased for TTL on account of his commitment to the family business. TTL further alleged that the property, as required by Mr Tan, was registered in the name of the company to ensure that TTL's wife would not be able to lay claim to it in the event of divorce. Neither Mr Tan nor TTL had informed anyone else of this alleged oral representation during their respective lifetimes. The company denied that the alleged oral representation was made.⁷⁷ The suit was commenced by TTL's family members, who sought a declaration that TTL's estate had a beneficial interest in the property under a common intention constructive trust or in the alternative under proprietary estoppel principles. A confrontation between TTL and his siblings had led TTL to believe that his siblings would not honour a prior understanding that the property belonged to him. Both Mr Tan and TTL were deceased at the time of trial. This was yet another case of children fighting over assets acquired by their parent(s).

Based on the above, four points are apparent. First, in *Lau Siew Kim* and *Chan Yuen Lan*, the parties chose to argue their cases on the basis of the presumed resulting trust.⁷⁸ As such, any development of the law in these cases could not have taken place by abandoning the doctrine. Thus, whilst the Court of Appeal in *Chan Yuen Lan* had considered whether to follow the *Stack* approach in Singapore law and indicated its preference for Lord Neuberger's dissenting views by way of seriously considered obiter,⁷⁹ it had little room to consider whether the *Rosset* approach to the common intention constructive trust was due for reform under Singapore law.

⁷³*Chan Yuen Lan*, above n 8, at [98].

⁷⁴*Geok Hong Co*, above n 40, at [71]. Tang pointedly described this case as one involving 'elderly persons who are used by their warring children to conduct litigation by proxy in order to obtain a more favourable inheritance': see Tang Hang Wu 'A dispute in Chancery Lane: reconsidering the resulting and common intention constructive trust: *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048' (2015) *Conveyancer and Property Lawyer* 169 at 174–175.

⁷⁵*Ibid.*

⁷⁶The Court of Appeal in *Geok Hong Co* did not revisit the question as to whether Singapore law should follow the *Stack* approach.

⁷⁷The company did not rely on Mr Tan's lack of authority to resist the common intention constructive trust claim in the lower court, though the argument was raised before the Court of Appeal. See *Geok Hong Co*, above n 40, at [41].

⁷⁸The relationships in these two cases attracted the operation of the presumption of advancement.

⁷⁹As the parties did not argue on the basis of common intention constructive trust and did not appear to submit on the applicability of the *Stack* approach under Singapore law, the Singapore Court of Appeal's 'rejection' of the *Stack* approach in

Second, all three decisions are, to varying degrees, concerned with disputes arising from vertical family relationships, legal battles initiated and/or driven by children over family assets acquired by their parents. They were not straightforward cases involving horizontal relationships between spouses or unmarried cohabitants. In this regard, *Geok Hong Co* stands out, as it was a clear-cut case of contentious intergenerational transfer of wealth. *Lau Siew Kim* and *Chan Yuen Lan*, however, required the courts to examine the horizontal relationship between spouses. That being the case, the underlying vertical family relational dynamics made the court very cautious in its assessment of oral evidence in both disputes. Crucially, in *Chan Yuen Lan*, the marriage existed only in name. In both parties' versions of the facts, it was not a property purchased during the currency of an intimate relationship that would strongly indicate 'emotional and economic commitment to a joint enterprise'.⁸⁰ The fact patterns of the decisions may explain the Singapore courts' intense focus on the proprietary aspects of the disputes.

Third, where the court is called upon to apply property law principles in the marital context, it is almost never a case of a terminated marriage and spouses going their separate ways.⁸¹ It is usually a case of a spouse's creditor going after the family property⁸² or where one spouse has passed away, as in *Lau Siew Kim*. In other words, in neither *Lau Siew Kim* nor *Chan Yuen Lan* did the Singapore Court of Appeal encounter socio-family issues – much less issues neglected by Parliament – similar to those in *Stack* and *Jones v Kernott*.

