



Neutral Citation Number: [2022] EWHC 631 (QB)

Claim No: F01BS770  
Appeal No: 11BS018C

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ON APPEAL FROM THE COUNTY COURT SITTING AT BRISTOL**  
**HIS HONOUR JUDGE RALTON**

Date: 21/03/2022

Before :

**MR JUSTICE KERR**

Between :

LEE HUDSON

**Appellant**  
**(Claimant)**

- and -

JAYNE HATHWAY

**Respondent**  
**(Defendant)**

Ms Zoë Saunders

(instructed by **Veale Wasbrough Vizards**) for the **Appellant**

**Mr Michael Horton QC** and **Mr Guy Holland** (instructed by **Ashtons Legal**) for the  
**Respondent**

Hearing date: 10 February 2022

**Approved Judgment**

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

.....  
MR JUSTICE KERR

**Mr Justice Kerr :**

**Introduction and Summary**

1. This is an appeal in a case about equitable ownership of a family home purchased in joint names, initially with equal ownership rights, where the unmarried parties later separate. Must a party claiming a subsequent increase in her equitable share necessarily have acted to her detriment? Or does a common intention alone suffice to alter the beneficial shares? And if the former, was the judge right to decide that the requirement of detriment was met?
2. Ms Hathway submits that detriment is not required in a joint names family home case with no express declaration of trusts. If it were, the House of Lords in *Stack v. Dowden* [2007] 2 AC 432 and the Supreme Court in *Jones v. Kernott* [2012] 1 AC 776 would have said so. The judge should not have held that detriment was required. Or, she says, if the judge was right, the requirement was met and, indeed, he should have found further detrimental conduct by her.
3. Mr Hudson asserts, to the contrary, that detrimental conduct was required to alter the beneficial shares; if it were not, the House of Lords and Supreme Court would have made that clear but they did not. The judge was right so to decide. However, Mr Hudson submits, the judge was wrong to find that Ms Hathway acted to her detriment; she did not, objectively, alter her legal position irrevocably, so as to make it worse than it would otherwise have been.

**Outline Facts**

4. Ms Hathway and Mr Hudson started a relationship in 1990. He moved into her home and became joint owner. They did not marry. They had two sons. They sold the home and bought another, in joint names. Then in 2007, with a mortgage, they bought Picnic House, again in joint names, with no declaration of trusts. Both worked. His earnings soon overtook hers; she left the financial services industry to work in the charity sector; he remained in financial services.
5. In 2009, Mr Hudson left Ms Hathway for another woman, moved in with her and later married her. They are now estranged. Ms Hathway stayed at Picnic House with the two sons. The mortgage was converted to an interest only basis. It was paid, as before, from the joint bank account into which both their salaries were paid. Over the years, Mr Hudson substantially paid the mortgage; the amount he contributed far exceeded Ms Hathway's contributions.
6. Then in 2011, the house was blighted by an oil spill, making it very difficult to sell. An environmental disaster was how the judge described it. Oil leaked into the house from a neighbouring tank and under the ground beneath the house. An environmental clean up was required. A complicated insurance claim dragged on for years. Over the following 20 months or so, the parties had sporadic email discussions about financial arrangements.

7. In July and August 2013, Mr Hudson and Ms Hathway agreed terms set out in emails. He had shares of unknown value and a pension. These he would keep: she would have no claim over them. In an email of 31 July he insisted that they should be “ring fenced ... what I get from my years of personal graft ...”. She would have the “liquid cash ... [s]avings in the bank, other plans ... [p]hysical property, the contents of the house ... [and] the house”. He described it as “a bad asset which is preventing all of us [from] .. moving on with our lives”.
8. Ms Hathway’s response in an email of 12 August 2013 was to accept “[s]o that we can move forward and get to a point of completely severing our financial connections”. She confirmed: “you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments ...”. She would “do everything I can to get the house ready for sale as soon as the situation with the oil spill is resolved”.
9. Time passed and Mr Hudson became impatient with a lack of progress in resolving the oil spill clean up, the insurance claim and the sale of Picnic House. In May and July 2014 he referred in emails to how much time had passed “since we came to a deal”. In January 2015, he ceased contributing to the mortgage. Ms Hathway took over the payments. It was cheaper than renting. The two sons, now young adults, remained at Picnic House with her.
10. The judge found that the parties had clearly reached a deal. The parties did not disagree; but the deal did not satisfy the formalities for transferring legal title or a declaration of trusts (Law of Property Act 1925 (**the 1925 Act**), section 53(1); Law of Property (Miscellaneous Provisions) Act 1989 (**the 1989 Act**), section 2(1)-(3)). A change of beneficial ownership could, though, arise by a constructive trust (section 53(2) of the 1925 Act; section 2(5)(c) of the 1989 Act) or by a proprietary estoppel.
11. In October 2019, Mr Hudson issued his claim under CPR Part 8 and the Trusts of Land and Appointment of Trustees Act 1996. He sought an order for the sale of Picnic House, with equal division of the proceeds. Ms Hathway agreed that the house should be sold but contended that she was entitled to the whole of the proceeds under a constructive trust following a common intention and agreement, in reliance on which she had acted to her detriment.
12. The detrimental conduct relied on was: paying all interest payments on the joint mortgage from January 2015; desisting from claiming against assets in Mr Hudson’s sole name acquired during their relationship; not claiming financial support for the benefit of the children under the Children Act 1989; accepting sole responsibility for the oil spill and insurance claim; at her own expense, maintaining and redecorating the property from January 2015; relying from 2014 on the understanding that she was sole beneficial owner, in conducting her finances and lifestyle; and living frugally to afford the upkeep and mortgage.

