Singapore Journal of Legal Studies
[2011] 89–110

'MATRIMONIAL' REALTY UNDER A RESULTING TRUST

TAN YOCK LIN*

Implicating a cross-section of property and familial policies, the question of when and whether a spouse acquires a resulting trust interest in realty jointly occupied with another spouse is one of the emotive questions of our times. This article examines the merits of a conventionalistic conception of the resulting trust against competing dogmatic and intentionalistic conceptions, and concludes that it furnishes a better resolution of the impinging policies. As the Court of Appeal decision in *Lau Siew Kim* is a foremost example of the conventionalistic analysis, attention is focused on various aspects of the decision with a view to defending it against the mixed reception it has received hitherto.

I. THE CONTEXT AND THE PROBLEM

How does a spouse, who is not a legal owner or the full beneficial owner, acquire or obtain an equitable interest or a larger beneficial interest in realty, which he jointly occupies or possesses with another spouse, the legal owner? The answer, in cases where the claimant is not the beneficiary of a valid express trust declared by the legal owner, is that he will have to establish an interest under a resulting trust ("RT") or constructive trust ("CT") or proprietary estoppel. In each category, the answer is complete and mutually exclusive, but complex[1] in that the precise boundaries of each solution continue to be debated in numerous cases and are still being worked out in many others. This complexity is of course regrettable since the question is one that concerns not only the spouses themselves but all having an interest in either spouse's property, including such third-party acquirers, donees, heirs, legatees or creditors to whom the benefit of the spouse's interest may accrue.

In seeking to add to the scholarship which has developed around the question, this article deliberately leaves out the CT and proprietary estoppel. The two reasons for focusing exclusively on the RT are first, the existence of space constraints and second, the fact that the narrower undertaking will give a more proper sense of the nature and importance of the RT thinking in the Court of Appeal's decision in *Lau Siew Kim v. Yeo Guan Chye Terence*,[2] which is a case of central importance in this article. In that case, the spouses were parties to an extremely long-standing marriage and seemed to be legal joint tenants of their dwelling home and an investment property.

---

* Geoffrey Bartholomew Professor, Faculty of Law, National University of Singapore.

1 For a comprehensive, albeit dated, study, see John Mee, *The Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999).

2 [2008] 2 S.L.R.(R.) 108 [*Lau Siew Kim*].

As the judgment indicates, the legal allocation of property rights was not conclusive. An investigation into the history of the acquisition of the properties and the nature of the actual marital relations between the spouses was considered necessary before the court could arrive at the conclusion that the surviving spouse was indeed the full beneficial owner of both properties in dispute, essentially on RT grounds.

Using the case as a point of departure, this article endeavours to interrogate the conceptual clarity of the RT against more fundamental notions of property and management of property, and the policies which underlie them. That this inquiry implicates a multiplicity of policies goes without saying. Where a claim to 'matrimonial' realty under an RT is made, it is a gross oversimplification to suppose that the question is purely about tolerance of informal acquisition of property. There are, as it were, several public dialogues to appreciate, several choices of policy to be made. Tolerance of informal acquisitions is only one of them. On the one hand, the prescription of formalities for the conveyance of property is not merely a fiscal scheme but is also importantly insisted upon for reasons of prophylaxis, caution, solemnity, for the sake of the transferor. For the sake of third parties who would deal in the property or would rely on the property as a source of comfort or collateral, it is there to ensure security of transaction by preclusion of fraud. At the same time, however, where an informal acquisition is bottomed on some notion of trust and confidence or good faith, the law cannot ignore the need to protect that trust and confidence or good faith.

In the case of Torrens land, moreover, the dialogue must go beyond the general policies of marketability of title and bankruptcy remoteness to the more specific property policies, particularly of preeminent purchaser protection, which underlie creation of title by registration. Under this system, the policy of preeminent purchaser security of title must be pursued without compromise so that a purchaser of Torrens land can deal safely in it irrespective of any trust or other unprotected, unregistered or unnotified interest over or in the land except when he is privy to fraud in relation to the dealing.[3] The result is extinguishment of all hidden titles prior to the registration of the conveyance, each acquirer acquiring a new title direct from the state save where it would be fraudulent for him to do so.[4]

There is a third dialogue with family policies if the parties in a proprietary relationship are also in a marital relationship. In particular, one must come to terms with certain prominent redistributive policies which follow upon the dissolution or destruction of a marriage. Whether or not a legal spouse has an interest in the jointly occupied property, the *Women's Charter* ensures that he will obtain an interest in such proportion as the court exercising its discretion declares following dissolution of the marriage, or a nullity or separation decree.[5] The redistributive provisions which thrust this difficult task on the courts have been the subject of important and recent judicial enunciation,[6] and while this is not the forum for considering in full

[3] See s. 46(1) of the *Land Titles Act* (Cap. 157, 2004 Rev. Ed. Sing.) which makes provision for indefeasibility of title by registration.

[4] See W.J.M. Ricquier, *Land Law*, 4th ed. (Singapore: LexisNexis, 2010) c. 7; Tang Hang Wu & Kelvin F.K. Low, eds., *Tan Sook Yee's Principles of Singapore Land Law*, 3rd ed. (Singapore: LexisNexis, 2009) c. 13 and 14.

[5] Pursuant to s. 112(1) of the *Women's Charter* (Cap. 353, 2009 Rev. Ed. Sing.).

[6] *Lock Yeng Fun v. Chua Hock Chye* [2007] 3 S.L.R.(R.) 520.

the weighty matters and particularly the just and equitable basis of distribution the law demands, the so-called anomaly between what the specialised law prescribes and the general law of property ascribes must here be taken into account. What a divorcing spouse can obtain by way of an interest in the shared matrimonial asset seems to many to provide an idea of the acceptable level of property allocation due to a surviving spouse. It does at first blush seem odd that a good marriage with all the benefits of cohesion and nurture it has contributed to the Singapore society could lead to a division of property rights inferior to that of a failed enterprise.

Further, if the parties are in a spousal relationship, some courts have taken the view that there must be a dialogue also with constitutional policies of equal opportunity to acquire property, which a law that disadvantages the female child-bearing party impedes. Not much of this policy has been heard in Singapore but it should not surprise that elsewhere, particularly in Canada, the Supreme Court has been importantly influenced by the need to prevent the feminisation of poverty to craft a principle of remedialism (known as the remedial CT) for the allocation of property rights as between spouses.[7]

Of all the policies or forces in play, which should prevail when an RT claim is made? The answers sought in this study of the limits of the RT are not simple. Part II provides an overview of the hotly debated academic issue of the intentionalistic nature of the RT before proceeding to defend the largely overlooked conventionalistic theory approved in *Lau Siew Kim*. Part III discusses the possibility of a presumption that equity will match the law as to quantum of interest, and rejects it. Part IV examines the intersection of marriage and property, and respectfully agrees with the decision in *Lau Siew Kim* that this interplay is sufficiently addressed by reworking the presumption of advancement and rejecting a presumption of equality. In keeping with its focus on the RT, the article manages to arrive in Part V at a few more comprehensive conclusions, making the conventionalistic RT more apprehensible alongside the common intention CT.

II. The RT as Informal 'Acquisition'

A. *The Academic Debate on the Intentionalistic RT*

There is little doubt that at about the turn of this century, the RT became a subject of burning academic interest with one common postulate and orientation, namely that the RT is singularly distinguished by an intention not to part with the beneficial interest. This dogmatic or doctrinal postulate seems almost inevitable since an intention to transfer ownership is indispensable to its validity (and party autonomy demands no less). It seems almost to go without saying that the RT must be a corollary to the fundamental tenet of transfer of ownership, in the sense that it seeks to reverse a truly unintended transfer by giving effect to an intention not to part with the beneficial interest in at least two forms. So under this conception, in its simplest form, where A voluntarily purchases realty for B, the fact that A is not named as legal co-owner or

---

[7] *Peter v. Beblow* (1993) 101 D.L.R. (4th) 621. The feminisation of poverty was first identified in *Moge v. Moge* [1992] 3 S.C.R. 813 at 853-854, and refers to the impoverishment of the female spouse through the systematic devaluation of her non-financial contributions to the family economy.

not named as owner of such share as his contribution would have given him signifies an intention not to part with the beneficial interest in whole or part, to which the law responds by presuming an RT.[8] In a more complicated form, where a trust disposition fails to exhaust the beneficial interest, the fact that the state's prerogative of *bona vacantia* would otherwise operate or that the trustee would otherwise receive a windfall signifies an intention not to part with the beneficial interest in the circumstances which have arisen, calling likewise for the imposition of a presumed RT.

