The Secondary-Rights Approach to the 'Common Intention Constructive Trust'

Ying Khai Liew

I. Introduction

It is a well-worn criticism that the English law of constructive trusts in the context of family homes purchased otherwise than by married couples and those in a civil partnership is in a state of flux. Despite having used for over 40 years the 'common intention constructive trust' (CICT) device to provide an equitable division when the relationships of cohabitants break down, serious questions remain over the legitimacy of the exercise of judicial discretion. This is caused particularly by the judicial willingness to infer and even impute intention to reflect context-specific policy considerations, which upsets consistency and certainty in the law. This paper suggests that understanding the CICT as responding to secondary rights provides a better explanation and justification for the courts' exercise of remedial discretion than the current approach taken by the courts.

II. Primary/Secondary Rights and Constructive Trusts

In the relevant judgments and literature, scant reference is made to primary and secondary rights, the focus being instead on the parties' 'intentions'. Nevertheless, it will be seen that the primary/secondary-rights approach is consistent with — and implicit in — the courts' analysis of constructive trusts; and further, it offers a theoretical construct which helps us better understand what judges are really doing.

II.1. The Distinction: Definition and Purpose

According to John Austin, primary rights are rights that exist '*in* and *per se*'; secondary rights 'arise out of violations of primary rights'.[1] Where A has a primary right against B, B owes a primary duty towards A, which does not arise from a wrong; where A has a secondary right, it arises from a civil *wrong* B commits when B breaches a primary duty.[2]

The primary/secondary rights distinction is a powerful conceptual tool for understanding private law remedies.[3] When courts enforce A's primary right directly, the range of potential remedial responses is narrow and limited.[4] They are logically restricted to enforcing the parties' primary rights and duties, leaving no room for the exercise of

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[1] R Campbell (ed), John Austin, *Lectures on Jurisprudence* (5th edn, John Murray 1885) 762.

[2] See generally James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002) 32 – 63.

[3] As Rafal Zakrzewski argues, remedies are court orders, and these may replicate A's primary right or give effect to A's secondary right: Rafal Zakrzewski, *Remedies Reclassified* (OUP 2009) 2.

[4] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UW Austl L Rev 1, 14.

judicial discretion over the *goal* and *content* of the awarded remedy.[5] Since the remedy always compels B to carry out his primary duties, B's breach of duty is not a necessary ingredient of the cause of action. For instance, in actions for a contractual debt due by A against B,[6] courts are concerned solely with compelling B to repay the debt, which is his primary duty under the contract; therefore B need not be shown to have breached the contract, and issues of causation, remoteness, and mitigation do not arise.

In contrast, remedies which respond to secondary rights have a wider remedial potential, and are not as restrictive as in the case of primary rights.[7] Although discretion is not exercised as to the *goal* of the remedy, this being set by the primary right breached,[8] the appropriate *content* of the remedy is determined through the exercise of judicial discretion to make right the wrong B causes in a particular case. The remedy is wrong-based: B must be shown to have breached a primary duty. Where A suffers loss, issues of causation, remoteness, and mitigation become relevant.[9] For instance, in actions for contractual damages,[10] B's breach of contract must be shown to have caused A's loss, and B will only be liable for losses which are not too remote.

II.2. 'Primary' and 'Secondary Rights' Constructive Trust Doctrines

Different constructive trusts respond to different events.[11] The CICT concerns, at least in part, the informal acquisition of beneficial interests based on the parties' intentions. Since s 53(1)(b) (where B is sole legal owner) or s 53(1)(c) (where A and B are co-legal owners) of the Law of Property Act 1925 is not complied with,[12] the enforced trust is not express but constructive in nature. Nevertheless, A obtains the intended equitable interest by virtue of s 53(2), which provides that s 53(1)(b) and (c) does 'not affect the creation or operation of resulting, implied or constructive trusts.'

Apart from the CICT, we can easily identify a number of other well-established constructive trust doctrines which respond (at least in part) to parties' intentions. Thus, the doctrine in *Rochefoucauld v Boustead*[13] and the doctrine in *Pallant v Morgan*[14] have been identified as '[w]ell-known examples of … a constructive trust'[15] 'by which both parties

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5 Discretion as to 'goal' involves deciding upon the purpose or object of the remedy; discretion as to 'content' involves determining the manner of realising the goal of the remedy: Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in WR Cornish, Richard Nolan, Janet O'Sullivan *et al* (eds), *Restitution Past, Present and Future* (Hart Publishing 1998) 268 – 70.

6 *White and Carte (Councils) Ltd v McGregor* [1962] AC 413.

7 Birks ('Equity in the Modern Law', n 4) 12.

8 John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 Law & Philosophy 1, 40.

9 Lionel Smith, 'The Measurement of Compensation Claims against Trustees and Fiduciaries' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (CUP 2010) 373.

10 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 349.

11 See Robert Chambers, 'Constructive Trusts in Canada' (1999) 37 Alta L Rev 173. On the event/response methodology, see Birks ('Equity in the Modern Law', n 4).

12 Simon Gardner and Katharine Davidson, 'The Supreme Court on Family Homes' (2012) 128 LQR 178, 181 – 2.

13 *Rochefoucauld* (n 13).

14 *Pallant v Morgan* [1953] Ch 43.