### **The Judge’s Decision**

13. The judge gave an extempore judgment on 29 January 2021, at the end of a three day trial at which both parties (and Mr Hudson’s estranged wife) gave written and oral evidence. The judge noted that there was a proprietary estoppel claim before the court, which I mention because in this appeal the parties agreed that I do not need to consider

it. A buyer had been found and a sale of Picnic House was proceeding towards exchange of contracts at the time of the trial.

14. The judge stated the facts, in greater detail than my summary above. He found that there was a clear agreement, on the terms set out in the emails quoted above. There was a clear common intention that Ms Hathway would have the entire equity in the property. There was a joint expectation that she would sell the property, but the agreement did not include any time limit for a sale, which was frustrated by the continuing consequences of the oil spill. He rejected Mr Hudson's suggestion that Ms Hathway was prevaricating about selling.
15. Before considering the submission of law, also made to me, that Ms Hathway did not have to show that she acted to her detriment, the judge considered whether she did in fact do so. He rejected all the suggested detriments apart from one: desisting from making claims against assets in the sole name of Mr Hudson.
16. The judge noted that matrimonial remedies involving transfer of assets between spouses were not available here and that Ms Hathway would have no claim against Mr Hudson's shares or pension. However, he observed, the parties were together for some 20 years and until July 2013 "both believed in the concept that wealth generated whilst the family was together would be shared between them when they separated".
17. There could be "some sort of civil claim ... like this one in the form of constructive trust or equity which could have been mounted ... perhaps against the shares. It may have been a weak claim but I cannot be convinced that it is a non-claim". Ms Hathway had given up all such claims and Mr Hudson "preserved what he wanted to preserve". Until his email of 31 July 2013 he:

"was not saying no to such claims in principle but was entertaining the concept of unwinding their financial affairs. That, it seems to me, was a significant change in position. It cannot be said that Mr Hudson would have refused making some payment to Ms Hathway even if the court might have decided that no payment should be made."
18. He then turned to the law, observing that no authority cited was on all fours with the facts before him. He mentioned three cases, though many more were cited to him: *Lloyds Bank plc v. Rosset* [1991] 1 AC 107 (the celebrated passage in Lord Bridge's speech at 132E-133B); *Jones v. Kernott* [2012] 1 AC 776, SC; and *O'Neill v. Holland* [2020] EWCA Civ 1583, [2021] 2 FLR 1016 (per Henderson LJ at [62]).
19. He rejected the submission of Mr Guy Holland that no detrimental reliance at all need be shown. The cases featured "activity resulting in a change of position", generally relied on "to support the making of a common intention of beneficial shares or varied beneficial shares". He agreed with Ms Zoë Saunders' submission that "there must be a change of position or detrimental reliance in a joint name case where A contends that a variation has been promised by B in A's favour". Otherwise, equity would be aiding a "pure volunteer".
20. He then turned to the degree of change of position or detrimental reliance that would suffice. He said it would depend on the nature of the case; in a *Rossett* type case of the weaker kind, where interest only mortgage payments were made rather than capital repayments, a substantial financial contribution to the purchase price would probably

be needed “to get over the hurdle of establishing a common intention of having beneficial interest in the first place”.

21. Where there is no agreement about the respective shares in the equity, in a joint names case, the judge said the hurdle is lower: the claimant must persuade the court that “two names does not mean 50/50 shares and ... to impose different shares ... a rather more holistic approach is taken looking at the whole course of dealing with the parties”. Here, he said, “the change in position does not have to ... match the value of that which is promised”.
22. There was an express agreement, the judge said. Ms Hathway was relying not on her subsequent conduct but on a promise in return for which “she gave up the claims she perceived she had and which Mr Hudson also perceived may be live against shares and pension”. That was sufficient to establish the necessary detrimental reliance or change of position. The judge therefore dismissed the claim and declared Ms Hathway the sole equitable owner of Picnic House.

### Issues, Reasoning and Conclusions

#### *The issues in the appeal*

23. The judge correctly found there was an express agreement (**the agreement**) that (among other things) Ms Hathway would have sole beneficial ownership of Picnic House. There is no dispute about that; Mr Hudson conceded as much in his initial skeleton argument in support of his appeal. The sole ground of appeal is that the judge was wrong to decide that sufficient detrimental reliance or change of position on Ms Hathway’s part (**detriment**, for short) was made out.
24. That ground of appeal assumes, as indeed the judge found, that detriment is necessary to make the agreement enforceable in equity, it not being enforceable at law for want of necessarily formalities. Ms Saunders contended that Ms Hathway had not proved nor even properly pleaded that she had irrevocably changed her legal position for the worse in reliance on the agreement, by giving up a valid claim to Mr Hudson’s shares. There was no such claim.
25. By a respondent’s notice, Ms Hathway submitted first that it was unnecessary to show detriment at all in the present context, where the property is bought in joint names “in the domestic consumer context” and without an express declaration of trust. The judge was wrong in law to decide otherwise, as he did.
26. Next, and alternatively, Ms Hathway asserted that the judge was right to find that Ms Hathway had acted to her detriment by foregoing a claim against Mr Hudson’s “other assets”; the agreement would have been a valid contract but for want of the necessary formalities; even a doubtful claim is good consideration; the court does not consider adequacy of consideration; and Ms Hathway acted to her detriment by keeping her side of the bargain.
27. Further, Ms Hathway submitted, the judge should have accepted as detriments her conduct in paying alone from January 2015 the mortgage instalments for which both were jointly liable and running her financial affairs in reliance on her sole right to the whole of the equity in Picnic House.