The above postulate has occasionally been cast in terms of an absence of intention to part with the beneficial interest,[9] but intentionalists mostly assume that there is little difference between an absence of intention to benefit and an intention not to part with the beneficial interest, and debate only the question whether the RT operates generally or merely specifically.[10] Of these, adherents to one camp insist that the intention not to benefit the transferee beyond the transfer of the legal interest must contemplate the creation of a trust.[11] They maintain that trusts are expressions of the settlor's will and RTs are no less cast in the same mould save that they are presumptively created by a putative settlor for himself. Thus, "the resulting trust is a species of express trust…in which evidence is replaced by presumption".[12] This is controverted by those who would postulate the RT as universally restitutionary, serving the purposes of reversing unjust enrichment, and unlimited by the putative will to settle a trust.[13] Thus, they propound that the RT effect is produced if there is an intention not to benefit the donee or even if the intention to benefit exists, it is occasioned by mistake in the sense that the disposition would not have occurred but for the mistake. The RT is obviously wider in scope under this restitutionalistic explanation.

As things stand, English jurisprudence has neither got past the stage of academic debate nor reached a clear incontrovertible judicial understanding. It has remained inconclusive and among the pronouncements of the RT, differences in formulation continue to be discernible, even if they have seemed to lack practical interest. On the view expressed by Megarry J., for instance, the implication of a purchase money RT seems to be just a case of inferring or implying a trust for the transferor (but not anyone else) when no trust for another may be inferred from the language of transfer which purports to be absolute.[14] On the view expressed by Lord Browne-Wilkinson, however, RTs are based on the presumed common intention to retain the beneficial interest at the outset or in the circumstances which have arisen after the express trust

---

8 Also known as the purchase money RT.

9 Robert Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997). But Chambers uses the notion of absence of beneficial intention and intention not to part beneficially interchangeably in "Resulting Trusts in Canada" (2000) 38 Alta. L. Rev. 378.

10 There is another controversy over whether the RT is automatic or presumed. See Peter Birks, ed., *English Private Law* (Oxford: Oxford University Press, 2004) at para. 4.253. The debate is mentioned by Lord Millett in his speech in *Twinsectra Ltd. v. Yardley* [2002] 2 W.L.R. 802 at paras. 92-95 (H.L.).

11 See *e.g.*, William Swadling, "A Hard Look at *Hodgson v Marks*" and *cf.* Charles Rickett & Ross Grantham, "Resulting Trusts—A Rather Limited Doctrine" in Peter Birks & Francis Rose, eds., *Restitution and Equity: Resulting Trusts and Equitable Compensation*, vol. 1 (London: Mansfield Press, 2000) c. 4 and c. 3 respectively.

12 Birks, *English Private Law*, *supra* note 10 at para. 4.254.

13 Peter B.H. Birks, "Restitution and Resulting Trusts" in Stephen Goldstein, ed., *Equity and Contemporary Legal Developments* (Jerusalem: Hebrew University, 1992) 335.

14 *Re Vandervell's Trusts (No. 2)* [1974] 1 All E.R. 47, reversed on other grounds in [1974] 3 W.L.R. 256.

is set up and performed without exhausting the beneficial interest.[15] Clearly limited to trust contexts because the intention must be common, the presumed common intention signifies that the transferor and transferee presumptively agree that the former shall retain the beneficial interest under an RT.

Elsewhere, however, in a commercial context, Lord Millett has in *Twinsectra Ltd. v. Yardley*[16] clarified the *Quistclose* trust as an RT, as opposed to an express trust, arising in favour of the lender when the lender parts with the money to the borrower on terms which do not exhaust the beneficial interest.[17] In two points, he disagreed with Lord Browne-Wilkinson. He regarded the RT as responding to an absence of intention (not a presumed common intention) and he did not require that this trust could only arise if there was an express trust in the first place which failed. However, as the clarification was not fully endorsed by the other law Lords in the case, the debate has ended for the moment on an inconclusive and ambivalent note.

B. *The Conventionalistic RT*

The above debate is not all there is on the subject. There is an alternative conventionalistic basis which has somewhat been ignored in the modern academic scholarship. It has however emerged prominently in the Singapore decision of *Lau Siew Kim*[18] to a mixed reception,[19] and this part of the article seeks to elicit its true light and defend the shift from doctrine or dogma to a conventional experience of property retention.[20] The first vital difference between a doctrinal analysis and a conventional analysis of the RT is a difference in the source. Unlike the intentionalistic RT, a conventionalistic RT owes its origin to some social convention, some accepted artificial standard of conduct, and is very different from one that is derived from a doctrine of intentionalism. It is proved by example rather than principle, and multifarious influences play their part in shaping it. Its variableness over time is inevitable. To put this another way, a convention is raised by pragmatic compromise, not principle, and no single factor is compelling.[21]

Building on the difference between sourcing the RT in convention and in dogma or doctrine, one can argue to another critical difference or what should be a critical difference between conventionalists and intentionalists. This is that conventionalism

---

15 *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669 (H.L.).

16 *Supra* note 10.

17 Generally, see William Swadling, ed., *The Quistclose Trust: Criticial Essays* (Oxford: Hart Publishing, 2004).

18 *Supra* note 2. There can be no doubt at all but that the C.A. agreed with the H.C.A. in such cases as *Calverley v. Green* (1984) 155 C.L.R. 242 that the RT is conventionalistic.

19 See Tang Hang Wu, "Equity and Trusts" (2008) 9 Sing. Ac. L. Ann. Rev. 295; Ruth S. Yeo, "The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman?" (2010) Int'l J.L. Pol'y & Fam 123. See also Kelvin F.K. Low, "Apparent Gifts: Re-examining the Equitable Presumptions" (2008) 124 Law Q. Rev. 369. For an assessment of the law prior to the decision in *Lau Siew Kim*, see Tey Tsun Hang, "Singapore's Muddled Presumption of Advancement" [2007] Sing. J.L.S. 240.

20 V.K. Rajah J.A.'s approval in *Lau Siew Kim*, *supra* note 2 at para. 35 of Chambers's view that absence of beneficial intention marks out the RT should not be misunderstood for endorsement of the restitutionalistic RT.