15 Despite the occasional suggestion that the doctrine in *Rochefoucauld v Boustead* enforces The informal arrangement as an *express* trust (see eg William Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010)), the overwhelming judicial view is that the trusts are constructive in nature (see cases cited at n 16, below). There are compelling reasons for this classification: see eg Peter Birks, *An Introduction to the Law of Restitution* (revised edn, OUP 1989) 65; Chambers (n 11) 183; Robert Chambers, *Resulting Trusts* (OUP 1997) 220ff; Ben McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 LQR 667, 675; Simon Gardner, *An Introduction to the Law of Trusts*, Clarendon Law Series (3rd edn, OUP 2011) 97; Ying Khai Liew, '*Rochefoucauld v Boustead* (1897)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012).

intend to create a trust from the outset'.[16] Likewise, constructive trusts are commonly imposed in proprietary estoppel, especially where the parties have made a 'bargain' — a promise to cede an interest in return for a defined *quid pro quo*.[17]

In the doctrine in *Rochefoucauld v Boustead*[18] and the doctrine in *Pallant v Morgan*,[19] B promises to hold some interest in property yet to be acquired on trust for A, and A's reliance on B's promise increases B's opportunity of acquiring that property, whether or not by transferring the property to B. A constructive trust is invariably imposed to grant A the promised interest without the exercise of any remedial discretion. It prevents B from taking an advantage for himself contrary to the parties' agreement.

In these doctrines, A's primary right arises from the moment B acquires the property. It does not depend on a wrong, that is, B's denial of A's promised right. Thus, B incurs custodial duties[20] and a duty to account[21] *from the moment* of acquisition. These primary rights and duties arise under a constructive trust by operation of law, and a 'constructive trust' award is purely declaratory: the court invariably recognises and enforces the primary relationship between the parties, compelling B to carry out his pre-existing primary duties. This explains the remedial inflexibility.

In contrast, proprietary estoppel remedies give effect to A's secondary rights. Proprietary estoppel arises where B induces A to assume, through a promise, assurance, or acquiescence in A's mistaken belief, that B will cede an interest in property he owns to A, and A detrimentally relies on the assumption. Guided by the notion of the 'minimum equity to do justice to the plaintiff',[22] the imposed remedy aims to achieve proportionality between A's detriment and B's role in inducing it.[23] A constructive trust is often imposed,[24] but compensatory damages (or 'equitable compensation') may also be awarded.[25] The availability of compensatory damages indicates that the doctrine gives effect to A's secondary right,[26] since "'damages" means … a monetary award given for a wrong.'[27] It follows that proprietary estoppel remedies, proprietary or personal, give effect to A's secondary right. A must therefore establish a causal link between B's promise or assurance and A's detriment,[28] and this is fulfilled when A's reliance is established. Moreover, the application of the 'minimum equity' concept prevents B from being liable for any of A's detriment which is too remote.

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16 *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 409. See also *Taylor v Davies* [1920] AC 636, 650 – 1; *Bannister v Bannister* [1948] 2 All ER 133; *Chattey v Farndale Holdings Inc* (1998) 75 P&CR 298, 316; *Banner Homes Group PLC v Luff Developments Ltd* [2000] Ch 372, 383 – 4; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 [36]; *Samad v Thompson* [2008] EWHC 2809, [128]; *De Bruyne v De Bruyne* [2010] EWCA Civ 519 [51].

17 Susan Bright and Ben McFarlane, 'Proprietary Estoppel and Property Rights' (2005) 64 CLJ 449, 458 – 60.

18 In the typical case, B informally agrees to hold A's land on trust for A; and in reliance A transfers the legal title of the land to B. A constructive trust binds B to his promise.

19 In the typical case, one bidding party (B) at an auction informally agrees to cede some part of the property yet to be acquired to another bidding party (A); and in reliance A refrains from attempting to procure the property. A constructive trust binds B to his promise if and when B successfully acquires the property.

20 *Banner Homes* (n 16) 399.

21 *Rochefoucauld* (n 13) 212.

22 *Crabb v Arun District Council* [1976] Ch 179, 198.

23 *Henry v Henry* [2010] UKPC 3 [65].

24 Bright and McFarlane (n 17) 458.

25 *Campbell v Griffin* [2001] EWCA Civ 990; *Jennings v Rice* [2002] EWCA Civ 159; *Ottey v Grundy* [2003] EWCA Civ 1176; *Henry v Henry* (n 23).

26 Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2010) 622.

27 Edelman (n 2) 5.

28 Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh, and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 219; Sean Wilken QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (3rd edn, OUP 2012) [11.53].

As for the primary duty B breaches, Michael Spence suggests that B has a 'duty to ensure the reliability of induced assumptions'.[29] He writes:[30]

> The primary obligation is that [B] must, in so far as he is reasonably able, prevent harm to [A]. 'Harm' consists in the extent to which [A] is worse off because the assumption has proved unjustified than he would have been had it never been induced. The secondary obligation is that, if [A] does suffer harm of the relevant type, and [B] might reasonably have prevented it, then [B] must compensate [A] for the harm he has suffered.

This gives a plausible account for why the elements of assurance or promise, reliance, and detriment are required:[31] only when these are fulfilled will B have breached his primary duty, giving A a cause of action in proprietary estoppel. Unlike the 'primary rights' constructive trust doctrines, the fundamental concern is the correction of reliance losses.[32] Because there can be various degrees of detriment suffered and expectations formed, by 'seek[ing] to react to multiple considerations',[33] proprietary estoppel allows courts to exercise remedial discretion in order to tailor the content of the remedy to achieve the goal of compensation.