Fourth, *Geok Hong Co* is an unusual case when viewed against the conventional fact patterns in which the family home common intention constructive trust is typically invoked. The property was held in the name of the family-owned company. The legal owner was therefore not a co-resident with the actual occupiers. Upon the failure to establish an express common intention because the alleged oral representation from Mr Tan to TTL could not be proved,⁸³ it was argued that a common intention could be inferred from the major renovation works paid for by TTL and his foregoing of an opportunity to purchase his own property. It was not disputed that TTL did not pay any part of the purchase price. The court said that the foregoing of an opportunity to purchase one's own property would be too speculative to amount to a detriment. The court further held that the renovation works were carried out for the benefit of TTL and his family to upkeep the house and to ensure comfortable enjoyment, as they had resided in the property rent-free for 40 years.⁸⁴ In the court's view, any equity arising from their payment of the renovations would have been spent.

There is no reason in principle why renovations carried out to ensure comfortable living could not also adjust the parties' beneficial interests. However, given that the legal owner was not (and could not be) a co-resident meant that it had not enjoyed the comfort brought about by the renovations. It was not argued that the company was saved any costs of maintenance. Nor was it argued that the renovations had increased the value of the property which was still retained at the time of trial.

Further, it is unclear how a common intention between a company and TTL could be authentically *inferred* based on the principles that are developed for the domestic setting, without straying into the realms of imputation of intention. The facts of *Geok Hong Co* lie midway between a conventional common intention constructive trust over a shared family home and a *Pallant v Morgan* equity type of

Chan Yuen Lan constituted obiter observation. Nevertheless, the Court of Appeal had dedicated 51 paragraphs in its judgment to discussing the merits of the *Stack* approach ([101]–[142]) and explicitly discussed whether Singapore law should adopt the same approach ([151]–[159]). The *Chan Yuen Lan* framework of analysis was clearly propounded on the basis of the in-depth discussion and on the perceived merits of the minority judgment delivered by Lord Neuberger in *Stack*. The obiter 'rejection' of the *Stack* approach in *Chan Yuen Lan* was thus authoritative and, notably, property disputes brought before the Singapore courts after *Chan Yuen Lan* applied the *Chan Yuen Lan* framework of analysis.

⁸⁰*Jones v Kernott*, above n 12, at [19] (Lord Walker and Lady Hale).

⁸¹Cf *Tan Poh Soon v Phua Sin Yin* [1995] 2 SLR(R) 583.

⁸²*Gibson v Revenue and Customs Prosecution Office* [2009] 2 WLR 471 at [27].

⁸³As the alleged oral representation was not proved, the alternative claim on proprietary estoppel also failed (*Geok Hong Co*, above n 40, at [95]). Moreover, the court did not think that detrimental reliance was established on the facts of the case.

⁸⁴*Geok Hong Co*, above n 40, at [88].

common intention constructive trust. The property was acquired as neither a shared residence (whether with the company or Mr Tan) nor a commercial joint venture.⁸⁵ Indeed, English case law has shown that the legal analysis applicable to cases where the properties are held by a company is less straightforward.⁸⁶ The Singapore Court of Appeal's unrelenting insistence on direct contributions to the purchase price for the inference of a common intention was therefore understandable, if not justified. *Geok Hong Co* was not the case for reform in the direction of the *Stack* approach. Its factual pattern was simply not comparable to the unmarried cohabitation paradigm underlying the *Stack* approach. That being the case, it does not appear at all likely that the *Stack* approach will be adopted in Singapore even when a case with a similar fact pattern comes before the Singapore courts, in view of the strongly worded obiter observations against the *Stack* approach in *Chan Yuen Lan* and the increasingly entrenched position of the *Chan Yuen Lan* framework in subsequent case law developments.⁸⁷