21 Thus, the fact that valuable property is transferred is not alone enough to support the presumption. *Cf. Ebner v. Official Trustee in Bankruptcy* (2003) 196 A.L.R. 533 (F.C.A.).

does not sit well with intentionalism. By their nature, conventional norms arise necessarily out of non-deliberation.[22] This crucial difference would have been more patent if, in the academic literature, the difference between absence of beneficial intention and negative beneficial intention[23] had been kept clearer in view. Regrettably, it has erroneously been supposed that there is a difference in kind between an intention not to part with the beneficial interest to the donee, which supposedly grounds an RT, and an intention to part beneficially to someone whether or not the donee, which grounds an express trust. The error is that both are dispositive intentions and logically stand on the same footing; so that A's intention that B take property on trust for A is logically equivalent to A's intention that B take property without the beneficial interest which remains in A. Rather, the vital point which has been missed is that absence of beneficial intention and intention not to part with the beneficial interest should not be conflated. The results of the two conceptions are different. If absence of beneficial intention is postulated, the donor's beneficial interest will not be lost by inaction since the absence of beneficial intention suffices alone to preclude beneficial loss. An intention to retain the beneficial interest will therefore have no RT effect. Being indistinguishable from an intention to dispose beneficially of property, an intention not to benefit the donee will have the consequence that the donee will hold the beneficial interest for the donor on an express trust of which he is aware and which he does not disclaim, or on a CT from the moment of awareness and non-disclaimer. In the other case, however, as the RT is based on an intention not to benefit the donee, the donee will hold the property on an RT and not an express trust for the donor.[24]

Another fundamental argument makes the same point. The two postulates of absence of beneficial intention and intention not to part beneficially must be kept apart if property rights in equity are to remain institutional.[25] Since as a general rule equitable property rights are not prescriptively acquired by effluxion of time, the notion of an RT emerging after the initial absence of beneficial intention hardens into an intention not to part beneficially is impossible. We must therefore, in order to be faithful to this principle of equity, ensure that the two postulates are not regarded as equivalent; we must avoid trivialising the difference between absence of beneficial intention and intention not to part beneficially by suggesting that there is an equivalence of degree.

Nor should the distinction be neglected as a matter of policy. Absence of intention to benefit must be insisted on in order to avoid doing damage to the important policy against hidden interests, and against bankruptcy remoteness. An intention not to part with or to retain the beneficial interest implies that all having an interest in the resulting trustee's property can set up against his personal creditors a hidden

---

22 David Lewis, *Convention* (Oxford: Blackwell Publishers, 2002) is still valuable as to this.

23 I use this terminology to cover both the positive intention not to part to the transferee and the intention to retain. The difference between them determines whether the RT is automatic or presumed. One is a new interest; the other which has never left the transferor is not a new interest.

24 *Cf.* Andrew Tettenborn, "Resulting Trusts and Insolvency" in Francis Rose, ed., *Restitution and Insolvency* (London: Mansfield Press, 2000) 156 at 158, who argues that the RT can co-exist with the express trust.

25 For a general discussion of remedial CTs, see Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" [2010] 22 Sing. Ac. L.J. 136.

interest.[26] The trustee would be afforded a position to perpetrate a fraud on his unsecured creditors by dealing with the property as if it were not impressed with an RT. Nothing in s. 73B of the *Conveyancing and Law of Property Act*[27] (as affirmed in s. 86 of the *Trustees Act*)[28] would clearly stop this exploitation of property, since the Act is designed to reverse fraudulent conveyances to a transferee in fraud of the transferor's creditors, not post-conveyance dealings between the resulting trustee and his creditors relying on the trustee's apparent ownership. In more exceptional instances, the donor in connivance with the resulting trustee would be given an opportunity to create an RT interest in fraud of his creditors as well as the trustee's creditors. In such cases, both s. 86 of the *Trustees Act* and the general doctrine of public policy[29] seem powerless to do justice as between the two sets of creditors who are equally defrauded and whose interests are in conflict.[30]

It is not only that absence of beneficial intention is essential for the prevention of fraud on creditors.[31] Absence of beneficial intention would also produce a more equitable result in such competitions between the RT beneficiary and the trustee's unsecured creditors; indeed in all non-contact situations where the RT beneficiary did not previously come into direct contact with the competing claimants. As absence of intention relates solely to the original property which is transferred, the RT will only yield to the RT beneficiary the surplus value in the original property. If the original property has been replaced by more profitable property, the RT beneficiary will not be entitled to the derivative surplus value. This is a fair result. On the other hand, the intentionalistic RT beneficiary must, by the logic of a dispositive trust, be entitled to investment of the sale proceeds in substitute property to be owned again in indivision. It does not however seem obviously fair that the RT beneficiary should be entitled to the derivative surplus value going beyond the original surplus value, if any, in any competition with unsecured creditors of the trustee.

So then, both by virtue of logic and policy, the conventionalistic RT necessarily operates and should do so where dispositive beneficial intention is absent. But absence of beneficial intention is not sufficient. There must also be a convention to give it definition and bring it into existence, and thus clarified, the conventionalistic RT of *Lau Siew Kim*, it is respectfully submitted, deserves its full effect and to be widely consulted. In fact, the sufficiency of conventionalism is an irreplaceable advantage, because it permits re-conceptualising the RT as a trust raised in good faith against the donee, thereby bringing the RT into perfect conformity with pre-existing property rights structures. Without a convention, it cannot be explained why

---

26 The *bona fide* purchaser is protected but creditors are not purchasers even when they extend credit relying on apparent ownership.

27 Cap. 61, 1994 Rev. Ed. Sing. Section 73B enacts the *Fraudulent Conveyances Act, 1571* (U.K.), 13 Eliz. I, c. 5 and has featured in *Peh Chui Choo v. Kuah Peng Ah* [2000] 2 S.L.R.(R.) 504 (H.C.); *Wong Ser Wan v. Ng Bok Eng Holdings Pte. Ltd.* [2004] 4 S.L.R.(R.) 464 (H.C.). For the English law generally, see John Armour, "Transactions Defrauding Creditors" in Howard Bennett & John Armour, eds., *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart Publishing, 2003) c. 3.

28 Cap. 337, 2005 Rev. Ed. Sing.

29 For a statutory example, see *Public Prosecutor v. Intra Group (Holdings) Co. Inc.* [1999] 1 S.L.R.(R.) 154 (H.C.).

30 Unless the beneficiary is estopped from asserting his interest against the creditor.

31 Tettenborn, *supra* note 24, argues that in commercial cases RTs are of little relevance anyway but this underestimates the need for alternate protection.

equity should have a role to play in some cases of legal transfer but not others, and why it should do so at the risk of recognising undivided ownership and impeding marketability of title and bankruptcy remoteness. The equitable RT, we must bear in mind, must operate within two boundaries. First, the state of mind or good faith of the transferee is irrelevant to a transfer of legal ownership. That is to say that as long as the transferee intends to receive the ownership transferred to him, it is inconsequential to passage of ownership that he entertains doubts about the transferor's title.[32] Second, if and when absence of good faith is operative, equity ascribes to it a loss of priority with the effect of creating, by subordination, an inferior title in the transferee and an obligation on the part of the transferee to respect some pre-existing equitable interest of which he has notice. So as to conform to this framework of property rights, mere doubts about the transferor's title or donative intention cannot of themselves supply a basis for equitable intervention by subordination of priority. This is because the RT interest is not some pre-existing interest; if it arises at all, it is at the same time as the legal transfer. Consistent with the first principle which is legal, the transferee's position cannot be impaired, certainly when he makes an honest mistake supposing that the transferor has intended to give him beneficial ownership. However, if a convention exists in the circumstances requiring the transferee to confirm that there is no mistake about the beneficial intention, it will be consistent with the second principle which is equitable to presume an RT where the donee who is put on inquiry does not make the necessary inquiries. So the convention establishes in substance when the donee has a duty to inquire and make the transfer terms clear. As has been said, this is not to say that knowledge of intention not to dispose of the beneficial interest is the ground of intervention. If the transferee actually knows that no ownership transfer is intended but claims beneficial entitlement, a CT will arise.[33] What is intended to be proved here is the true character of the RT, namely that there are conventional circumstances where the donee who does not inquire and seek the true intention is acting in bad faith, so that equity compels him to hold the beneficial interest for the donor.

Contrariwise, whereas conventionalistic explanations produce a better fit with existing property rights structures in terms of preserving marketability of title and bankruptcy remoteness, an intentionalistic analysis indiscriminately applies the same analysis no matter what the property is. It is, in consequence, insufficiently sensitive to the existing structures around which property is organised. In the case of personal property, for instance, the law of ownership already differentiates the effect of mistaken transfer by a rule that not any mistake will have the effect of an invalid transfer; but that only fundamental mistake will invalidate.[34] That being already the case, there is little need to provide a parallel analysis in equity to accommodate the effect of fundamental mistake on an absolute transfer. Indeed, a presumed RT based on the reversal of unjust enrichment would contradict the law of ownership and introduce distortion. The broad proposition that the RT is restitutionary seems therefore wrong for being insufficiently nuanced and accommodative of existing property rights structures.