III. The CICT: A Primary-Rights Approach

This section explains how the present judicial approach to the CICT reflects a primary-rights approach. It will be explained later why this approach causes difficulties for a coherent analysis of the law.

III.1. 'Common Intention'

The touchstone of the CICT is the concept of a 'common intention' — an 'agreement, arrangement or understanding reached between [the parties] that the property is to be shared beneficially.'[34] There are two stages to the process by which this is evaluated. First, it is ascertained whether there is a 'common intention' at all that A will acquire a share of B's beneficial interest (the 'acquisition' stage). This can be shown by evidence of express discussion or be inferred from the parties' conduct, but may not be imputed.[35] If such an intention is adjudged to exist, courts then consider the proportion each party is to have (the 'quantification' stage). A 'common intention' may be imputed at this second stage in the absence of express or inferred intention.[36] Where B is the sole legal owner the starting point is that B owns the entire beneficial interest in the property; in relation to legal co-owners their 'beneficial ownership [is presumed to] be joint, so that it is held in equal shares'.[37] The burden of proof is on the party (A) who disputes his presumed beneficial interest.[38]

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[29] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 2.
[30] Spence (n 29) 2.
[31] See *Thorner v Major* [2009] UKHL 18 [29].
[32] Simon Gardner, 'Reliance-Based Constructive Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 79; Wilken and Ghaly (n 28) [11.94].
[33] Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492, 507.
[34] *Lloyds Bank plc v Rosset* [1991] 1 AC 107.
[35] *Jones v Kernott* [2011] UKSC 53 [31].
[36] *Jones* (n 35) [31].
[37] *Stack v Dowden* [2007] UKHL 17 [109].
[38] *Stack* (n 37) [68].

It has been suggested that the acquisition stage is irrelevant where the parties are legal co-owners, since they 'already share the beneficial interest'.[39] However, the material question at the acquisition stage in every case is not merely whether A should acquire a share *in the property*, but whether A should acquire *a portion of B's prima facie share*.[40] In legal co-ownership cases, the parties' presumed starting point of equal shares is not based on the parties' 'common intention' but a conclusion of law.[41] Therefore, it remains necessary to determine whether the parties had a 'common intention' at all that A should acquire a portion of B's prima facie 50% share.

III.2. A Primary-Rights Approach

The present understanding of the CICT reflects a primary-rights approach.[42] Judges repeatedly emphasise that their main concern is 'to ascertain the parties' actual shared intentions',[43] independent of B's breach of any duty. Courts perceive their role to be purely declaratory: they simply recognise and enforce the parties' primary rights and duties. Just like the 'primary rights' constructive trust doctrines, the operative event is said to be the parties' intentions. Hence the judicial reluctance to impute intention at the acquisition stage: judges are unwilling to make B liable where there was no actual agreement to that effect.

A primary-rights approach is also detected at the quantification stage. The first CICT case involved the House of Lords eschewing any jurisdiction to exercise substantive remedial discretion;[44] and the same approach is taken today. Thus, judges refuse to impose a remedy 'contrary to what the evidence shows that [the parties] actually intended' in relation to quantification.[45] This hesitancy to exercise discretion indicates that the remedy is logically limited to enforcing the parties' primary rights and duties. Courts claim that the process of imputation — an exercise that allows the exercise of judicial discretion — is merely a 'fallback position' based on necessity: where no actual intention is found at the quantification stage, 'the court has a duty to come to a conclusion on the dispute put before it'[46] — hence the need to impute. Thus the claim that the ability to impute is only 'a small chink of darkness': 'it merely fills the gap, where there is one, as to how the beneficial interest under that institutional trust are [*sic*] to be assigned.'[47] It is clear that the courts take a primary-rights approach to the CICT.

IV. Difficulties with the Primary-Rights Approach

Upon closer scrutiny, the reality emerges that the CICT does not give effect to A's primary rights, revealing a disparity between what judges claim to be doing and what they actually do in practice.

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[39] *Jones* (n 35) [47].
[40] Simon Gardner and Katharine Davidson, 'The Supreme Court on Family Homes' (2012) 128 LQR 178, 181.
[41] *Stack* (n 37) [109].
[42] See too Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] Conv 104, 115.
[43] *Jones* (n 35) [31], [46]. See also *Gissing v Gissing* [1971] AC 886, 898; *Stack* (n 37) [37].
[44] *Pettitt v Pettitt* [1970] AC 777.
[45] *Jones* (n 35) [47].
[46] *Jones* (n 35) [47].
[47] Lord Neuberger, 'The Remedial Constructive Trust — Fact or Fiction', speech at the Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014 <http://www.supremecourt.uk/docs/speech-140810.pdf > [18]–[19].

IV.1. Imputation-Related Difficulties

In principle, imputation — the process of attributing to the parties an intention they never had[48] — is inconsistent with a primary-rights approach. A remedy based on imputed intention hardly enforces a pre-existing relationship which arose in response to the parties' intentions.