(c) Singapore case law: a different cohabitation paradigm

For completeness, we should also consider property disputes arising between unmarried cohabitants in Singapore and inquire why they have not been a driver for reform. Canvassing Singapore case law, property disputes involving unmarried cohabitants are far and few between. Of the few unmarried cohabitation cases in Singapore, most do not entail a fact pattern that comes close to that in *Stack* or *Jones v Kernott*. The cohabitation period was generally much shorter by comparison, and the couples had usually entered into cohabitation with a view towards getting married shortly (although the marriage did not ultimately materialise).⁸⁸ The cohabiting couples also generally had no children together.⁸⁹ In other words, these were not relationships for which termination would have raised questions of fairness or family policy concerns, much less provide an occasion for the familialisation of property law.

One decision stands out. In *Ng Kong Yeam v Kay Swee Pin*,⁹⁰ the cohabitation lasted for about 30 years, and the unmarried couple had one child together. The nature of the relationship in *Ng Kong Yeam* thus bears a close resemblance to those in *Stack* and *Jones v Kernott*. The man had transferred all of his shares in a company which in turn held the couple's family home to the woman. As the woman had provided no consideration for the shares, the issue was whether the man had intended to make a gift to the woman.⁹¹ Noting that the parties' relationship as 'quasi-familial' and that the man regarded the woman as his wife and their child together as 'his daughter from his second marriage',⁹² the court concluded that the man had intended to make a gift to the woman.⁹³ This suggests that the nature of the parties' relationship and the type of contest are relevant to the Singapore courts' exercise of divining parties' intentions. Had Singapore family property disputes been predominantly of the *Stack/Jones v Kernott* variety, it is far from clear whether Singapore law would have gone down the path that it did.

⁸⁵See *Tahir v Faiz* [2019] EWHC 1627 (QB). The English High Court applied the resulting trust analysis, instead of the common intention constructive trust analysis.

⁸⁶See *Smith v Bottomley* [2013] EWCA Civ 953. There are issues as to whether the representor has authority to make the oral representations on behalf of the company and whether the corporate veil could be pierced. Where the representor has contributed to the purchase price of the property, a resulting trust analysis may be applied to determine the representor's interest in the property without having to pierce the corporate veil: see *Prest v Petrodel* [2013] 2 AC 415. In *Geok Hong Co*, however, it was not clear if the 10% deposit was paid for by the patriarch (Mr Tan) or the company. The trial court found that the remaining 90% of the purchase price was paid for by Mr Tan but it was unclear if he did so in his personal capacity or on behalf of the company. In any event, neither party to the dispute contended that the property was held on a resulting trust for Mr Tan. See *Geok Hong Co*, above n 40, at [21].

⁸⁷See also comments at n 79 above.

⁸⁸*Tan Thiam Loke v Christina Woon* [1991] 2 SLR(R) 595; *Chia Kum Fatt Rolfston v Lim Lay Choo* [1993] 2 SLR(R) 793.

⁸⁹*Tan Thiam Loke*, above n 88; *Chia Kum Fatt Rolfston*, above n 88; *Ng So Hang*, above n 37.

⁹⁰[2019] SGHC 219.

⁹¹The plaintiff was certified to be mentally disordered by the time of trial and he was thus unavailable to provide testimony.

⁹²*Ng Kong Yeam*, above n 90, at [46].

⁹³*Ibid*, at [49].

3. Understanding the Singaporean socio-economic, cultural and legal context

An understanding based on family property cases alone is insufficient. Financial factors might have played a role in preventing *Stack*-like disputes from coming through the Singaporean judicial system. This paper therefore takes a step further and considers the wider context in which these disputes arise. The discussion below shows that the socio-economic, cultural and legal conditions of contemporary Singaporean society play a role in shaping the kind of family property disputes that come before the courts. These conditions also help to explain the legal developments in Singapore, particularly the points of distinction from English law.