---

32 See Mellish L.J. in *Hill v. Wilson* (1873) L.R. 8 Ch. App. 888 at 896.

33 See *Hodgson v. Marks* [1971] Ch. 892.

34 See William Swadling, "Unjust Delivery" in Andrew Burrows & Lord Rodger of Earlsferry, eds., *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 277.

III. Presumption that Equity Follows Law on Quantum?

If the RT originates from a convention, there will be no obstacle in principle to developing other conventional presumptions as the circumstances and social norms regarding property rights may from time to time necessitate, so as to supersede the presumed RT. By their nature, conventional presumptions can cease. New ones can take their place if these will ensure a better fit for the sake of preserving marketability of title and bankruptcy remoteness. We must therefore not stop at the re-conceptualisation of the RT but must inquire whether something more than that ought to replace the conventionalistic RT in the light of the present architecture of rights in realty. So far as concerns the need to accommodate existing property rights structures, the equitable maxim that 'equity follows the law' expresses the same thought and is helpful to a point. It is however necessary to avoid over-extending the maxim by turning it into a general presumption that equity will imitate the quantum of legal interest in property. If this is done, the maxim, which negatively constrains equitable rights to conform to existing property rights structures, will take on a positive stricture and cross its limits. It will also immediately become unfaithful since traditionally, equity has never recognised or acknowledged such a presumption of matching interests. Only the common law did so in limited fashion by presuming from a conveyance in joint names to holding as legal joint tenants, in part for the sake of third-party acquirers.[35] In England, moreover, there has since 1925 been even less reason to transform the maxim into a positive presumption as to quantum of interest. This is because the common law presumption has been taken even further by making the legal joint tenancy in realty mandatory.[36] Where all co-ownership of realty must be a legal joint tenancy, a dominant role for equity to ensure that the true interests are preserved is inevitable and necessary. Obviously, no presumption of equity following the law as to quantum of interest can be possible if the fruits of the realty or where it is sold, the sale proceeds, are to be fairly distributed.

All these comparative observations are enough to inject severe caution as to the application of English rules in Singapore where similar changes have never occurred. The English cases are only valuable in indicating that a less prominent role for the RT in Singapore is correct. Since parties who are intended co-owners can choose to avoid separating the legal and equitable interests, it is deducible that if the parties have chosen to deal with the absolute interests, there should and will be no separate and distinct inquiry as to RT interests at all. Would it however be necessary to further reduce the role of the RT in the absence of deliberate choice to dispose of property as absolute interests, by constructing a presumption that equity will imitate the quantum of legal interest in realty? Considering the match with the modern architecture of land rights in Singapore, this article argues that the Court of Appeal in *Lau Siew Kim*[37] did not introduce any such presumption and that so far as Torrens land is concerned, such a presumption would be otiose.

The thesis to be proved is again established in very large part by *Lau Siew Kim*. Lest it be suggested that the decision recognised that there was a generally applicable

---

[35] So far from this, equity countered the common law presumption by converting the presumed legal joint tenancy into an equitable tenancy in common in equal shares.

[36] See *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. V, c. 20.

[37] *Supra* note 2.

presumption that equity will match the equitable interests to the legal, some background elaboration is necessary. In the pre-existing case law, there never was any such presumption.[38] If the Court of Appeal in *Lau Siew Kim* had meant to create a presumption of matching interests, these previously decided cases would have been overturned without proper acknowledgement and consideration. It is suggested that we should be slow to attribute this untoward effect to *Lau Siew Kim* since as it turns out, there was little consequence in the fact that these cases were not cited to the court in *Lau Siew Kim*. This is because the court was primarily concerned with the effect of s. 53(1) of the *Land Titles Act* which had been omitted in those cases.[39] Juxtaposing *Lau Siew Kim* with those cases, however, one can clearly see that those cases were overstated in omitting to factor in the possibility of a deliberate choice to deal in absolute interests as undergirded by s. 53(1). They must therefore receive this qualification in the light of *Lau Siew Kim*.

On the important possibility of deliberate choice, V.K. Rajah J.A. said:

> [I]f cogent evidence is adduced to show that registered co-owners had in fact exercised their informed and voluntary intention to hold land as legal joint tenants, and if this evidence is accepted by the court, then the presumption of resulting trust which may arise to impose an equitable tenancy in common should be displaced and equity should, instead, as a matter of course, follow the law.[40]

Thus, where the conveyance of property expressly contains words of interest and states that the contributors are joint tenants after the parties have been advised by their solicitors on the differences between the two forms of holdings, that will be strong evidence that they have chosen to deal in absolute interests irrespective of their respective contributions; unless there is reason to vitiate it, for instance where the consent of one was procured by the misrepresentation of the other or perhaps where one party was mistaken as to the effect of putting the property into joint names and did not appreciate that doing so would give the appellant an immediate and absolute entitlement to a beneficial interest.[41]

Truly understood, although the court referred to equity following the law in the passage just cited when enunciating the effect of party choice, there was no suggestion that in the absence of party choice, there is now a presumption arising from the specification of joint tenancy or tenancy in common based solely on the fact and

---

[38] See *Tan Chui Lian v. Neo Liew Eng* [2007] 1 S.L.R.(R.) 265 (H.C.).

[39] *Supra* note 3. Section 53(1) states as follows: "In every instrument affecting registered land, co-tenants claiming under the instrument shall, unless they are described as tenants-in-common, hold the land as joint tenants; and if they are described as tenants-in-common, the shares in the registered land to be held by them shall, subject to subsection (2), be specified in the instrument."

[40] *Supra* note 2 at para. 95. At para. 110, it appears that mere expression of words of limitation or co-ownership is insufficient; the court must accept that the parties have made a conscious choice with full knowledge of the nature of a joint tenancy.

[41] Incidentally, the fact that Singapore property may deliberately be left in indivision immediately poses a difficulty which the court alludes to but leaves unresolved. If the choice is mistaken, what is the consequence? Will the parties hold shares according to their contributions under the RT as a default rule? In the present view, the existence of a choice removes the case from the RT law and the solution must be found in the law of CT. If the choice is induced by the fraud of one spouse, the fraudster will hold the realty on CT.

manner of conveyance.[42] In any case, the court should not be taken to have arrived at so far-reaching a proposition without having considered the earlier decisions already mentioned and in particular its earlier decision in *Tay Yok Swee v. United Overseas Bank Ltd.*,[43] where the appellant claimed a one-third share of the surplus as a tenant in common as to one-third of the property although his actual proportion of the contributions was less than one-third, and the RT analysis was applied.[44]

With the apparent benefit of hindsight, an argument to the contrary for a presumption that equity should imitate the legal interests could derive some imperfect parallel from the subsequently decided English case of *Stack v. Dowden*,[45] but should be resisted.[46] Baroness Hale of Richmond in that case was prepared to install a presumption that where spouses take a conveyance as joint tenants, there is a presumption that they are joint tenants in equity. As has been seen, where title is constrained to be a legal joint tenancy, co-ownership must be equitable so far as land is concerned. In these circumstances, it can be said that where the parties deliberately indicate that they shall be joint tenants, the deliberate choice is a good indication of beneficial ownership. Against the backdrop of forced joint tenancy, a deliberate specification clearly can have specific inferential value. Singapore law however allows legal co-ownership without separation of the equitable from the legal, and therefore the deliberate specification in Singapore is either a deliberate choice to deal with the absolute interest without separating the legal and equitable or it is not. It would be wrong to pre-judge party choice by raising a presumption of equality similar to that in the English case.