To establish her sole beneficial ownership, must the defendant have acted to her detriment or changed her position in reliance on the agreement?

28. Although 39 authorities were cited to me, I propose to cite only a few of them, in the hope that clarity will not be lost among the detail.

*Summary of appellant's submissions*

29. Ms Saunders, for Mr Hudson, submitted that the answer to the question above is yes, as the judge held: Ms Hathway must establish detriment to establish sole beneficial ownership, contrary to the legal title. Her main submissions can, in my paraphrase, be summarised as follows.

30. She accepted that the House in *Stack v. Dowden* and the Supreme Court in *Jones v. Kernott* did not expressly mention a requirement to show detriment in joint names cases; and that it was Lord Neuberger in *Stack v. Dowden* at [124] in his dissenting speech who said that the court may deduce:

“an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held”, which may be “express ... or inferred, and must normally be supported by some detriment, to justify intervention by equity”.

31. Ms Saunders submits, nonetheless, that detriment sufficient to render the express agreement enforceable must be an irrevocable change of position or an objective state of affairs leaving the party in question in a substantially worse position than she would otherwise have been in. A gratuitous intention to create a beneficial interest does not create a constructive trust, she argued; without any detriment, there is no more than an unenforceable declaration of trust.

32. The required irrevocable change of position, Ms Saunders submitted, must be of a kind upon which the beneficiary could not be expected to embark unless she was to have an interest in the property. Ms Saunders relied on the Privy Council's decision in *Austin v. Keele* (1987) 72 ALR 579, per Lord Oliver at 586-588, which included the proposition at 587 that:

“There has to be some conduct detrimental to the cestui que trust, even if only in the sense of an irrevocable change of legal position, which is referable to the common intention proved and undertaken on the footing of the grant of the beneficial interest claimed.”

33. Ms Saunders said the judge erred by treating the case as “quasi-matrimonial” and deciding that Ms Hathway had sufficiently changed her position by agreeing not to pursue any claim against Mr Hudson's shares.

34. She cautioned against misplaced invocation of analogies from the law of contract. The only exceptions to the requirement for formalities under the 1925 and 1989 Acts were cases of resulting, implied or constructive trusts. The strictness of the requirement for formalities is deeply embedded and can be traced back as far as the Statute of Frauds 1677. There was no exception for contracts, whose creation and operation is subject to different rules.

35. While in contract compromise of a doubtful claim can be good consideration, as long as the claim is not known to be invalid and advanced in bad faith, the position is

different, Ms Saunders submitted, where a constructive trust is asserted. The requirement for a detriment is that the putative beneficiary must show an objective state of affairs leaving her in a substantially worse position that she would otherwise have been in: per Henderson LJ in *O'Neill v. Holland* [2020] EWCA Civ 1583, [2021] 2 FLR 1016, at [62].

36. This requirement to show detriment had developed separately from contract law in a well known line of cases referring to the need for conduct which the claimant (i.e. the party asserting the trust) could not reasonably be expected to embark unless that party were to have an interest in the property: e.g. *Grant v. Edwards* [1986] Ch 638 (per Nourse LJ at 648G-H); *Eves v. Eves* [1975] 1 WLR 1338, CA; *Hammond v. Mitchell* [1991] 1 WLR 1127; and *Chan Pui Chun v. Leung Kam Ho* [2003] 1 FLR 23, per Jonathan Parker LJ at [89].
37. Ms Saunders submitted further that even if analogies from contract law were permissible, consideration, though not required to be adequate, ie. proportionate to the benefit claimed in return, must be more than illusory. Something of value must pass, but in the present case nothing did. Ms Hathway gave up only claims that were so hopeless as to be non-existent, over Mr Hudson's shares and pension and under the Children Act 1989 in relation to their two sons.
38. She submitted that *O'Neill v. Holland* and Nugee LJ's decision in *Amin v. Amin (deceased)* [2020] EWHC 2675 (Ch) (at [32]) stand as authority that the exercise the court must undertake is the same in joint names and sole name cases, albeit from a different presumptive starting point as to what the beneficial interests are. There were not different rules applicable in joint names cases, Ms Saunders insisted. Both required detriment to be shown; it need not necessarily take the form of financial expenditure, but it must be substantial, not minimal.
39. The issue was always whether it would be unconscionable for the party with the better legal title to take advantage of his title. The enquiry into unconscionability was the same as in proprietary estoppel cases. Constructive trusts should not be at odds with proprietary estoppel, where the equitable remedy is confined to what is proportionate to remedy any unconscionable taking of advantage. In a constructive trust case that was not so, but that did not mean that there need not be any detriment at all.
40. Ms Sanders took me to HHJ Paul Matthews' decision in *Dobson v. Griffey* [2018] EWHC 1117 (Ch) (not a joint names case). After citing *Stack v. Dowden* and section 53 of the 1925 Act, he said at [20]:

“For a common intention constructive trust to arise, the parties must have had a common intention to share the property beneficially, upon the faith of which the claimant then acts in reliance to her detriment. The common intention by itself is not enough for the constructive trust to arise. Otherwise s 53(1)(b) of the 1925 Act would be meaningless. It is the detrimental reliance that makes it unconscionable for the defendant landowner to resile from their otherwise unenforceable agreement.”
41. Ms Saunders accepted that in *Jones v. Kernott*, Lady Hale and Lord Walker JJSC had made clear in their joint judgment that there is not necessarily a single regime in sole name and joint names cases; the analysis proceeds from the different starting point, in joint names cases, of the presumption of joint tenancy. It does not follow that no

detriment need be shown in joint names cases, she submitted. The notion of “ambulatory” beneficial interests discussed in their joint judgment in *Jones v. Kernott* at [54]-[70], should be treated with caution.

*Summary of respondent’s submissions*

42. For Ms Hathway, Mr Michael Horton QC (in the appeal) and Mr Guy Holland (in the appeal and below) submitted, in line with the respondent’s notice, that Ms Hathway did not have to show detriment. Their main submissions can be summarised, again in my paraphrase, as follows.
43. First, they say Mr Hudson’s reliance on *Austin v. Keele* is misplaced. An “irrevocable change of legal position” (in Lord Oliver’s words at 587) is but one example of what might amount to detrimental reliance.
44. The board was dealing with a specific submission from Mr Austin that a particular document established the requisite common intention (on the part of the relevant companies) that he should have a half share beneficial interest in the properties in question. Assuming that point in Mr Austin’s favour, the board nonetheless found that it was not inequitable in all the circumstances for the companies to deny his beneficial interest; even if a common intention could be inferred, he had not acted to his detriment in reliance on it.
45. Lord Oliver’s authority for the requirement of detrimental reliance was Lord Diplock’s speech in *Gissing v. Gissing* [1971] AC 886, HL; yet Lord Diplock recognised forms of detrimental reliance such as conduct after purchase of a property, not amounting to an irrevocable change of legal position (as explained in *Grant v. Edwards* [1986] Ch 638, cited by Lord Oliver (see Mustill LJ’s sixth proposition at 652E)).
46. The Privy Council cannot therefore have intended the necessary detriment to be confined to cases of irrevocable change of legal position. The detriment found by the judge, forbearance from bringing a *bona fide* claim, was sufficient detriment if any was needed and, contrary to Mr Hudson’s contention, was properly pleaded. In any case, the law had moved on from *Gissing v. Gissing*. The decisions in *Stack v. Dowden* and *Jones v. Kernott* marked a “seismic shift in the law”, as Mr Horton put it.
47. He submitted that in the “domestic consumer context” (the words of Lady Hale JSC in *Stack v. Dowden* at [58]), in a joint names case with no express declaration of trusts, the presumption of beneficial joint tenancy applies, but may be rebutted by proof of a contrary intention to alter the beneficial shares, without any detrimental reliance or change of position. The latter proposition, Mr Horton says, is implicit in *Stack v. Dowden* and *Jones v. Kernott* from the absence of any mention of detriment in the majority judgments.
48. Mr Horton submitted that the possible routes to unequal shares suggested by Lady Hale in *Stack v. Dowden* at [59] were either via proof of a disparity in financial contributions or proof of a common intention to hold in unequal shares. A third alternative - the creation of a fresh common intention constructive trust established on conventional lines - was not considered. Thus, the beneficial shares may be “ambulatory” - the term attributed (in *Stack* at [62]) by Lady Hale to Lord Hoffmann in the course of argument - if the parties’ intentions change over time.