(a) Co-residence between parents and adult children

Co-residence between elderly parents and adult children is common in Singapore.⁹⁴ This phenomenon is driven in part by cultural values: unmarried adult children are expected to live with their parents, regardless of their age.⁹⁵ Whether the child is married, filial piety, which requires children to care for and support their ageing parents financially and emotionally, continues to be a recognised cultural value in Singapore. One way of fulfilling this form of family responsibility is by living with elderly parents.

Cultural norms aside, modern family arrangements in Singapore are largely dictated by economic priorities. Considering the soaring property prices and high costs of living in Singapore, co-residence is therefore mutually beneficial for the different generations living under one roof. Many elderly parents in Singapore provide financial, emotional, advisory and/or household/childcare support for their children.⁹⁶ These factors may explain why a substantial number of family property disputes in Singapore arise between parents and children.⁹⁷

(b) Housing policies

Moreover, Singapore housing policies privilege certain family structures, providing family members within these recognised family structures with greater access to affordable government-subsidised housing, known as Housing Development Board (HDB) flats. More than 80% of the Singapore population resides in HDB flats.⁹⁸ These housing policies serve both economic and nation-building objectives.⁹⁹ Like many modern and urbanised Asian societies, Singapore faces various socio-economic challenges: an ageing population, a below-replacement fertility level and high non-marriage/delayed marriage rates.

On the issue of caring for the aged, the Singapore strategy is to incentivise the formation of a mutual care network between elderly parents and their adult children, which can take the form of co-residence or living in close proximity to each other. Housing priorities¹⁰⁰ and grants¹⁰¹ are available to HDB flat buyers who live with or near their parents or married child. As for reinforcing the norm of marriage and having children within a marriage, married couples with children similarly have

⁹⁴K Mehta 'Intergenerational exchanges: qualitative evidence from Singapore' (1999) 27 *Southeast Asian Journal of Social Science* 111 at 113.

⁹⁵K Göransson 'Ethnographic family research: predicaments and possibilities of doing fieldwork on intergenerational relations in Singapore' (2011) 42 *Journal of Comparative Family Studies* 903 at 909–910.

⁹⁶Mehta, above n 94.

⁹⁷See for example *Neo Hui Ling v Ang Ah Sew* [2012] 2 SLR 831; *Moh Tai Siang v Moh Tai Tong* [2018] SGHC 280; *UJT v UJR* [2018] 4 SLR 931.

⁹⁸See https://data.gov.sg/dataset/estimated-resident-population-living-in-hdb-flats?resource_id=a7d9516f-b193-4f9b-8bbf-9c85a4c9b61b (last accessed 11 March 2021).

⁹⁹Y Heo 'The development of housing policy in Singapore and the sources of path dependence' (2014) 31 *Housing, Theory and Society* 429 at 439.

¹⁰⁰See priority schemes: <https://www.hdb.gov.sg/residential/buying-a-flat/new/eligibility/priority-schemes>.

¹⁰¹See housing grant schemes: <https://www.hdb.gov.sg/residential/buying-a-flat/new/schemes-and-grants/cpf-housing-grants-for-dbss-flats>.

the benefit of housing priority for purchasing HDB flats that are not available to singles and unmarried couples with children.¹⁰² Married couples and soon-to-be married couples are also eligible for housing grants to purchase HDB flats.¹⁰³ More limited grants are available to singles above the age of 35 to acquire a HDB flat, but they are not eligible for housing priority. Singles (including unmarried cohabitants) who are below the age of 35 are not able to acquire HDB flats on their own. Given the high prices of private housing, this housing policy encourages single adult children to share a home with their nuclear family.¹⁰⁴

As married couples and members of a nuclear family (parents and their children)¹⁰⁵ have greater access to HDB flats than unmarried couples and singles, they constitute the largest group of property owners in Singapore.¹⁰⁶ It is thus unsurprising that family property disputes in Singapore tend to arise between married couples or between parents and children.