The above observation about the new English presumption of equality must in addition be supplemented by the understanding that the new presumption of equality in England serves importantly to fill a gap relating to marketability of title. Although not emerging prominently in the judgments of the law Lords, there are distinct echoes of this in the Law Commission's paper which was cited.[47] The Law Commission had maintained that parties should be encouraged to declare their beneficial intentions at the time of acquisition; hence they supported the decision in *Goodman v. Gallant*[48] and advocated that if parties declared a trust of their interests at the outset, the courts should give effect to that invariably and immutably.[49] The reason for this call for greater certainty lies in the troublesome overriding interests from the perspective of third-party acquirers. In England, even where marketability of title is regarded as vital, for instance in relation to land registered under the *Land Registration Act,*

---

[42] The reference to equity following the law in para. 95, it is suggested, is unnecessary or an unintended slip.

[43] [1994] 2 S.L.R.(R.) 36 (C.A.).

[44] The fact that section 48(1) of the *Land Titles Act* was in force (prior to its replacement by section 53(1)) was inconsequential.

[45] [2007] 2 All E.R. 929 (H.L.). See also *Kernott v. Jones* [2010] 2 Butterworths Family Court Reports 372.

[46] *Contra* Tang, "Equity and Trusts", *supra* note 19. Note that this reference to *Stack v. Dowden*, *ibid.* is purely to its first proposition about the presumption of equality (which can be rebutted by a CT, which is the second proposition).

[47] U.K., Law Commission (No. 278), *Sharing Homes: A Discussion Paper* (London: The Stationery Office, 2002). See *Stack v. Dowden*, *ibid.* at para. 46.

[48] [1986] Fam. 106 (C.A.).

[49] *Sharing Homes: A Discussion Paper, supra* note 47 at paras. 2.20-2.22.

1925,[50] third-party acquirers, it is enacted, will not be protected against the overriding interests of occupiers. As prime examples of overriding interests, RTs have a protected status which is apt to surprise third-party acquirers. While an intended purchaser should not have great difficulty surmising that there could be hidden RT interests in the property he seeks to buy from a spouse, he has no easy way to compute the value of the interests and therefore the discounted value at which to strike the deal. In England, therefore, there are good reasons for champions of marketability of title to advocate greater transparency of RT interests; and the new presumption responds to the need to make the value of these interests more transparent to the third-party acquirer of registered land.

It is submitted that in Singapore, however, the Torrens system of landholding is deliberately designed to keep all hidden informal interests (including those which correspond to overriding interests under the English system)[51] out of marketable titles, and therefore no further intervention is necessary by way of a presumption of equity following the law as to quantum of interest, let alone a presumption of equality. This follows by virtue of the in-principle extinguishment of all titles (though not of interests) prior to registration so far as third-party acquirers are concerned, and is not in any way contradicted by the *obiter dictum* of the Court of Appeal in *Loo Chay Sit v. Estate of Loo Chay Loo, deceased*,[52] namely that the principle of indefeasibility of title will not avail the former registered proprietor against a *claim to the sale proceeds* in his hands by a beneficiary asserting an RT interest. In other words, the problem that the RT may undermine marketability of titles is a false problem so far as third-party acquirers in Singapore are concerned. As between the immediate co-owners in a title dispute, it would be wrong to regard the non-registered RT beneficiary as a third-party acquirer under the Torrens legislation, and no one supposes that he is.[53]

However, there is still the question of bankruptcy remoteness which the Torrens system was never intended to address. That question is of course partly affected by Torrens policy. This is because a transfer under Torrens to the favoured third-party acquirer deprives the unsecured creditors of the registered transferor in regard to the alienated property and accordingly, a risk-averse creditor has the option of incurring the costs of obtaining a registered mortgage and attaining thereby the status of a protected third-party acquirer. However, if a personal creditor has not done so, or has calculated that it would not be worth his while to do so, so that he will remain an unsecured creditor, then his claim as unsecured creditor will be exigible against the sale proceeds of the alienated property in competition with the RT beneficiary's claim. Nothing in the Torrens scheme denies this or was intended to deny it.

To revert to the question: irrespective of any presumption of equality for the sake of marketability of title, in the event of the registered owner's bankruptcy, should a presumption of equity matching the legal interests be raised as to the sale proceeds

---

[50] (U.K.), 15 & 16 Geo. V, c. 21.

[51] The Torrens system gives effect to a number of 'overriding interests', none of which is an informal hidden interest. See s. 46(1) of the *Land Titles Act, supra* note 3 and *United Overseas Bank Ltd. v. Bebe bte Mohammad* [2006] 4 S.L.R.(R.) 884 at para. 84 (C.A.).

[52] [2010] 1 S.L.R. 286.

[53] In view of the commitment to the creation of a new title by registration and arguably to the putting aside of the RT for those purposes, it would be wrong to regard the non-registered owner as a third-party acquirer.

for the sake of tilting the balance in favour of the personal creditors of the registered proprietor or should the conventionalistic RT be upheld for the sake of the beneficiary? Since the problem is one of bankruptcy remoteness, the crucial point which needs to be reiterated is that unless there is a convention which makes it a duty of the transferee to clarify and confirm the dispositive intention, the transferor and the RT beneficiary claiming through him have no business to present hidden claims. Likewise, those who have lent moneys to the registered proprietor (and resulting trustee) have no legitimate claims consistent with the policy against bankruptcy remoteness if they have not relied on reasonable appearances of full ownership. Consistent with these principles, as between the two innocent parties where there is conflict between their claims to the sale proceeds of Torrens land, it would be fair to let the transferor and the RT beneficiary claiming through him prevail where there is a convention that recognises his interest and because the existence of the convention makes it not unfair to subordinate the personal creditors' claims who could have taken the convention into account.[54] In other words, there is no question of equity matching presumptively the stated legal interests when the RT beneficiary should prevail in any event over the personal creditors of the registered proprietor. In any case, such a presumption would be inconsistent with the fact that the construction of the Torrens system already gives to personal creditors the means and facility to be treated as third-party acquirers and those who choose not to use them already take the risk that the registered proprietor can always withdraw the property from execution by mortgaging it.

These considerations incidentally also defend the *obiter* refusal in *Lim Chen Yeow Kelvin v. Goh Chin Peng*[55] to attach to a survivorship clause in the bank's joint account document any presumptive fact of joint tenancy in equity as between the account parties. The refusal, with respect, is right. If s. 53(1) does not yield a presumption of correspondence of equitable and legal interests, there is even less reason for saying that the private survivorship clause does; when in many cases, the clause is inserted only for the bank's convenience to concentrate the power of disposal in one and thus relieve the bank and favour its status as a third-party acquirer through its power of set-off.

IV. Presumption that Spouses are Joint Tenants?

Thus far, it has been argued that neither the policy of marketability of title nor that of bankruptcy remoteness provides grounds for any radical abandonment of the RT and its total or partial replacement by a presumption of equity matching the undivided legal interests. Where the acquiring parties are spouses, the specific question that arises is whether, even if we must reject the earlier presumption of equity matching the legal interests, we should accept a more specific presumption that legal spouses who take as joint tenants at law are joint tenants in equity or that legal spouses who are legal tenants in common in unequal shares are tenants in common in equity in

[54] One should distinguish between personal creditors whose claims precede the RT and those with subsequent claims. It is the latter who are apt to be misled but the existence of the convention reduces the extent to which the latter could be misled.

[55] [2008] 4 S.L.R.(R.) 783 (H.C.). The decision was that the conversion of the deceased's account to a joint account with the defendant was proved to be a deliberate choice to deal absolutely.

equal shares. As regards the peculiar considerations that may possibly distinguish spousal acquisition of realty during the course of marriage, they interrelate in a complicated fashion. The marital union is often characterised by a certain degree of unity of financial interests, if only because marriage often entails common expenses, or other pooling of resources to an extent. It may therefore seem artificial to start from a position of separation of property. Arguments are also sometimes made that spouses who are economically disadvantaged from acquiring property by their choice to put family above career ought to be compensated by a presumption of equality whenever property is acquired. The presumption furthermore is economic since spouses on a lower economic level than their inter-married spouses are given an incentive to contribute by their savings to preserve property in which they are presumptively equal owners. There is another, an attractive moral, argument. In the not insignificant scholarship on property rights of divorcing spouses, the idealistic notion of marriage as a deep and profound partnership has been approved as being morally good.[56] The stark anomaly between divorcing spouses and surviving spouses mentioned earlier can therefore be strongly denounced. This article, in seeking to deal with the problem of RTs, must necessarily involve us in fundamental notions of marriage and property. Located at the intersection of family and property, the problem, it is argued, must also be solved in terms of conventions, not doctrines or dogmas.

