

Common intention constructive trusts and proprietary estoppel essay sample



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The difference between common intention constructive trusts and proprietary estoppel has been described as 'illusory' (Hayton). Do you agree with this statement? Consider how the case law has developed and give reasons for your answer.

In his article 'Equitable Rights of Cohabitees' Hayton suggested that the distinction between common intention constructive trusts and proprietary estoppel has, over time, come to be but illusory and goes on further to propose that since the general direction of the development of the law has been to embrace the principle of preventing and remedying unconscionable conduct regardless of whether the claim brought before them was originally brought under the concept of a constructive trust or proprietary estoppel, the distinction between the two legal tools should be altogether abolished. The scholar suggests that this would further promote the equitable principle of remedying unconscionable conduct. As Lord Browne-Wilkinson put it, 'the two principles have been developed separately without cross-fertilization between them: but they rest on the same foundation and have on all the matters reached the same conclusions'.

However, while there undeniably are many close similarities in the nature of both common intention constructive trusts and the doctrine of proprietary estoppel, particularly in terms of the circumstances under which they are claimed, the remedies the courts are able to award under each type of claim, and the evidence courts have been willing to accept in order for each type of claim to be affirmed, numerous distinctions nevertheless exist and in practice case law has not always supported Browne-Wilkinson's assertion.

Before the similarities and differences between the various legal elements of common intention constructive trusts and proprietary estoppel can be closely analysed, it is useful to provide definitions for both of these terms.

Common intention constructive trusts have been defined as trusts created by a court (regardless of the intent of the parties) to benefit a party that has been wrongfully deprived of its rights. Following the principles of *Lloyds Bank v Rosset* [1991], in order for a common intention constructive trust to be established, there must be a common intention to share ownership of the land (which can be either express, amounting to the explicit assurances on the part of the legal owner or the existence of an oral agreement to share the property between the legal owner and the claimant, or inferred), as well as detrimental reliance on the part of the claimant on that common intention.

The only type of detrimental reliance that courts have been willing to accept without question, however, is a direct contribution to the purchase price of the property on the part of the claimant. All other types of detrimental reliance, particularly non-financial acts, such as meeting household bills and domestic care have been taken into account by the courts favourably in certain instances, such as *Le Foe v Le Foe* and *Woolwich* [2001], but such occasions have been rare to date.

It is sometimes also recognized that the common intention constructive trust can be further subcategorized into two different branches, following the judgement given by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] which distinguishes between institutional constructive trusts and remedial constructive trusts. As Terence Etherton, <https://assignbuster.com/common-intention-constructive-trusts-and-proprietary-estoppel-essay-sample/>

has summarised, “ The institutional constructive trust is a property institution, which will have arisen before the date of the court’s judgment, and whose existence the court declares as a subsisting private right. A remedial constructive trust, on the other hand, is usually described as a judicial discretionary remedy, which may have retrospective effect”. In other words, the courts have the ability to both affirm the pre-existence of constructive trusts and to impose constructive trusts as a remedy where they see fit. Constructive trusts, then, as it will be shown, can also in theory be a remedy under a proprietary estoppel claim, although courts have not been inclined to grant these in such a way in the past.

Proprietary estoppel, on the other hand, is a “ legal bar preventing a (first) party from denying another (second) party’s right in first party’s property where the second party has incurred costs in that property to its detriment”. Proprietary estoppel, like other types of estoppel, is not a remedy in itself but a tool to raise “ estoppel equity”, on the basis of which the court is able to decide on the type of remedy that this equity will satisfy. Similarly to the need for the element of common intention for the purpose of establishing a constructive trust, there is a need for the establishment of an active or passive assurance on the part of the defendant that leads to some form of consequential detriment on the part of the claimant when acting in reliance on that assurance.

Thus, there must be a causal connection between the actions undertaken by the claimant and the initial assurance on the part of the defendant. The extent and the nature of the detriment suffered by the claimant, however, appears to be substantially more flexible than that necessary to find the <https://assignbuster.com/common-intention-constructive-trusts-and-proprietary-estoppel-essay-sample/>

existence of a constructive trust. For example, in *Inwards v Baker* [1965], such detriment amounted to the improvement of the defendant's land, while in *Gillett v Holt* [2001] it was manifested in both financial and personal detriment. Yet unlike in most cases involving common intention constructive trusts, in neither of these instances did the claimant make any direct contributions to the purchase price, and the rules on detrimental reliance appear to be a lot more flexible.

Nevertheless, at a first glance, common intention constructive trusts and the doctrine of proprietary estoppel appear to have an overwhelming amount of similarities. The aim of both instruments is to enforce an informal promise between the legal landowner and the claimant. Both rely upon a promise which has been relied upon and a detriment on the part of the claimant resulting from the claimant's reliance of the promise.