IV.1.1. The Acquisition Stage

At the acquisition stage, short of evidence of an express discussion,[49] the parties' intentions can only be inferred.[50] An inferred intention 'is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements.'[51] The refusal to impute intentions gives the appearance of judges searching for the actual intentions of the parties. However, due to the multifariousness of interactions between the parties, judges can essentially 'cherry pick' specific episodes over the course of their relationship to infer a 'common intention'. 'Nearly any case [can] be made "special"'.[52] Considering that a fine — often indistinguishable — line exists between a 'candid' and 'sophisticated' claimant,[53] a 'sympathetic' and non-sympathetic judge,[54] and words spoken 'in earnest' and 'in dalliance',[55] the ability to infer intention often allows for the exercise of judicial discretion, albeit masquerading as an evidential inquiry. Inference then becomes very much like imputation. This is a far cry from the way an agreement is treated in the 'primary rights' constructive trust doctrines, where judges insist that there must be a bargain which sufficiently defines the parties' respective beneficial interest in the property,[56] and that B must give 'an assurance' to A as opposed to merely extending 'a friendly gesture'.[57]

Another difficulty at the acquisition stage concerns detrimental reliance.[58] Where there is an express 'common intention', A's detrimental reliance can arise from his financial contribution to the house or other actions; if the 'common intention' is inferred from the parties' conduct, then that very conduct would also count as detrimental reliance.[59] Given that express 'common intention' is a 'rarer class of case',[60] in practice determining 'common intention' and detrimental reliance is conflated in the process of inferring intention. However, this allows 'common intention' to be inferred from A's conduct alone,[61] without investigating whether a '*common* intention' (properly so-called) exists on the facts. This provides an avenue for imputing intentions through the back door. That is, where intention is inferred from the parties' words and actions although there is no evidence whatsoever of B making assurances and A relying thereon, this is identical to imputing intention, 'since there can be no point in the court investigating whether [A] has relied to her detriment on a fictional common intention that the court has

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48 *Stack* (n 37) [126].
49 *Rosset* (n 34) 132.
50 *Stack* (n 37) [69].
51 *Stack* (n 37) [126].
52 Martin Dixon, 'The Never-Ending Story — Co-Ownership after *Stack v Dowden*' [2007] Conv 456, 459.
53 *Gissing* (n 43) 897.
54 *Gissing* (n 43) 897.
55 *Hammond v Mitchell* [1991] 1 WLR 1127, 1139.
56 *Bannister* (n 16) 136.
57 *Pallant* (n 14) 46.
58 *Grant v Edwards* [1986] Ch 638, 646 – 7.
59 *Grant* (n 58) 647.
60 *Grant* (n 58) 647.
61 See eg *James v Thomas* [2007] EWCA Civ 1212 [27] and *Morris v Morris* [2008] EWCA Civ 257 [26].

invented.'[62] It is fundamentally questionable whether the imposition of a constructive trust in this case is justified, given that A's lack of reliance would be fatal to his claim under *both* 'primary rights' and 'secondary rights' constructive trust doctrines. If A commits to a certain course of action when there is no evidence that B intends for A to acquire property thereby, surely A takes a risk that his efforts will go uncompensated.[63]

IV.1.2. The Quantification Stage

At the quantification stage, while judges claim that actual — express or inferred — intention is paramount, in practice it is extremely rare for parties in a familial context to have formed the relevant actual intention.[64] Where found, it can, moreover, be easily sidestepped, either by holding that the agreement did not apply to the events which transpired,[65] or by holding that any discussion concerning quantification was not 'exact'[66] enough, thereby warranting imputation.[67] The upshot is that in the majority of cases courts impute intentions at this stage. The ability to vary the size of the parties' respective beneficial shares strongly indicates that the remedy imposed does not merely enforce the parties' primary rights and duties, but instead reflects the exercise of remedial discretion.

Indeed, the Supreme Court's analysis of imputation as merely a 'fallback position'[68] does not withstand scrutiny. Consider the doctrine in *Pallant v Morgan* where, absent a firm agreement concerning apportionment, the beneficial interest in the property is invariably equally divided.[69] Why does this default apportionment rule not apply in the CICT context? Where an actual agreement in relation to quantification is lacking, A should obtain half of B's equitable interest in the property by default. That is, A would obtain a 50% interest in the property where B is sole legal owner, and 75%[70] where the parties are legal co-owners. The point is that it is in fact *unnecessary* for courts to impute intention in order to resolve a dispute. The ability to vary the parties' respective beneficial interests is therefore an exercise of remedial discretion masquerading as a rule based on necessity.

IV.1.3. Attempts to Minimise the Difficulty

In *Jones*, the majority attempted to play down the distinction between inference and imputation, reliance being placed on Nick Piska's observation[71] that the two concepts present a 'distinction without a difference'.[72] Piska's argument is based on the obvious inability of a judge to step into the minds of the parties to determine their subjective intentions; from this he concludes that inference and imputation are substantively similar, since *both* are concerned with objectively determining the parties' intentions from

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[62] Charles Mitchell, *Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies* (13th edn, Sweet & Maxwell 2010) [15-30].
[63] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55.
[64] *Williamson v Sheikh* [2008] EWCA Civ 990 is a rare example.
[65] *Gallarotti v Sebastianelli* [2012] EWCA Civ 865 [23].
[66] *Jones* (n 35) [47].
[67] See James Lee, 'And the Waters Begin to Subside: Imputing Intention under *Jones v Kernott*' (2012) 5 Conv 421, 426.
[68] See text to nn 46–47, above.
[69] *Holiday Inns Inc v Broadhead* (Ch, 19 December 1969), as reported in *Banner Homes* (n 16) 390.
[70] Upon severance of the initial joint tenancy in equity, each party has a 50% share (*Goodman v Gallant* [1986] Fam 106; *Hunter v Babbage* [1994] 2 FLR 806). Obtaining half of B's 50% share (i.e. 25%) and adding this to A's own 50% share, A obtains a 75% share in the property.
[71] Nick Piska, 'Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*' (2008) 71 MLR 120, 127 – 8.
[72] *Jones* (n 35) [34], [65] – [66].

the facts. This argument is fallacious. Inference involves objectively concluding from the parties' words or actions that they did lead each other to form a common intention;[73] imputation involves attributing an intention *despite* concluding from the facts that the parties could *not* reasonably have led each other to form that intention.[74] Inference is based on the facts of the case — the parties' words or actions; imputation is based on a norm — that of 'fairness'.[75] Conceptually, imputation is clearly different from inference, the former involving far more judicial discretion than the latter.