Conventionalism necessarily embodies institutionalised and instantiated experience and observation. However, as befits conventionalism, the avoidance of anomaly between the acquisition of property during the course of marriage and the distribution of property on dissolution of marriage has to be taken seriously. To this end, the nature and extent of the anomaly must be understood precisely. In Singapore, the division of property as between divorcing spouses was for a time argued to reflect a 'community of property' broaching an idealistic notion of equally shared endeavour or equal property partnership. The alternative phrase 'deferred community of property' which has passed into judicial currency can be misleading.[57] If this also means that some ideal framework approximating to equality of a property partnership between spouses is to be set up as the benchmark against which to make adjustments for extraordinary efforts or contributions to the acquisition of property, it would be wrong. While the courts might have slipped subconsciously into this mode of thought in earlier cases, the Court of Appeal in the latest cases has in substance signified that the formula of just and equitable division is entirely devoid of presuppositions or ideations of equality.[58] So the first problem with arguing from anomaly to any presumption of equality is that the anomaly must not be expressed as an ideation and the experience of equality exaggerated. Rather, the just and equitable division of matrimonial property must involve an examination of opportunities foregone to acquire property or a greater share of property; and in taking into account all contributions,

---

[56] See Leong Wai Kum, "The Just and Equitable Division of Gains Between Equal Former Partners in Marriage" [2000] Sing. J.L.S. 208. See also Leong Wai Kum, "Trends and Developments in Family Law" in Singapore Academy of Law, *Review of the Judicial and Legal Reforms in Singapore between 1990 and 1995* (Singapore: Butterworths Asia, 1996) 632 at 700.

[57] See Leong Wai Kum, "Fifty Years and More of the *Women's Charter* in Singapore" [2008] Sing. J.L.S. 1 at 20.

[58] *Lock Yeng Fun v. Chua Hock Chye*, *supra* note 6 at paras. 50–58; *NK v. NL* [2007] 3 S.L.R.(R.) 743 at para. 20.

financial and non-financial, this is what the courts are in effect doing. This approach would resonate with similar views, such as those of the Canadian Supreme Court, on the relevance of equal opportunities to acquire property.[59] The difference is that whereas the Supreme Court requires the hypothetical equalisation to be computed for an ongoing acquisition of property during the course of marriage, the specialised law in Singapore is reserved to *distribution on dissolution* of marriage. Should the specialised approach be extrapolated to an ongoing acquisition, in displacement of conventionalism?

The answer this article advocates is in the negative. Extending a solution reserved to a final distribution of property to an ongoing acquisition of matrimonial property would be uneconomic. It would seriously undermine the importance of maintaining individual autonomy in the formation of collective wealth. When a marriage is over, the computation of individual shares can and ought to take into account foregone opportunities to acquire a greater individual share, for the reasons just mentioned. The process of wealth formation during a subsisting marriage however would be impeded by hypothetical or idealistic frameworks which constantly require assessment of the impact of foregone opportunities, not to mention surmounting the valuation difficulties that would entail. Historic cost valuations would be inappropriate and survived value valuations would be complicated by the changing or fluctuating risk preferences of the spouses during the course of marriage. Hence for sound economic reasons, equity's function must be contractarian, supplying a default set of individuated benefit rules which leave the parties free to select for themselves that principle of management of property which best reflects their balance of sentimentality and commerce.[60] Moreover, as a notable form of 'collective wealth', spousal acquisition of property would not be efficient unless a ready market was created and fostered for matrimonial property. Maintaining the autonomy of the individual shares during the marriage, and avoiding the extreme notion of collective ownership and its inertia and braking tendency on commerce and property utilisation, is best. There must be few who would want to deal in matrimonial property if there were risks of being saddled with in effect hidden and uncertain interests arising under a just and equitable formula. The policy of the common law in avoiding collective ownership with indefeasible shares thus seeks to facilitate the formation of collective wealth by spouses by preserving spousal autonomy, and enhancing marketability of matrimonial property.

No doubt, the above economic arguments can be overcome if a presumption of equality is necessitated by some overriding marital or familial or constitutional policy. However, there appears to be none. Any familial policy to keep property in the family so as to ensure succession to the children of the marriage and preclude devolution to strangers, such as the relatives of either spouse, must be ruled out. It would in any case be inconsistent with the policy of freedom of testation of a spouse, the commitment to which is incontrovertible and irreversible. Of course, the facilitation of marriage is an important policy, evidenced for instance in the rule of equity that embraces children within the marriage consideration for the sake of encouraging and giving effect to marriage settlements of future interests.[61] But the facilitation

---

59 See *Peter v. Beblow*, *supra* note 7.

60 Common intention CTs are thus also relevant but they are not covered in this article.

61 See *Pullan v. Koe* [1913] 1 Ch. 9 (H.C.).

of marriage can be spurred on more expediently by a presumption of advancement, and avoiding the more extreme measure of presuming equality of holding. As for constitutional arguments, the well-known absence of any constitutional protection of property in Singapore argues that the policy against feminisation of poverty is not acknowledged. On the other hand, the constitutional protection of equality of laws which exists is directed at legislative and executive discrimination but that would not signify a positive obligation on the part of the legislature to neutralise the feminisation of poverty, much less the courts.[62]

In short, as no non-economic policy ought clearly to prevail or predominate, the arguments come down in favour of conventional advancement, not imputative equality. If the parties to a marriage have decided to share in a quantum disproportionate to their intended contributions, the court will find that their deliberate choice of absolute shares consummates the intention to advance the excess beyond contribution. If, however, there is absent any such dispositive intention to advance at the onset, we must not over-extend the redistributive formula, applied when a marriage has failed, of retrospective consideration of the sacrifices made for the family which were foregone opportunities to acquire a greater share.

This article therefore would disagree with arguments to end the anomaly between surviving and divorcing spouses by developing the RT as a just and equitable measure.[63] It welcomes again the decision in *Lau Siew Kim* to maintain and adhere to the system of separation of property between spouses. Accordingly, where spouses take a conveyance of property in their joint names it will not be presumed that they are joint beneficial owners;[64] and (although the Court of Appeal did not spell it out) where spouses take as legal tenants in common in unequal shares which do not reflect their contributions to the purchase price, it will not be presumed that they are tenants in common in equal shares.

However, while the existence of a marital relationship will not create an automatic advancement through the presumption of joint beneficial tenancy or equality, it may provide the occasion for conventionally establishing a gift of the equitable right of survivorship at the expiry of the lifetime of the donor. In reaching this holding in *Lau Siew Kim* that the convention about giving between spouses expresses itself in a presumption of advancement of variable strengths, the Court of Appeal, with respect, has made a brilliant turnaround. Shifting the focus to convention, the court has side-stepped the debate between different schools of thought over the basis of the presumption, whether love or affection or dependency or moral duty. Whether it is one or the other only matters to the strength of the presumption, since the presumption is strong or weak depending on the strength or weakness of the relationship at the time of acquisition or transfer of property and the nature of the relationship viewed against the social conditions at the material time.

---

62 Art. 12 of the *Constitution of the Republic of Singapore* (1999 Rev. Ed.).

63 Such arguments were regarded as credible in *Peter v. Beblow*, *supra* note 7 where the fact that household and childcare contributions were entitled to recognition and compensation under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 was highlighted.