49. The decision in *Barnes v. Phillips* [2015] EWCA Civ 1056, [2016] 2 FLR 1292, was an illustration of ambulatory beneficial shares, Mr Horton argued. In that joint names case with no express declaration of trust, the beneficial shares changed not once but twice (from 50-50, to 75-25 and then 85-15 in the claimant's favour), without any suggestion that the claimant needed to establish that she had relied on the changed common intention to her detriment to establish her right in equity to a share increased from 75 to 85 per cent.
50. Mr Horton contrasts these cases with those outside the "domestic consumer context", such as *Austin v. Keele*; or where there is an express declaration of the trusts on which the property is held; or where the property is in the sole name of one of the parties. As to the latter class of cases, he points to *O'Neill v. Holland*, per Henderson LJ at [27]-[32] analysing the reasoning in *Gissing v. Gissing* and *Grant v. Edwards*.
51. In each of those situations, detriment is necessary because a fresh trust is needed to displace the legal title or express declaration of trust. The same is no longer true in domestic joint names cases with no declaration of trusts, such as *Stack v. Dowden*, *Jones v. Kernott* and the present case, Mr Horton submits. And once the claimant has established entitlement to a share in equity, the amount of her share may vary, or ambulate, following a change in the common intention, without the need for any detriment to be shown.
52. In oral argument, I queried why the detriment requirement should be absent in joint names cases, given the established presumption that the beneficial ownership is in equal shares in such cases. Mr Horton's response was, first, because the House of Lords and Supreme Court had so ordained; and second, because in a joint names case (but not a sole name case), a third party purchaser is not prejudiced. The purchaser can see both names on the title documents and the adjustment between the beneficiaries need not concern the purchaser.
53. Finally, Mr Horton submitted that cases in which it had been suggested that a variation of beneficial interests from those fixed at acquisition can only be effected by creation of a new trust (express or constructive) are not, on examination, cases where the presumption of beneficial joint tenancy arose. Those cases all fell outside the principles laid down in *Stack v. Dowden* and *Jones v. Kernott* in one way or another.
54. Thus, in *Taylor v. Taylor* [2017] EWHC 1080 (Ch) (HHJ Paul Matthews sitting as a High Court judge), the context was not purely domestic; there was a business involved and the parties were bound in equity by an unexecuted express declaration of trusts. In *Slater v Simm* [2007] EWHC 951 (Ch) (Peter Smith J), an informal agreement for one party to buy out the other's share created a constructive trust under section 53(2) of the 1925 Act, but there had been a prior express declaration of trusts (see at [14]).
55. Mr Horton contended that a decision of Master Bowles, *Insol Funding Co Ltd v. Cowlam* [2017] EWHC 1822 (Ch), was either wrong or distinguishable, or both, on the issue under discussion. The Master's reasoning at [99], similar to that of the judge below in this case, was:

"The existence of a continuing common intention, that Ms Cowlam hold an 80% beneficial interest in the Property, is not ... the end of the matter, in the determination of her beneficial interest. Such a beneficial interest ... does not arise as an express trust, since it

is not supported by a signed writing in compliance with section 53(1)(b) of the Law of Property Act 1925, but can only arise by virtue of the application of constructive trust principles. Those principles ... require, in circumstances where the beneficial interest is not to follow the legal interest, that the party asserting a constructive trust interest different to the legal interest, in reliance upon a common intention, must show that he, or she, has acted in reliance upon that common intention in such a way as to render it inequitable that he, or she, not obtain the intended interest. Although the focus of attention in both **Stack** and **Jones v Kernott** was on the proof of the common intention, whether by agreement, or imputation, there is nothing in either authority to abrogate the requirement of reliance, or the requirement that such reliance render it inequitable that the party asserting the trust be deprived of his or her intended interest.”

56. Mr Horton said that reasoning was wrong, but that in any case the facts in *Insol Funding Co Ltd v. Cowlam* were different because, again, there was an unsigned declaration of trust: see at [50], [75] and [80]-[81]. The Master held at [103]-[104] that it would be inequitable to deny the defendant, Ms Cowlam, her 80 per cent share in the property in question because she had changed her position in reliance on the parties’ common intention and that she was entitled to her 80 per cent share under a constructive trust.

*Reasoning and conclusions on the first issue*

57. My starting point is the statement of the relevant principles at [51] in the joint judgment of Lady Hale and Lord Walker JSCC in *Jones v. Kernott*:

“... the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests. (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity. (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change. (3) Their common intention is to be deduced objectively from their conduct:

‘the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party: Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906.’”

58. It is striking that no mention is made of detriment in that statement of the principles that apply; nor elsewhere in either *Stack v. Dowden* or *Jones v. Kernott*, apart from the mention in Lord Neuberger’s dissenting judgment in the former, at [124]. It is the more striking because in the latter case the Supreme Court justices were revisiting the same territory with the objective of clarifying and settling the law.
59. The present case is one where the property in question was in joint names and there was nothing to rebut the presumption of beneficial joint tenancy at the point of purchase. At that stage, equity followed the law and the beneficial shares were equal. The onus therefore fell on Ms Hathway to show a later alteration of the beneficial shares. The judge decided that the agreement, whose existence was undisputed, provided the necessary evidence of such an intention.
60. There can be no quarrel with his conclusion that the agreement rebutted the presumption in the sense that it was evidence of a changed common intention. Mr Hudson twice

used the phrase “we came to a deal”. The emails in July and August 2013 make plain that the deal included Ms Hathway having a 100 per cent beneficial ownership of Picnic House. The judge was correct to decide that the common intention of the parties that she should have it was proved.