Secondly, in *Stack* the CICT was confined to the 'domestic consumer context'.[76] Presumably one concern was that inferring or imputing intention would destabilise business transactions. Yet, the domestic/business distinction is inherently unhelpful, causing uncertainty where the parties' use of the property[77] or the parties' relationship is atypical.[78] In fact, the Court of Appeal has, post-*Jones*, analysed cases relating to investment properties[79] and properties bought by business associates[80] in CICT terms. Clearly, it is the difficulties raised by imputation cannot be confined, which is an obvious cause for concern.

IV.2. Severance-Related Difficulties

Since legal co-owners are presumed to hold as joint tenants, the CICT can only be said to give effect to A's primary rights if the event which severs their equitable joint tenancy can be identified. It is trite law that severance occurs only through specific methods such as written notice,[81] operating on one's share, mutual agreement, course of dealing,[82] or the murder of a joint tenant.[83] The CICT does not reflect any of these. In particular, given that 'common intention' can be inferred where none actually existed, '[a]n uncommunicated declaration … cannot operate as a severance.'[84] The only remaining plausible explanation is that the severance occurs by court order. If so, then the CICT certainly does not give effect to A's primary right, since the court would not *simply* be enforcing a pre-existing relationship, but instead exercising discretion to sever the joint tenancy.

IV.3. Policy-Related Difficulties

Difficulties also arise in squaring the policy considerations specific to the cohabitation context with 'primary rights' constructive trusts principles. When dealing with 'primary rights' constructive trust doctrines, courts are concerned solely with identifying whether a pre-trial event — an agreement — triggers the parties' primary rights and duties prior to the court order. Conversely, in applying the CICT, courts take policy considerations *at trial* to be more important than ascertaining the existence of a pre-existing relationship.

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[73] *Gissing* (n 43) 906.
[74] *Stack* (n 37) [126].
[75] *Oxley v Hiscock* [2004] EWCA Civ 546 [69]; *Jones* (n 35) [51].
[76] *Stack* (n 37) [58], [60], [69]. See also *Jones* (n 35) [31].
[77] See Etherton (n 42) 111.
[78] *Favor Easy Management Ltd v Wu* [2012] EWCA Civ 1464. See Man Yip and James Lee, '"Less Than Straightforward" People, Facts and Trusts: Reflections on Context: *Favor Easy Management Ltd v Wu*' (2013) 5 Conv 431.
[79] *Geary v Rankine* [2012] EWCA Civ 555 [18].
[80] *Gallarotti* (n 65) [6].
[81] Law of Property Act 1925, s 36(2).
[82] *Williams v Hensman* (1861) 1 John & H 546, 557 – 8.
[83] Forfeiture Act 1982, s 1.
[84] *Burgess v Rawnsley* [1975] Ch 429, 448.

By unnaturally forcing their desired conclusion to fit into the primary-rights approach, judges distort orthodox 'primary rights' constructive trusts principles.

Indeed, one detects a fundamental clash of norms. In relation to 'primary rights' constructive trust doctrines, one of equity's primary concerns is the '[respect] for genuine intentions … out of a libertarian respect for autonomy'.[85] Courts wish to reflect the same norm in the CICT by using the 'common intention' concept. Yet, the willingness directly or indirectly to impute a 'common intention' indicates the contrary — a *lack* of respect for the parties' autonomy. It is difficult to justify suppressing *this* policy concern in favour of those commonly rehearsed concerning family homes.[86]

V. The Secondary Rights-Approach

It is submitted that a better approach is to analyse the CICT as responding to A's secondary rights. Enforcing B's secondary duty allows the exercise of judicial discretion to tailor the content and size of the remedy to achieve a particular goal. Such remedial flexibility explains the willingness to impute intentions at the quantification stage. The yardstick for imputation, being 'fair[ness] having regard to the whole course of dealing',[87] can (tentatively)[88] be cast as the remedial goal, which guides the exercise of remedial discretion.[89] On the secondary-rights approach, the remedy ultimately has nothing to do with enforcing an agreement between the parties, but something else — the putting right of the consequences of B's breach of duty.

V.1. Ingredients of the Claim

It is possible to analyse the CICT as fulfilling the necessary ingredients of a secondary rights claim — a primary duty, breach, loss, and causation. Inspiration can be drawn from proprietary estoppel, which is the only equitable doctrine which enforces B's secondary duty to allow A informally to acquire proprietary rights. While the secondary-rights approach does not provide a perfect fit for every CICT case, it is suggested that the renewed approach leads to more justifiable outcomes, and far better explains the exercise of judicial discretion than the current approach.