64 *Cf. Lau Siew Kim*, *supra* note 2 at para. 93, where reference was made to the rule in Western Australia that parties purchasing in equal shares and conveying in joint names will be presumed to be beneficial joint tenants.

To be sure, the conventionalist rationalisation of the presumption of advancement which the Court of Appeal has given is a little mysterious since the genesis of the presumption of advancement is said to be corrective, responding to "the unjust operation of the presumption of resulting trust in certain circumstances".[65] Consequently, "its functionality is limited to, and indeed dependent on, the prior existence of a presumed resulting trust".[66] The idea of a conventional presumption pegged on another is not strange but that of the unjust operation of the conventionalistic RT is hard to grasp since conventions are above all always reasonable. The alternative explanation this article has provided earlier for the RT as a conventional measure of good faith in receiving gifts is better in making sense of the presumption of advancement. The presumption of advancement simply represents the obverse situation where it ceases to be bad faith for the legal owner to claim the entire or a greater beneficial interest encompassed by his legal interest. This more perfect alignment with the convention of giving exemplified by the RT ensures that the presumption of advancement will not upset existing property rights structures or encroach unwarrantably into the policy against hidden informal interests.

Besides introducing a new idea about repelling the unjust operation of the RT, the Court of Appeal has provided a seemingly thorough expatiation of the presumption of advancement which in fact leaves questions about the timing of the presumption and the subject matter of the presumption a little vague. The case was one where the statutory joint tenancy of s. 53(1) applied to convert the joint names presumptively into joint tenants at law while the presumption of RT operated to give the beneficial interests to the spouses according to their contributions. From an examination of the entire circumstances up to the demise of the deceased, the court concluded that the presumption of advancement was strong and that therefore the surviving spouse should benefit from the operation of the rule of survivorship in relation to the two properties in dispute. The fact that the post-acquisition relationship was relevant in evaluating the strength of the presumption of advancement suggests that in the court's view the presumption can arise post-acquisition and supports one possible interpretation of the judgment, namely that the court found that at some time before the demise of the deceased, he presumptively advanced a future interest, his right of survivorship, to his surviving spouse. The other possibility is that he presumptively advanced upon his death a gift of his entire beneficial ownership to his wife (the present interest).[67] However, this alternative interpretation should be rejected for it would be tantamount to validating a testamentary disposition not complying with the requirements of the *Wills Act*.[68]

On the first interpretation, it would not be inconsistent with the court's rejection of the presumption of equality with its effect of automatic advancement, to countenance that in exceptional circumstances, the presumption of advancement could arise at the time of acquisition of property. Applying the presumption at the time of acquisition should not be impossible where the acquisition occurs after a substantial period of

---

65 *Ibid*. at para. 57. *Cf*. Chambers, *supra* note 9, who explains more tentatively that the presumption might be a limited exception to situations where the protection of the RT is not required.

66 *Lau Siew Kim*, *ibid*.

67 Note that the presumption is one of present donative intent, and its subject is a present interest, not a future interest.

68 See s. 5 of the *Wills Act* (Cap. 352, 1996 Rev. Ed. Sing.).

enduring marriage when the presumption has gained in strength. But this should still be exceptional. Generally it would not be correct to apply the presumption where property is purchased at or around the onset of marriage. For then, the presumption of advancement is likely a weak one incapable of rebutting the presumption of RT not only because there is likely to be only slight evidence of a strong presumption. If there is already a facility to express any strong donative intent by choosing to convey the absolute interest instead, it would arguably also be wrong to permit parties to rely on the presumption of advancement, thus by-passing the facility. In any other case, the presumption of advancement should only operate in respect of the excess over contributions. On the one hand, the argument that any such advancement should to the contrary be made by a fresh re-conveyance open to the parties but incurring additional legal and stamp fees would prove too much. On the other hand, to countenance an advancement greater than equality (*i.e*. in excess of fifty per cent share of the beneficial interest) would not be a proper employment of the presumption of advancement, which is not free-standing but serves as a counter-presumption to the presumption of RT.[69] The proper way to make an advancement going beyond equality should be to make a proper gift by a fresh conveyance.

V. Some Secondary Issues

A. *The Mortgage Liability*

Among the secondary issues which this article will next consider selectively, the issue of what contributions are relevant to the presumption of RT can be easily disposed of once the conventionalistic nature of the RT is brought home. On hindsight, many wrong turns were made by turning the RT into a restitutionary principle under what was called an 'extended RT' based on the nebulous notion of subsequent contributions referable to the acquisition of property,[70] and should be reversed if the RT is conventionalistic.[71] The problem of mortgage liability however has continued to defy consistent treatment. In *Lau Siew Kim*, the Court of Appeal took the view that the contractual mortgage liability of a signatory to the loan contract is a direct contribution but the actual servicing of the mortgage by a non-signatory will not count as contribution in the absence of prior agreement. With respect, there is considerable doubt whether the taking of a mortgage in joint names should in effect be equiparated to cash contributions.

The first problem is that equity has never treated a promise as value. V.K. Rajah J.A. apparently relied on *Curley v. Parkes* for the judicial view just stated.[72] But that passage was *obiter* as counsel for the plaintiff did not suggest that the contributions to the joint account, in so far as they went to pay amounts payable under either of two mortgages, were contributions to the purchase price. In *Ulrich v. Ulrich*,[73] however,

---

[69] See *Laskar v. Laskar* [2008] 1 W.L.R. 2695 (C.A.).

[70] See Mee, *supra* note 1.

[71] In *Lau Siew Kim*, *supra* note 2, the court was prepared to extend the presumption of RT to cover re-development costs if the re-development followed closely upon the acquisition and enhanced the value of the property.

[72] [2004] EWCA Civ 1515, cited with approval in *ibid.* at para. 115.

[73] [1968] 1 W.L.R. 180 (C.A.).

Lord Denning M.R. and Diplock L.J. held it was wrong to treat a mortgage contribution as equivalent to a cash contribution.[74] Second, if according to the *dictum*, the prior agreement can secure the subsequent contributor to mortgage payments a share of the property, it would be incongruous to say that the mortgagor and co-mortgagor are treated as having provided the proportion of the purchase price attributable to the monies so borrowed without more, ignoring any agreement between them as to the true extent of their share of the mortgage liabilities.

For consistency with conventionalism, it is submitted that the purchase price if raised by mortgage financing should be treated as equally provided by spouses who have contracted as joint promisees,[75] subject to equitable accounting as between the parties to reflect their actual subsequent mortgage contributions. These subsequent payments count as payments which increase the value of the equity of redemption rather than as retrospective contributions towards the cost of acquisition. In any case, if one party subsequently repays the mortgage advance, equitable accounting should be invoked to adjust the equities.

As for the court's suggestion that subsequent mortgage payments made by a non-signatory pursuant to agreement with the signatory are contributions raising an RT, this runs into greater difficulties. Clearly, subsequent payments of the mortgage instalments are not part of the purchase price already paid to the vendor, but are sums paid for discharging the mortgagor's obligations under the mortgage.[76] In principle, as Lord Neuberger said in *Stack v. Dowden*:

> The cash contribution is effectively equity, whereas the mortgage liability arises in relation to a secured loan. If the value of the property in the example just given had fallen by 25% when it came to be sold, the party who made the cash contribution would lose £75,000 of his £100,000, whereas the other party would lose nothing (unless he would be liable to pay £25,000 to the former, which seems intuitively improbable).[77]

Additionally, there is the problem that subsequent payments will not bear the same cash value as payments made at an earlier date if the inflation rate is significant.