61. On the issue of detriment, I conclude that on the whole, I prefer the submissions of Mr Horton. By not dealing with the issue of detriment in *Jones v. Kernott*, the Supreme Court either omitted mentioning for completeness that it did not need to be proved in the case before them, or omitted to mention a crucial element of the relevant principles to be applied. In my judgment, the latter is less likely than the former.
62. Lord Walker and Lady Hale at [51], in the passage just quoted, were setting out in summary form “the principles applicable in a case such as this”. The “case such as this” before them, they were careful to explain, was one where “a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests”.
63. I think it most unlikely that they forgot to mention the need to establish detrimental reliance separately from the principle they numbered (3): that the common intention of the parties is deduced objectively from their conduct, in the manner explained by Lord Diplock in *Gissing v. Gissing* in the passage quoted from his speech as part of paragraph [51] in *Jones v. Kernott*.
64. So, on a textual examination of what was actually said by the highest judges in the land, Ms Hathway has the better of the argument. I do not think it would be right for me to accede to Ms Saunders’ suggestion that in *Jones v. Kernott* they were only stating part of the law and not all the law necessary to decide the case before them.
65. I do not think that conclusion is invalidated by judicial observations to the effect that the analysis is essentially the same in joint names cases and sole name cases. That is true in the sense that in both kinds of case (i) the search is for evidence to rebut the presumption that equity follows the law (ii) the onus is on the party seeking to displace the legal title and (iii) a constructive or other trust of the beneficial interests is required to displace the legal title (for otherwise absence of statutory formalities will defeat the claim).
66. It does not follow that the manner in which a constructive trust is established and the kind of evidence that the court will require for it to be established, is necessarily the same in a sole name case and a joint names case. If it were, I agree with Mr Horton that the Supreme Court would be likely to have said so. It is consistent with principle for the law to permit a constructive trust to be established by whatever evidence is necessary to show that it would be unconscionable for the party denying the equitable interest to do so.
67. I remind myself that the issue is always ultimately one of unconscionability, in the broadest sense. The question in each case or each kind of case is what factors and what kind of evidence will satisfy, or not satisfy, the requirement of unconscionability, i.e. persuade the court that the party denying the equitable interest is not permitted to do so. The Supreme Court answered that question in *Jones v. Kernott*, for cases of the kind they were considering, in the manner I have quoted, at [51]. The present case is of the same kind.

68. The authors of learned texts do not speak with one voice on the issue of detriment in this context. In Megarry & Wade, the Law of Real Property, 9<sup>th</sup> edition, the learned authors stop short of endorsing the proposition that no detriment is required at all in some cases. Rather, they comment at 10-027:
- “Recent cases, including *Jones v Kernott*, have tended not to comment on the role of detriment in crystallising the constructive trust, but instead focus on factors which establish the common intention, possibly because such factors might also constitute the necessary detriment.”
69. In Lewin on Trusts, 20<sup>th</sup> edition, the authors say at 10-069: “[t]he claimant must prove that he has acted to his detriment in the reasonable belief that by so acting he was acquiring a beneficial interest”. At footnote 318, various authorities are cited for this proposition. They note that one of them, *Taylor v. Taylor*:
- “was a decision in a business context. The judge did not decide whether detriment is needed in the domestic consumer context, but we consider that the need for detriment is axiomatic in order to affect the conscience of the party denying the interest of the party who incurs the detriment”.
70. In a case where there is a clear express agreement, the question of detriment does tend to merge with the agreement itself. It is obvious that an express agreement evidences the necessary common intention. It seems otiose to superadd a detriment requirement where the common intention – and unconscionability if the agreement is broken - is already shown by the existence of the agreement; at any rate if the agreement is more than a gratuitous promise.
71. The arguments before me touched on analogies with contract law, as I have said. If the agreement is just a gratuitous promise, it would not be enforceable as a contract unless made by deed. In equity, the promisee would be a mere volunteer, whom equity does not assist. If the agreement consists of mutual promises, the counter-promise of the beneficiary would be likely to satisfy any requirement for a detriment.
72. I agree with Ms Saunders that there may be dangers in taking contract law analogies too far. In a domestic context, it is more difficult than in a business context to show an intent to establish legal relations. For example if the parties agree that “you will have sole beneficial ownership of the house because of the love and comfort you give our children”, it would be difficult to spell out a binding contract.
73. But since contractual principles are not directly in play, the rule that a promise must (if not made in a deed) be supported by consideration does not apply. In the above example the promisor would be hard pressed to deny the promisee’s beneficial interest, applying the criterion of unconscionability, even though it is difficult to characterise as a detriment or change of position the continuation of love and comfort that would no doubt be given voluntarily anyway.
74. I agree with Mr Horton that an irrevocable change to the beneficiary’s legal position need not be shown in a case such as this. The decision in *Austin v. Keele* is not authority for that dogmatic proposition, applied outside its proper context. *Austin v. Keele* was a business relations case, not a domestic consumer case. The Privy Council was explaining why Mr Austin failed to show that it would be unconscionable, on the facts, to deny his claimed beneficial interest. At 588, Lord Oliver commented:

“In matrimonial cases it may not be difficult, once the intention is established, to find conduct on the part of a spouse reasonably clearly referable to the creation of his or her beneficial interest in the property. But this was an arm’s length arrangement between men of business and it is to be expected that there would be spelt out in some way the conduct or contribution anticipated as the *quid pro quo* for the creation of the beneficial interests claimed.”