V.1.1. Primary Duty

What is B's primary duty? The primary duty in the context of proprietary estoppel can be adopted: B has a 'duty to ensure the reliability of induced assumptions'.[90] B must be deemed, 'by his words or conduct [to have] induced [A] to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.'[91] B's duty is not to fulfil A's expectations from the very moment B induces such assumptions; rather, it is to ensure A does not suffer harm — detriment — through

[85] Gardner and Davidson (n 40) 182.
[86] Eg *Stack* (n 37) [69].
[87] *Oxley* (n 75) [69]; *Jones* (n 35) [51].
[88] Refined at text from n 115, below.
[89] Notably, 'primary rights' constructive trust doctrines do not aim to attain *inter partes* 'fairness', since the parties' autonomy is of paramount importance.
[90] See text from n 30, above.
[91] *Gissing* (n 43) 905.

relying on the induced assumption. Thus, B's primary duty is *to ensure that A does not suffer harm from the unreliability of B's induced assumptions.*

Since A's assumption can be induced through acquiescence, representation, or promise,[92] courts do not need to stretch the 'common intention' concept to provide a remedy. It also becomes unnecessary to find or invent the element of mutuality that '*common* intention' evokes; it suffices that A's assumption was induced *by B*. This does not distort the present law. In cases where an *express* 'common intention' has been found to exist, B would to the same extent be found to have induced A's assumptions; in cases where a 'common intention' has been *inferred*, the often fictitious 'intention' can likewise more realistically be reanalysed as an inducement of A's assumptions by B.

V.1.2. Breach

B must have breached his primary duty. This can be analysed as occurring when B deals with the property inconsistently with the induced assumption — when it becomes clear that B cannot, will not, and/or has not transfer(red) to A the beneficial interest A expects. This will be so, for instance, where B unilaterally acts on his whole (in sole-name cases) or half (in joint-names cases) beneficial interest to the exclusion of A, such as by mortgaging, selling, or letting the property. This is the earliest point when A can be said to have suffered harm which is caused by the unreliability of B's induced assumptions, thus constituting a breach of B's primary duty.

Could B avoid the breach by discharging his primary duty? In most cases, it is ambiguous as to when precisely A will acquire some of B's beneficial interest.[93] The most obvious way that B can avoid the breach would be to secure A his expected interest *as soon as practicable*. If B fails to do so, that failure constitutes a wrong, even though it might not be B's fault. The strict nature of the wrong should not be surprising: B always has a positive role to play in inducing A's assumptions, and thus the risk that A would be harmed if the primary duty is not discharged ought properly to lie with B.

It may be objected that B will often be unaware of his duty to transfer an interest to A at all. There are two possible readings of this objection. First, it may point to the courts' present ability to infer intention even though B is in fact unaware that a 'common intention' ever existed. To this, it is submitted that the current law is, to that extent, misguided, since this is tantamount to *imputing* intention at the acquisition stage in the absence of any *actual* 'common intention'. Second, this objection may point to the fact that B's inducement might not consist of a 'one-off' act such as making a promise, but through a sequence of events over time, such that B is unaware of precisely when an induced assumption has in fact 'crystallised'. In reply, it can be noted that B does not need to be subjectively aware that he has induced A's assumption at all, since B need not be at fault to commit a breach. So long as B had in fact objectively induced A's assumptions, any unilateral action which excludes A is a breach of B's primary duty.

It might be further objected that, even if B wishes to fulfil his primary duty by formally declaring a trust (in sole-name cases) or disposing his beneficial interest (in joint-names

[92] Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014) Ch 2.

[93] Similar to proprietary estoppel cases where B promises that A will have a 'home for life'(*Campbell v Griffin* (n 25)), or that a hotel will 'all be [A's] one day' (*Wayling v Jones* (1995) 69 P & CR 170), or that a farm is 'going to be [A's]' (*Gillett v Holt* [2001] Ch 210). Contrast proprietary estoppel cases where B's promise is that A would inherit B's property *at B's death*: see eg *Wayling v Jones*; *Gillett v Holt*; *Jennings v Rice* (n 25).

cases) in A's favour, it may not be clear what proportion of B's interest A ought to have. This scenario is highly unlikely in practice; yet B has two options. He could breach his primary duty anyway to allow a judge subsequently to rule on the matter; alternatively, drawing an analogy from the doctrine in *Pallant v Morgan*,[94] B could transfer a half-share of his beneficial interest to A as a rule of thumb. The latter option would not prevent A from suing B for a larger share on the basis that some outstanding 'harm' is yet to be compensated for, but it would be extremely difficult for A to succeed on this point.

V.1.3. Loss

A must have suffered loss or harm due to B's breach. This can be squared with the requirement to establish *detrimental* reliance in a CICT claim.[95]

'Detriment' is commonly used in two very different ways. When used as an adjective, it describes the event of reliance. This can be labelled 'detriment-as-event'. For instance, if A's reliance involves making a financial contribution or foregoing an opportunity, these acts *in themselves* are 'detrimental' insofar as that word refers to A's costs in terms of time, money, and effort. Characterising A's acts as 'detrimental' in this sense focuses wholly on A; it does not involve evaluating A's position vis-à-vis B. In contrast, 'detriment' may describe the *net harm* A ultimately suffers, all things considered. This can be labelled 'detriment-as-harm'. If B fulfils A's expectation, A suffers no detriment-as-harm: by fulfilling B's primary duty, B will not have caused A to suffer any net harm. Conversely, if (and only if) B breaches his primary duty would A suffer detriment-as-harm: he would be left worse off than he would have been had B never induced A's assumption. It is this latter sense of 'detriment' which needs to be demonstrated.[96]