(c) Unmarried cohabitation in Singapore and childbearing outside of marriage

Putting aside housing policies that are hostile to unmarried cohabitants acquiring HDB flats, the general attitude towards cohabitation in Singapore is that it would operate as a form of ‘pre-marital living arrangement with their intended spouse’.¹⁰⁷ In Singaporean society, childbearing out of wedlock remains uncommon.¹⁰⁸ Children born out of wedlock are labelled ‘illegitimate’, and parents of illegitimate children do not enjoy the same benefits (eg housing and tax relief) as parents of children born within a marriage. As such, unmarried cohabitation as a long-term family arrangement and childbearing within such a family structure are not yet prevalent in Singapore. These factors likely contribute to the very small number of property disputes between unmarried cohabitants in Singapore.

(d) Joint tenancy and right of survivorship

Finally, the Singapore courts’ views¹⁰⁹ on the significance of purchasing properties in joint names may be explained by a combination of indigenous legal, cultural and social factors. Properties in Singapore may be held in joint tenancy or tenancy in common. An incident of legal joint tenancy is the right of survivorship, which automatically devolves to the surviving co-owner the entirety of the property upon the demise of the other co-owner. Given Singapore’s strong inheritance culture and intergenerational co-residence pattern,¹¹⁰ joint tenancy is a useful means of effecting the intergenerational transfer of wealth,¹¹¹ especially because it bypasses the probate process and is not subject to inheritance taxation (which was in force in Singapore until its abolition in 2008). This explains why the Singapore High Court did not consider the fact of a property’s being registered in joint names as being strongly

¹⁰²See priority schemes, above n 100. Notably, housing priority is also accorded to divorced or widowed parents (whose child is a natural offspring from the lawful marriage or legally adopted).

¹⁰³See housing grant schemes, above n 101.

¹⁰⁴K Strijbosch ‘Single and the city: state influences on intimate relationships of young, single, well-educated women in Singapore’ (2015) 77 *Journal of Marriage and Family* 1108 at 1113.

¹⁰⁵They must be children that were born within a legal marriage.

¹⁰⁶HDB flat owners are permitted to sell their flats for market value and therefore at profit, which puts them in a position to acquire properties (private or government housing) further down the line.

¹⁰⁷Report: IPS Perception of Policies in Singapore (POPS) Survey 6: Perceptions of Singles on Marriage and Having Children (Lee Kuan Yew School of Public Policy, National University of Singapore, June 2013), available at https://lkyspp.nus.edu.sg/docs/default-source/ips/pops-6_report_0812.pdf (last accessed 11 March 2021). See also: ‘50 per cent of singles okay with cohabitation’ (*The New Paper*, 15 February 2014), available at <https://www.asiaone.com/singapore/50-cent-singles-okay-cohabitation> (last accessed 11 March 2021).

¹⁰⁸Strijbosch, above n 104.

¹⁰⁹See discussion above at text to nn 37–39.

¹¹⁰Mehta, above n 94, at 118; CN Choo ‘Retirement adequacy and housing financing through the CPF system’ in HK Soo and C Leong *Singapore Perspectives 2012: Singapore Inclusive: Bridging Divides* (World Scientific Publishing Co Pte Lt, 2012) p 89 at p 92.

¹¹¹See, for example, *BUE v TZQ*, above n 38.

presumptive of equal beneficial ownership while the owners are alive.¹¹² Importantly, the property disputes in *Ng So Hang*¹¹³ and *BUE v TZQ*¹¹⁴ (discussed above), where this clarification was made, did not arise between a married couple or unmarried cohabitants, relationships where one would more readily infer an intention for present and equal sharing.

The pertinent question is this: should we readily presume that family members other than spouses and unmarried cohabitants intend to share their properties equally during their lifetime, notwithstanding their unequal financial contributions to the property? The study of Singapore developments should motivate us to reflect more deeply on the *Stack* approach and its underlying default assumptions. In Part 4, the analysis returns to English law and considers how English courts have applied the *Stack* approach to relationships beyond the unmarried cohabitants context. Case law reveals that English courts do not interpret family behaviour and human intentions differently from Singapore courts.