75. Nor do I agree with Ms Saunders that the beneficiary must show an objective state of affairs leaving her in a substantially worse position that she would otherwise have been in. Henderson LJ in *O’Neill v. Holland*, at [62], was not seeking to state a general proposition of law to that effect; he was dealing with the facts of the case before the court.
76. I find it difficult to explain by reference to a detriment requirement the recognition by the Supreme Court of ambulating beneficial interests after acquisition of a property, of which *Barnes v. Phillips* is a particularly striking example. The notion of detriment does not appear to have played any part in the second ambulation, whereby Ms Phillips’ share increased from 75 per cent to 85 per cent.
77. I do not agree with Master Bowles in *Insol Funding Co Ltd v. Cowlam* where he said, at [99], that there was nothing in *Stack v. Dowden* or *Jones v. Kernott* “to abrogate the requirement of reliance ...”. I also respectfully think HHJ Paul Matthews in *Dobson v. Griffey* at [20] put the matter too high when he said that:
- “[t]he common intention by itself is not enough for the constructive trust to arise. Otherwise s 53(1)(b) of the 1925 Act would be meaningless. It is the detrimental reliance that makes it unconscionable for the defendant landowner to resile from their otherwise unenforceable agreement.”
78. No violence is done to the requirement for writing in section 53(1)(b) of the 1925 Act by recognising the exception to that requirement in section 53(2) where there is a constructive trust. The question is how the existence of the trust is shown. In a domestic consumer context, it is readily shown and, in my judgment, may be shown by (among other ways) an express agreement of a kind that would not necessarily qualify as a contract or amount to a *quid pro quo* “detriment” as understood in a contractual or arm’s length business context.
79. In the domestic consumer context, an express agreement as to beneficial shares, provided it is not a unilateral oral declaration of trust making the putative beneficiary a mere volunteer, can itself supply the necessary detriment or, as I prefer to put it in the light of the formulation in *Jones v. Kernott* at [51], satisfy the requirement of unconscionability without the need to establish separately that the beneficiary has acted in detrimental reliance on or changed her position in reliance on the promise.
80. Applying that reasoning to this case, the judge could just as well have found that the deal itself provided all the necessary requirements for the constructive trust asserted by Ms Hathway. It provided all the evidence needed to make it unconscionable for Mr Hudson to resile from it. Applying the formulation of the principles by Lord Walker and Lady Hale in *Jones v. Kernott*, the deal was sufficient to establish the common intention and the common intention was sufficient to establish the constructive trust.

81. For those reasons, I uphold Ms Hathway's contention under paragraph 1 of the respondent's notice. The judge's decision can be supported on the additional ground that he was wrong to decide that detriment was required to establish Ms Hathway's equitable share in Picnic House. That is sufficient to dispose of the appeal. If, however, it were necessary to show detrimental reliance or change of position, the second issue is whether the judge was right to decide that it was sufficiently shown.

*If some detrimental reliance or change of position is necessary, did the defendant sufficiently act to her detriment or change her position in reliance on the agreement?*

82. Since both parties wished to defend some of the findings of fact and attack others, I was variously told that the findings each wished to defend were properly matters for the first instance judge, absent some error of principle or a finding not supported by any evidence or not reasonably open to the judge; while the findings subject to attack were, after all, tainted by some such flaw.
83. There was no dispute about the applicable principles, which are too well known to bear repetition here. The usual authorities were cited: *Piglowska v. Piglowski* [1999] 1 WLR 1360, in Lord Hoffmann's speech at 1372; *Prescott v. Potamianos* [2019] EWCA Civ 932, per Leggatt and Rose LJ (as they then were) at [76]; and *Fage v. Chobani* [2014] EWCA Civ 5, per Lewison LJ at [114], among others.

*Summary of appellant's submissions*

84. Mr Hudson's main submissions from Ms Saunders on this issue were as follows, in my paraphrase. First, in the negotiations Ms Hathway gave up her supposed claim to an interest in certain shares held by Mr Hudson in his sole name, of uncertain value. That was not a change of position that could suffice to establish detriment. The judge was wrong to decide otherwise.
85. Ms Hathway could have pursued that claim at any time and never formally renounced it, in a legally binding manner. That claim was baseless and unsustainable; to forego it was to forego nothing of value. Ms Hathway may, subjectively, have viewed her forbearance to bring the claim as a detriment; but, objectively, it was not capable of being one. If a contract analogy were permissible, giving up that claim would not count as good consideration.
86. The same was true of any supposed claim for financial provision in respect of the parties' two sons, under the Children Act 1989. That claim could not begin to get off the ground; the parties were not married, the sons grew to be young adults and any claim would be theirs not Ms Hathway's.
87. Mr Hudson paid nearly all the mortgage payments up to January 2015. The mortgage was in joint names and both were equally liable for the payments. The payments were of interest only; no capital repayments were made. Only from January 2015 onwards did Ms Hathway begin to incur any significant expenses for the upkeep of the property. That alleged detriment only started, therefore, upwards of 18 months after the agreement reached in July and August 2013.
88. Ms Hathway would have incurred living expenses wherever she lived. The judge was right to reject the suggestion that conducting her financial affairs in reliance on the

agreement was a sufficient detriment to Ms Hathway. There was no evidence that she conducted them significantly differently from the manner in which she would have if the agreement had not been entered into. Her financial transactions and lifestyle did not change significantly after the agreement was reached.