The existing body of case law has too frequently noted the similarities between the two concepts and their practical applicability in the past. This was first explicitly recognised in *Lloyds Bank v Rosset*. Similarly, in *Yaxley v Gotts*[2000], the court ruled in favour of the claimant in a claim brought under proprietary estoppel, mentioning obiter that the same conclusion would have been reached should the claim have been brought as resulting from a common intention constructive trust.

In *Lloyds Bank v Rosset* Lord Bridge held that a common intention to share the equitable title could only be inferred for a claimant if they had made a direct financial contribution to the acquisition of the property (be it to the purchase price, the payment of the deposit or the mortgage payments).

However, Lady Hale in *Stack v Dowden* [2007] commented obiter that the bar was set 'too high' in this regard. In *Abbott v Abbott* she further developed the notion of the need to afford greater flexibility to the type of conduct required in finding an equitable trust in favour of the claimant.

Doyle suggests that Lady Hale's comments in *Stack v Dowden* and *Abbott v Abbott* [1981] should be perceived as an attempt to develop the law "away from a restricted but certain set of circumstances in which the non-legal owner could claim a constructive trust in their favour, to a more flexible approach, aimed at giving the parties the most suitable outcome on the facts of each and every case", yet that the subsequent case law pertaining to establishing common intention constructive trusts has in reality constituted a shift away from this flexibility.

In both the instances of *James v Thomas* [2007] and *Morris v Morris*, the Court of Appeal refused to decide on a constructive trust based merely on the conduct of the claimant. *Morris v Morris* in particular makes it plain that establishing a constructive trust based on solely conduct can only take place under exceptional circumstances. As such, these judgements can be strongly contrasted with the findings of proprietary estoppel, particularly in the cases of *Inwards v Baker* and *Gillet v Holt*. Doyle does, however, point out that both in the cases of *James v Thomas* and *Morris v Morris* the defendants were the legal owners of the properties under dispute prior to the time when their relationships with the claimants began; thus, it may be that in the future courts will be more willing to find a constructive trust on the basis of conduct alone in situations whereby the property under dispute is acquired during the course of the claimant's and defendant's relationship. It

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nevertheless remains that the finding of proprietary estoppel requires substantially less rigidity in rules applicable to detriment on the part of the claimant than that necessary to determine the existence of a constructive trust.

Thus, the requirement of agreement, arrangement or some understanding between the parties to share, coupled with the need for detrimental reliance in constructive trusts are very similar to the requirement of assurance, reliance and detriment in estoppel, while the degrees of stringency pertaining to the claimant's detriment contrast vastly.

The remedies available to the claimant under each concept constitute, perhaps, the most vital and strong contrast between them. Conversely to the cases involving constructive trusts, in proprietary estoppel claims courts have discretion in terms of the extent of the remedy awarded. In the instance of constructive trust cases, once the existence of a constructive trust is found by a court, the court has little discretion by the way of awarding shares in the property. It has been termed 'all or nothing' approach, as the claimant will receive either what the parties had agreed to or what the claimant had been promised or nothing.

The remedy awarded under the doctrine of estoppel is based on the principle of it being the 'minimum necessary to do justice' and is "not limited to a proprietary one". Remedies awarded by the courts in the instances whereby proprietary estoppel has been found in the past have included the transfer of the land freehold to a claimant expecting a home for life (Pascoe v Turner [1979]), award of a life interest in the property, award of an equitable

interest under a constructive trust, as well as financial compensation equivalent to the cost of full-time nursing care (Jennings v Rice [2003]). As such, not only are the remedies under proprietary estoppel more flexible, and can be said to be more proportionately connected with the facts of a particular case, but are also arguably significantly more dependent on the beliefs of a particular judge, and as such a lot less predictable and entrenched.

Thus, we are able to conclude that while there are numerous parallels between the doctrines of proprietary estoppel and constructive trusts, the differences between the two are nevertheless highly substantial. Similarly, the notion of detriment serves a different purpose under each concept - in cases involving constructive trusts, detriment gives the claimant a proprietary interest which is enforceable against third parties, whereas detriment in proprietary estoppel cases is simply a factor which the courts take into account when deciding whether it would be unconscionable for the owner to resile from his assurance or encouragement and if so, the appropriate remedy to be granted. Naturally, then, the range of remedies available under proprietary estoppel is also undeniably larger than those available under constructive trusts.

In effect, Hayton was not entirely wrong in describing at least some of the elements of both as possessing only an 'illusory' distinction. At the time when he wrote the article, the case law had started to develop more favourably in terms of accepting non-financial detriment on the part of the claimant as a sufficient element in establishing constructive trusts. Since then, the development of the case law has been unclear, and appears to <https://assignbuster.com/common-intention-constructive-trusts-and-proprietary-estoppel-essay-sample/>

vary strongly from judge to judge. Whether proprietary estoppel and constructive trusts come to be virtually indistinguishable in the future remains to be seen.