4. Reflections on English law

(a) Other personal and family relationships

Coming full circle back to English law, case law shows that the *Stack* approach, which was built based on the unmarried cohabitants paradigm, has not been rigidly applied by the English courts to other kinds of personal and family relationships.

Post-*Stack* disputes advanced forceful challenges to the application of the *Stack* approach outside the adult cohabitants context.¹¹⁵ The difficulty – and artificiality in some cases – of applying the *Stack* approach in all non-commercial scenarios did not escape the English courts' notice. Where property has been purchased for domestic consumer purpose and the parties are clearly in a familial or close and personal relationship, the English courts would apply the *Stack* approach as a starting point but appear more willing to depart from the presumptions that are relevant to adult cohabitants of a shared home. For example, in *Adekunle v Ritchie*, the ownership dispute concerned a property purchased in the joint names of the mother and her adult son. Behrens J said that it would be easier to find a non-*Stack* type of case to be *unusual*, so as to depart from the default presumption of beneficial joint tenancy.¹¹⁶ In that case, the property was a council house to which the mother was entitled to purchase at a discount, but she could not afford the mortgage solely, which necessitated the joint purchase with her son. It was not disputed that the property was acquired primarily for her residence. Although the son's financial contributions justified his having a beneficial interest, as the mother was on good terms with her other children, there was no basis to conclude that she would have intended for the entire beneficial interest to pass to the son with whom she jointly purchased the property. Departing from the default position of beneficial joint tenancy, the court found that the son was entitled to one third of the beneficial interest in the property.

Another technique to ensure fairness and justice is to draw inferences (based on a different set of assumptions) that are appropriate to the nature of the specific relationship. In *Gallarotti v Sebastianelli*,¹¹⁷ a dispute arose between two good friends who decided to purchase a property

¹¹²As explained in *Ng So Hang*, above n 37, at [46], that parties 'intended for the right of survivorship to operate upon the demise of one party in deciding to hold the Property as joint tenants' did not mean that 'the parties also intended for the beneficial interest to be held in equal shares, or in any particular proportion while both parties were alive'. In other words, Singapore law appears to permit joint owners to use joint tenancy for different purposes: (1) joint tenancy as in the joint owners holding the whole interest in the property with no separate shares even while the joint owners are alive; or (2) joint tenancy for the pragmatic purpose of enabling the operation of right of survivorship on the demise of a joint tenant for passing the property to the other joint tenant but the joint tenants are to hold the property as equitable tenants in common while both are still alive and in accordance with their contributions to the purchase price.

¹¹³The court did not characterise the parties' intimate relationship as being familial in nature.

¹¹⁴The property dispute arose between a father and his adult sons.

¹¹⁵See for example *De Bruyne v De Bruyne* [2010] EWCA Civ 519; *Tahir v Faiz* [2019] EWHC 1627 (QB). Cf *Sandhu v Sandhu* [2016] EWCA Civ 1050 at [12].

¹¹⁶[2007] WTLR 1505.

¹¹⁷[2012] EWCA Civ 865.

together. The two friends had expressly agreed at the outset that they would share the property equally, notwithstanding their unequal contributions. The English Court of Appeal agreed that this was a domestic case, which brought the common intention constructive trust into play.¹¹⁸ According to the Court, the common intention constructive trust is more appropriate than the resulting trust in cases involving parties who have incurred expenditure on the strength of their personal relationship without the expectation of precise accounting, as would be expected in a true legal partnership.¹¹⁹ However, that the common intention constructive trust applies does not mean that the court would draw the same inferences as it would in the context of unmarried cohabitants. In *Gallarotti v Sebastianelli*, the Court held that the appropriate inference to be made from the parties' dealings was that 'they intended that their financial contributions should be taken into account but not that there should be any precise accounting'.¹²⁰ Arden LJ also explained that being 'strong friends' did not mean that they would give up 'any chance of substantial equality at the end of the day'.¹²¹