*Summary of respondent's submissions*

89. Mr Horton, for Ms Hathway, submitted that the judge properly made an evaluative decision that the possible claim for an interest in Mr Hudson's shares and other assets could not be dismissed as a "non-claim". The judge had characterised those assets as "Mr Hudson's pension and his share-save schemes and any savings of his other than the joint savings". The parties were together some 20 years and, the judge observed, before the agreement was reached "they both believed in the concept that wealth generated whilst the family was together would be shared between them when they separated".
90. The judge referred to "some sort of civil claim ... in the form of a constructive trust or equity which could have been mounted ... perhaps against the shares. It may be a weak claim but I cannot be convinced that it is a non-claim". Mr Horton submitted that the appellate court is not in a position to interfere with that finding. The judge's reasoning was sound; he added that before the agreement was reached "Mr Hudson was not saying no to such claims in principle but was entertaining the concept of unwinding their financial affairs".
91. The judge, Mr Horton submitted, was entitled to characterise foregoing any such claim as a "significant change in position. It cannot be said that Mr Hudson would have refused to make ... some payment to Ms Hathway even if the court might have decided that no payment should have been made". Ms Hathway could have relied on an oral declaration of trust requiring no particular formality (see e.g. *Paul v. Constance* [1977] 1 WLR 527).
92. Such a claim, even if weak, would not have been unarguable or patently hopeless. Further, said Mr Horton, even if the claim was hopeless and a thing of no objective value, there is nothing to prevent foregoing the claim from counting as sufficient detriment if in fact Mr Hudson could have been disposed to honour it in some way or settle it for reasons other than its legal merit, for example from a sense of moral obligation.
93. Mr Horton submitted that if the informal agreement had operated in the context of a contract, Ms Hathway's forbearance to press her claim to other assets such as the shares, even if doubtful, would be consideration if it were believed to be valid; see e.g. *Simantob v. Shavleyan* [2019] EWCA Civ 1105, per Simon LJ at [45]-[53]. Similarly, if detriment was necessary to establish a common intention constructive trust to give effect to an informal agreement, a person keeping to her side of an informal bargain would be sufficiently acting to her detriment (*Gissing v. Gissing*, per Lord Diplock at 905D-G).
94. Mr Horton then went on to submit that the judge ought to have found other detriments over and above that of forbearance from bringing a claim to an interest in Mr Hudson's shares or other assets. He contended that the judge should have accepted as sufficient detrimental reliance, individually or collectively, the following: payment by Ms

Hathway of the mortgage instalments from January 2015 onwards; and conducting her financial affairs in reliance on being the sole beneficial owner of Picnic House.

95. Any requirement to show detriment was readily satisfied where a constructive trust is established by an informal agreement. The hurdle is low and almost any act would suffice (see e.g. *Grant v. Edwards*, per Browne-Wilkinson V-C (as he then was) at 657B-G; and *Lloyds Bank plc v. Rosset* [1991] 1 AC 107, HL, per Lord Bridge at 132F-G). The judge should have allowed that Ms Hathway's mortgage payments from January 2015 sufficed; it did not matter that she would have incurred accommodation expenses anyway, in that property or another.
96. Mr Horton submitted further that Ms Hathway conducting her financial affairs generally in reliance on the informal agreement that Picnic House was completely hers, should have been found to be sufficient detriment, if any was required. This followed, he argued, from conventional equitable principles such as those found in cases cited to the judge, such as *Lloyds Bank plc v. Rosset*, *Gillett v. Holt* [2001] Ch 210, CA and *Grant v. Edwards*.

*Reasoning and conclusions on the second issue*

97. I can deal with this second issue in the appeal more briefly. If it were necessary to decide this issue, contrary to my decision on the first issue supported by the reasoning above, I would confidently decide that the findings criticised by both parties were soundly based and that this appellate court would not be justified in interfering with any of them.
98. I agree with Mr Horton that the judge's decisions on detriment were not just primary findings of fact but were evaluative, i.e. they extended to the judge's considered assessment of the quality and character of the primary facts and whether they sufficiently amounted to a detriment. He decided that some of them did while others did not. He gave sound reasons for that assessment. I respectfully defer to it and find no reason to do otherwise.
99. That applies as much to the findings of "no detriment" criticised by Mr Horton as to those of detriment which he seeks to defend. The judge's thinking was, in essence, that it was the agreement between the parties that was all-important. It was, as Mr Horton rightly submitted, open to the judge to decide that foregoing a weak claim to an interest in personal assets of Mr Hudson was sufficient because Mr Hudson might well have been willing to part with some of his personal assets whether the legal claim to them was good or bad.
100. The other supposed detriments relied on were not, on the judge's findings, what made it inequitable for Mr Hudson to resile from the main agreement, the lynchpin of the parties' understanding. It was the main agreement which made that inequitable. Although the notion of detriment is broad and unconfined in this domestic context, it was not wrong for the judge to tie the detriment to the central basis of the parties' understanding and to reject other peripheral features as sufficient in themselves.
101. Thus, while the judge might have viewed with more favour Ms Hathway's mortgage payments after January 2015, her payments of other outgoings of the property, her taking responsibility for the oil spill and its consequences, her conduct of her financial



affairs and her lifestyle generally, he was not (contrary to Mr Horton's contention in his respondent's notice) bound to treat those matters as detriments separate from the effect of the agreement. His rejection of those matters as sufficient detriments in themselves was an evaluative decision which was open to him.

*Conclusion*

102. For those reasons, the appeal is dismissed.