Still further, if the *obiter dictum* in *Lau Siew Kim* is correct, it would have to be extended to all agreements about how the cost of acquisition and even expenses are to be shared. It would rely on a dubious distinction between agreements on funds and agreements on sharing, according to which only the former would be effective in yielding an RT interest.[78] It would also be inconsistent with the prior decision of the Privy Council in *Neo Tai Kim v. Foo Stie Wah*[79] to the effect that the presumption of RT cannot be rebutted by showing an agreement that expenses and assets are to be shared equally. Unfortunately, *Neo Tai Kim* is still misleadingly cited for the proposition that:

> [W]here a property is conveyed in the name of a non-contributing party, his share is held beneficially under a resulting trust for the contributing party, subject to

---

74 *Ibid*. at 186 and 189, approved in *Pettitt v. Pettitt* [1970] A.C. 777 at 816 (H.L.).

75 By analogy with *Neo Tai Kim v. Foo Stie Wah* [1985-1986] S.L.R.(R.) 48 (P.C.).

76 See Underhill & Hayton, *Law of Trusts & Trustees*, 16th ed. (London: Butterworths, 2003) at 351-352.

77 *Supra* note 45 at para. 118.

78 The distinction was first made in *Cowcher v. Cowcher* [1972] 1 W.L.R. 425 (H.C.).

79 *Supra* note 75.

> the actual common intention of the parties prior to or at the point of acquisition of the property that the non-contributing party is to have a beneficial interest.[80]

This erroneously presents the decision as an authority on the CT or the effectiveness of an informal agreement as to undivided sharing. The Privy Council however never intended to establish a general proposition about common intention to share, or to say that the RT might be rebutted by a common intention CT. What it decided was merely that an agreement to use shared assets to pay for property in one name may be proved to show that the contributions were in fact equal because those assets were used. Emphasis was on the fact that shared assets were used for the purchase, and not so much that the parties agreed to do so. Another *ratio* may arguably be extracted from the case. The Privy Council could be regarded as having also decided that where property is in a sole name, the presumption of RT does not arise if there is evidence of common intention to give the entire beneficial interest to the sole name. This however is exactly what the Court of Appeal has decided in *Lau Siew Kim* with the benefit of citation of s. 53(1).[81]

B. *Equitable Accounting and CT*

In short, this article denies that the size of contributions to the purchase price can be subject to any prior, let alone subsequent, actions of sharing the property or discussions about the property having the effect of varying the shares of contributors under an RT. The legal significance, if any, of prior or subsequent actions of or discussions about sharing the property has to be sought from the principles of CT.[82] As the RT conventionally presupposes an absence of beneficial intention, nothing about the RT is relevant where the parties have intended to create a trust by their conduct and informal declarations in sharing realty. Such a trust can only be valid as a CT and so the requirements of the CT must be satisfied. As has been said, no one should expect to find here an attempt to pursue the CT but it may be relevant to note that the principles of CT are largely irrelevant when spouses jointly buy an asset for profit or commercial use, as opposed to sharing it. The mere fact that the parties are related as a family will not give the joint purchase of a matrimonial asset for investment purposes its character as a shared asset which may possibly attract principles of CT;[83] therefore, unless the parties have chosen to deal in the absolute interest, their beneficial interests will, as in *Lau Siew Kim*, turn on the presumption of RT or advancement. On the other hand, where subsequent contributions have no legal significance under the principles of CT, their effect is to be found in principles

---

80 This reading for instance was canvassed in *Siak Lye Ping v. Chia Tien Leong Benjamin (Chia Kim Teng, Intervener)* [2005] SGDC 183 at para. 47. Fortunately, it did not succeed on the facts as the district judge found. See also *Mu Yuyun v. Fei Jinmei* [2009] SGDC 446 for a similar approach.

81 The rebutting common intention to give the whole or the excess over the contributory share is strictly one way. It is evidence for the non-contributing legal owner which rebuts the RT in favour of the contributor but the latter cannot give such evidence in order to gain a larger interest than his *pro rata* share. That would only be possible under CT.

82 As in *Stack v. Dowden*, *supra* note 45 at para. 11.

83 In borderline cases where the property is both a shared asset and an investment (as in *Baumgartner v. Baumgartner* (1987) 164 C.L.R. 137 (H.C.A.)), it is suggested that the parties' primary purpose will be determinative.

of equitable accounting as between co-owners;[84] which principles are designated to do broad justice or equity between the co-owners by giving credit for monies paid and expenditure incurred on the jointly owned property, or by charging a co-owner in sole occupation of property an occupation rent and offsetting these credits against each other.[85]

C. *RT and HDB Property*

Finally, in leading up to the conclusion, this article suggests that the preceding discussion should leave few, if any, ruffles on property rights in HDB property. Previously, s. 51(4) of the *Housing and Development Act*[86] declared that no trust should be created by the owner of the flat without the HDB's prior written approval, and s. 51(5) voided any such trust for the benefit of any person ineligible to "acquire an interest in HDB property".[87] In 2005, s. 51(6) was introduced not to prohibit the RT or CT, but to ensure that a beneficiary ineligible for acquiring an interest in HDB property should not become entitled under any RT or CT.[88] As the Act did not say that no person should be entitled to *any interest* under an RT, the RT interest was not destroyed and arguably the ineligible purchaser would be entitled to trace his undestroyed RT interest to any relevant sale proceeds in the hands of his nominee. In 2010, s. 51 of the Act was repealed and re-enacted, and it appears that the effect of s. 51(10) is now that so far as an ineligible purchaser is concerned, any RT interest in protected property will cease to exist by operation of law and with it any right to trace the interest to any relevant sale proceeds.[89]

VI. Conclusion

The stress on fit with the modern architecture of rights in realty which conventionalism posits has important repercussions for the role of the RT. The availability of deliberate choice no doubt will diminish the role of the RT. Ironically, however, the CT will assume greater importance in cases where parties have chosen to deal in the absolute interest. In these circumstances, the significance of any informal advancement subsequent to acquisition will have to be determined in terms of the principles of CT or proprietary estoppel. The RT however will remain relevant on the question

---

84 See *Tan Chui Lian v. Neo Liew Eng*, *supra* note 38. See also *Re Gorman (A Bankrupt)* [1990] 1 W.L.R. 616 (H.C.); *Bernard v. Josephs* [1982] Ch. 391 at 400.

85 See *Re Pavlou (A Bankrupt)* [1993] 1 W.L.R. 1046 at 1050-1051 (H.C.); *Ex parte Marley v. Trustee of the Property of the Debtor* [1976] 1 W.L.R. 952 (H.C.); *Re Pittortou (A Bankrupt)* [1985] 1 W.L.R. 58 (H.C.).

86 Cap. 129, 2004 Rev. Ed. Sing.

87 *Cheong Yoke Kuen v. Cheong Kwee Kiong* [1999] 1 S.L.R.(R.) 1126 (C.A.). See *Neo Boh Tan v. Ng Kim Whatt* [2000] SGHC 31.

88 See *Housing and Development (Amendment) Act 2005* (No. 29 of 2005, Sing.). See also *Tan Chui Lian v. Neo Liew Eng, supra* note 38.

89 See *Housing and Development (Amendment) Act 2010* (No. 18 of 2010, Sing.), which came into operation on 11 August 2010. *Cf. Allen v. Rochdale Borough Council* (1999) 80 Property, Planning & Compensation Reports 1. *Cf.* also the recent observations in *Koh Cheong Heng v. Ho Yee Fong* [2011] SGHC 48 at paras. 54-56 where the court did not mention the reference to any interest in protected property under an RT.

of third-party contributions to facilitate marriage, and of co-ownership of investment properties, and the presumption of advancement will be relevant after an initial acquisition which is subject to the presumption of RT. In the last category, the CT may be relevant if there is evidence of common intention arising out of discussions or conduct in sharing the property.[90]

[90] *Cf*. Tang, "Equity and Trusts", *supra* note 19; Yeo, *supra* note 19; and Tey Tsun Hang, *Trusts and Shared Property* (Singapore: Centre for Commercial Law Studies, Faculty of Law, National University of Singapore, 2010), who see the RT and the common intention CT as occupying the same ground and prefer the majority reasoning in *Stack v. Dowden*, *supra* note 45.