In *exceptional* non-commercial cases, English courts have decided that the *Stack* approach does not apply to the dispute at all. In *De Bruyne v De Bruyne*, the English Court of Appeal acknowledged that it would be 'artificial and unrealistic' to apply the *Stack* approach, which was 'designed to resolve issues of beneficial ownership between adult co-habitees in a property', to a case involving children who 'cannot be regarded as privy to any common intention...in a real way'.¹²² In *Tahir v Faizi*,¹²³ the litigants (Tahir and Faizi) had no family connections and had only known each other very briefly at the time of purchase of the property. The property was not their home, and its ownership was not alleged to be shared between them. The property was purchased in Tahir's name because Faizi was not able to purchase the property in his own name at the time of acquisition because of his immigration status. The English High Court ruled that a common intention constructive trust did not arise in that case and applied a resulting trust analysis instead. In *Wodzicki v Wodzicki*,¹²⁴ an English property was purchased in the joint names of the father and the stepmother, and the purchase price was paid by a loan that was secured over their jointly-owned French property. The daughter and her children stayed at the English property, and the daughter paid all of the associated outgoings. On the death of the father, the stepmother claimed possession of the English property, and in defence, the daughter claimed sole beneficial ownership of the house. The English Court of Appeal did not think that the *Stack* approach would be appropriate under these circumstances because 'there was nothing close about the relationship' between the daughter and the stepmother that would indicate that the latter would intend to make a gift to the former in the event that the latter was to repay part of the loan or if the security over her French property was enforced.¹²⁵

More generally, the above discussion suggests that the *Stack* approach might not have been developed in English law had the seminal cases been different. The discussion also prompts us to think more deeply about the underlying assumptions of any legal approach and the degree of universal applicability of these assumptions beyond the core case. The post-*Stack* decisions discussed above (including *Marr v Collie*), in their application, rejection or expansion of the *Stack* approach, progressively acknowledged the non-universality of the assumptions underlying the approach. The lesson is this: not all family relationships are the same. Studying these decisions as a group also helps to pinpoint two uncertainties that plague the *Stack* approach. First, it is difficult to predict the outcome under the *Stack* approach because of the discretionary exercise at the quantification stage of the common intention constructive trust. The type of family relationship has a bearing on how the discretion is to be exercised. Second, it may be hard to predict whether the *Stack* approach or some other

¹¹⁸Ibid, at [6].

¹¹⁹Ibid, at [5].

¹²⁰Ibid, at [25]. See also *Sandhu v Sandhu* [2016] EWCA Civ 1050 (a property dispute between a father and an adult child).

¹²¹*Gallarotti v Sebastianelli*, above n 117, at [24].

¹²²[2010] EWCA Civ 519 at [48].

¹²³[2019] EWHC 1627 (QB).

¹²⁴[2017] EWCA Civ 95

¹²⁵Ibid, at [25].

approach (the *Marr v Collie* approach or the resulting trust analysis) should apply to the case. It is not clear that the UK Supreme Court will abandon the *Stack* approach entirely if and when the next major case arising in the non-cohabitant context comes before it. But the clarity that is gained from the analysis provides a proper basis for the apex court to define the limits of the *Stack* approach and perhaps even to modify the *Stack* approach going forward. Further, if it were to look to other common law jurisdictions for inspiration for reform, it should also be reminded that the solutions developed by other jurisdiction (eg Singapore) are not necessarily perfect or perfect for the English society.

Finally, although English and Singapore courts have taken divergent paths in dealing with disputes over the beneficial ownership of family property, they differ in terms of the technical framework of analysis because of the types of cases the apex courts in each jurisdiction are confronted with. However, they do not differ greatly in their understanding of human intentions and interaction and therefore what the just outcome of a case should be, as the above discussion shows.