V.1.4. Causation

B's breach must have caused A's harm for which compensation is sought. The element of causation can be squared with the requirement to establish detrimental *reliance* in a CICT claim.[97] As Mustill LJ observed in *Grant v Edwards*,[98] 'the court must decide whether [A's] conduct is referable to the bargain, promise or intention.' There has been a dearth of authorities concerning the requisite causal link, with conflicting tests emerging from fleeting judicial considerations of this point. A 'but for' or 'sole cause' test is sometimes posited;[99] at other times an 'a cause' test is detected.[100] This uncertainty leaves it open to courts to develop the causal test in line with proprietary estoppel, where the precise test depends on whether the claim is based on B's acquiescence, representation, or promise.[101]

V.1.5. An Unliquidated Secondary Right to Compensation

Once B breaches the primary duty which causes A to suffer detrimental reliance, A obtains an unliquidated secondary right to compensation, the content of which must be liquidated by a court. This provides an explanation for the oft-found exercise of judicial

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[94] See text to n 69, above.
[95] *Grant* (n 58) 646 – 7.
[96] Explained more fully in *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] 59 CLR 641, 674.
[97] Elizabeth Cooke, *Land Law* (2nd edn, OUP 2012) 93.
[98] *Grant* (n 58) 652.
[99] *Morris v Morris* (n 61) [27].
[100] *James v Thomas* (n 61) [27].
[101] McFarlane (n 92) Ch 3.

discretion in CICT cases to determine the parties' respective share in the property according to what is 'fair'.[102] This discretion afforded by the CICT can be contrasted with 'primary rights' constructive trust doctrines, where in the absence of an express agreement as to the parties' respective shares, the parties invariably hold the beneficial interest in the property in equal shares.[103]

A secondary-rights approach would also allow judges to deviate from an express agreement between the parties concerning their respective shares. Although the Supreme Court has advised against this,[104] in practice courts are willing to sidestep the express agreement in favour of imposing what they deem to be a 'fair' share.[105] Moreover, if 'fairness' is the yardstick, then courts can easily conclude that an express agreement between the parties is 'unfair'. As David Hayton observes, '[i]f [A]'s detrimental conduct on a scale of one to 100 only registers 10 she should not necessarily obtain a promised half share'.[106]

V.2. Benefits of the Secondary-Rights Approach

The secondary-rights approach to the CICT is beneficial for a number of reasons. First, it better explains the discretion which courts at present exercise by unjustifiably stretching the 'common intention' concept: the renewed understanding analyses judges as exercising the remedial discretion inherent in liquidating A's secondary right to compensation. Just as in proprietary estoppel, '[i]f reasonable expectation induced by [B] can be accepted as forming the first limb of the doctrine, we can jettison the subtleties of intentions, promises and their implicit contents. The crucial issue then turns on the circumstances in which [A]'s expectations will be enforced.'[107]

Secondly, the secondary-rights approach is more conceptually coherent. It encourages a move away from the touchstone of 'common intention', and thus discourages the fictitious imposition of an actual agreement where none existed. In its stead, courts are encouraged to address the questions of whether B has induced A's assumption through B's words or actions, and whether A has detrimentally relied on this. Importantly, the secondary-rights approach removes the need forcefully to align the CICT with the 'primary rights' doctrines since they are analysed as performing different functions. It nevertheless remains possible, on the renewed approach, to maintain the view that courts will not generally override the parties' actual intentions at the quantification stage.[108] The explanation lies not in taking this as evidence that courts are responding to primary rights, but by analogising this to the courts' approach in 'bargain' cases in proprietary estoppel — involving B promising to cede an interest to A in return for a defined *quid pro quo* — where A's expectation interest is almost always protected.[109]

Thirdly, the renewed approach to the CICT renders it unnecessary artificially to constrain the ambit of this area of law to the 'domestic consumer context' in order to take into account contextual policy concerns. Instead, these can be taken into consideration when

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[102] *Oxley* (n 75) [69]; *Jones* (n 35) [51].
[103] See text from n 68, above.
[104] *Jones* (n 35) [47].
[105] See text to n 65, above.
[106] David Hayton, 'Constructive Trusts of Homes — A Bold Approach' (1993) 109 LQR 485, 487 fn 12. See also *Grant* (n 58) 657 – 8.
[107] John Eekelaar, 'A Woman's Place — A Conflict between Law and Social Values' [1987] Conv 93, 100.
[108] *Stack* (n 37) [61].
[109] Bright and McFarlane (n 24) 458 – 60.

judges exercise discretion to determine the appropriate content of the awarded remedy. Indeed, policy concerns that are particular to *any* relationship, 'domestic' or 'commercial', can be accommodated within the secondary-rights framework.

Finally, the secondary-rights approach suggests a solution to the severance problem in joint-names cases, by explaining severance as occurring by 'course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common'.[110] On this view, severance occurs when B induces an expectation that A will obtain some of B's beneficial interest *and* when A acts in reliance — actions which are manifestly inconsistent with survivorship. Both inducement and reliance must have occurred, since *both* parties must have dealt with their interests as if they are interests in common and not joint.[111] It follows that B can renege on the induced assumption before A has detrimentally relied on it, leaving the joint tenancy intact. Also, if B's inducement and A's reliance are complete and a court ultimately awards mere compensatory damages, then the parties will share the already-severed beneficial interest in the property in equal shares.[112] This helpfully explains what judges are trying to do when they apply the 'equality is equity' maxim[113] to joint-names cases, while avoiding the pitfalls of analytical inconsistency.