(b) Private law solutions to breakdown of cohabiting relationships

The analysis thus far shows that Singapore developments differ from English developments by reason of the different family paradigms on which the respective legal frameworks in the two jurisdictions are constructed. That being the case, it does not mean that the *Stack* approach is the only plausible private law solution to address the financial consequences of the breakdown of cohabiting relationships. Canadian law, notably, deploys the law of unjust enrichment to redistribute the overall accumulated wealth between the cohabitants, instead of focusing only on the family home.¹²⁶

The difference in approach to the same legal problem may be attributable to ‘context’ factors. Sanders argues that the Canadian legal environment might have encouraged the Canadian courts ‘to adopt a bolder, more functional approach’ than the English courts and focus on the realities of the relationship rather than on allegedly autonomous agreements.¹²⁷ She explains that, unlike the English legal environment, there is extensive legislation on cohabitation in Canada (save in Quebec) and long-standing discussion of the exclusion of cohabitants from spousal rights as being possibly discriminatory.¹²⁸ It was decided by a mere majority of five to four in the decision of *Quebec (Attorney General) v A*¹²⁹ that the exclusion was constitutional.

(c) Legal transplant and divergent foreign law

Finally, the comparative study of Singapore developments demonstrates that the transplanting of English law in foreign societies is not merely a matter of the doctrinal sophistication of the English legal rules. The success of the legal transplant would depend on the legal and socio-economic contexts of both the exporting and importing jurisdictions, as well as consequent calibrated adjustments to the specific English doctrine to fit with the environment of the importing jurisdiction.

Even where English developments have not been followed in other common law jurisdictions and a divergence has occurred, it does not mean that the divergent English law is irrelevant to these other jurisdictions. To appreciate the value of divergent foreign law, the local courts must first determine the extent of the divergence and the likely contributing factors to the divergence. Take the law on the beneficial ownership of family property as an example: the divergence between English law and Singapore law arose as a result of the type of case law that comes before the apex courts in each jurisdiction. If we scrutinise the judicial reasoning in cases involving similar fact patterns – that is, comparing the like with the like – the English courts and Singapore courts applied similar thinking and arrived at similar results. Importantly, the Singapore approach is yet to be fully developed. For

¹²⁶*Kerr v Baranow* 2011 SCC 10 at [84].

¹²⁷A Sanders ‘Cohabitants in private law: trust, frustration and unjust enrichment’ (2013) 62 *International and Comparative Law Quarterly* 628 at 651.

¹²⁸*Ibid.*

¹²⁹2013 SCC 5.

example, the Singapore courts have yet to comprehensively consider whether the principles of the common intention constructive trust should be liberalised and, if so, in what ways. Societal attitudes will also evolve and there may come a day when Singapore courts are confronted with a greater number of property disputes arising between unmarried cohabitants. English law can provide suggestions on how Singapore courts may deal with such types of disputes, even if we do not choose to abandon the *Chan Yuen Lan* framework – for example, should Singapore law adopt the quantification factors enunciated in *Stack* that look beyond the proprietary aspects of the dispute? In a similar vein, the Singapore decisions may be a useful resource to English courts in respect of the resolution of family property disputes arising between family members other than unmarried cohabitants.

Conclusion

Using the beneficial ownership of family property as the anchor context for comparison, this paper has shown that the legal rules that emerge in a society are shaped by the conditions of that society. In our comparison of divergent English and Singaporean developments in the area of beneficial ownership of family property, this paper has demonstrated that the divergence is probably facilitated by the different family paradigms which underlie the seminal decisions in the two jurisdictions. This has led to a divergence in the analytical framework and default presumptions applied by the courts of the two jurisdictions. However, it has also been shown that the courts in the two jurisdictions do not appear to differ very much in their understanding of human interactions and what a just outcome ought to be in disputes arising from complex human relationships, albeit through deploying different legal techniques. As such, the apparent legal divergence should not render English law irrelevant to Singapore, and vice versa. Nor should the rejection of the English approach by Singapore courts on its own be read as outright rejection on the basis of doctrinal merits. The true picture of what has happened is far more complex.