VI. Going Further: The CICT as a Specific Application of Proprietary Estoppel

If we accept the secondary-rights approach to the CICT, and if we further accept the parallel of this approach with proprietary estoppel, then it is only a small step further to suggest that the CICT ought to be analysed as a specific application of proprietary estoppel. Some commentators have opposed this suggestion, and their concerns require evaluation.

The most common objection relates to the remedial differences. It has been argued[114] that the CICT leads only to a constructive trust award, unlike proprietary estoppel where a monetary award is possible. While this is descriptively accurate, the difference appears to be more apparent than real. It is already commonplace for A to plead both the CICT and proprietary estoppel as alternative claims. Assimilating the CICT within proprietary estoppel does not deprive A, since a judge can award a constructive trust or a lesser remedy depending on the merits of a particular case. This would certainly encourage a more efficacious legal system.

A related objection is that the CICT and proprietary estoppel have irreconcilably different 'goals', the former being 'fairness'[115] and the latter being compensation. However, it is strongly arguable that 'fairness' is too imprecise a yardstick, since it is liable to afford unbridled discretion to the courts. Rather, 'compensation' provides a more refined yardstick: not only is it 'fair' to compensate A for harm caused by B, it also

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110 *Williams v Hensman* (n 82) 558.
111 *Gore and Snell v Carpenter* (1990) 60 P&CR 456 (Ch D) 462.
112 *Goodman* (n 70); *Hunter* (n 70).
113 See text to nn 37 – 38, above.
114 John Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 CFLQ 367; Simon Gardner, 'Family Property Today' (2008) 124 LQR 422, 436 – 7; Patricia Ferguson, 'Constructive Trusts – A Note of Caution' (1993) 109 LQR 114, 120 – 3.
115 See text to n 89, above.

aligns the current law on family homes with the well-established doctrine of proprietary estoppel.

Another objection points to the inability of proprietary estoppel to explain the current judicial inference of 'common intention' at the acquisition stage. Thus, Mee argues that the courts' willingness to infer 'common intention' from A's financial contribution to the acquisition of the property does not amount to a 'representation' for the purposes of proprietary estoppel.[116] Gardner too argues that A often does not suffer detrimental reliance in the CICT cases, since there can be no *reliance* on an invented intention.[117] In reply, it is observed, first, that a 'representation' by B is not necessary on the secondary-rights approach: A's assumption can even be induced by acquiescence. Secondly, it seems strange to conclude from the differences between proprietary estoppel and the CICT that both doctrines ought to be kept separate. Given the courts' repeated refusal to invent 'common intention' at the acquisition stage, it is sensible to conclude instead that A ought not to succeed if he can only rely on fictitious intention. Instead, A ought only to obtain a remedy where he suffers harm caused by the unreliability of B's induced assumptions that he will obtain a share of B's beneficial interest in the property.

A final objection contends that remedies which give effect to secondary rights are different from the CICT, because the former only has prospective effect.[118] The argument is that prospective remedies disadvantage A if B deals with X (a third party) prior to a court order, since A would not have any rights enforceable against X.[119] There are two possible replies. First, given the artificiality of 'common intention' in the present law, surely even on a primary-rights approach it is at the judge's discretion to determine when precisely A's proprietary right arises 'prior to the court order'. In this regard, the secondary-rights approach commendably removes a fiction in favour of recognising that it is ultimately judicial discretion at play. Secondly, as s 116(a) of the Land Registration Act 2002[120] confirms,[121] A's equity by estoppel is proprietary in nature and capable of binding X.[122] The secondary-rights approach reveals the mechanics of the remedy: A obtains an equity by estoppel — an unliquidated secondary right — when B breaches his primary duty; this is liquidated at the day of judgment. Where a proprietary remedy is awarded, its proprietary effect is backdated, 'by virtue of some doctrine of relation back',[123] to the time of B's breach; where a merely personal remedy is awarded, A has no proprietary right against X, since A's equity by estoppel was, after all, merely *capable of* binding X. Since A obtains an 'equity by estoppel' only when B commits a breach, A therefore only has priority over X where B deals with X post-breach (and where a proprietary remedy is ultimately awarded); so, for instance, A obtains no right against X if B deals with X before A incurs detrimental reliance.

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116 John Mee, *The Property Rights of Cohabitees* (Hart Publishing 1999) 169.
117 Gardner (n 114) 436.
118 David Hayton, 'Equitable Rights of Cohabitees' [1990] Conv 370, 372, Ferguson (n 114) 121, Hayton (n 106) 487.
119 Ferguson (n 114) 126 – 7.
120 An 'equity by estoppel ... has effect from the time the equity arises as an interest capable of binding successors in title'.
121 See Law Com. No. 271.
122 See eg *Re Sharpe (A Bankrupt)* [1980] 1 WLR 219, 223; *Re Basham* [1986] 1 WLR 1498, 1504; *Sen v Headley* [1991] Ch 425, 440; *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P&CR 167 [24]; *Lloyd v Dugdale* [2002] 2 P&CR 167 [38] – [39]; Cooke (n 97) 104.
123 Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) [9.2.89]