

---

## ACTIVITY 149

---

### **Constructive trusts versus proprietary estoppel: is there a difference?** (allow 1 hour 25 minutes)

This activity is divided into two parts. Part 1 asks you to consider the first article in the series and Part 2 looks at the two later articles.

#### PART 1

Please find and read the article by Hayton, 'Equitable Rights of Cohabitees' [1990] Conv 370. You can find this article on Westlaw. Using Journals search, type 'Hayton' in the 'Author' box and 'constructive trusts' in the 'Free Text' box. Please then answer the following questions. Read the comment on each question before answering the next.



#### **1 What arguments does Hayton put forward in his article about the distinction between constructive trusts and proprietary estoppel?**

##### COMMENT

The conventional view of the constructive trust is that there must be an agreement or understanding between the parties that if the non-legal owners act in a certain way they will acquire an equitable interest in the land. If the non-legal owners then act as expected, they acquire the agreed or expected share in the land. The non-legal owners acquire an equitable interest in the land from the date of their conduct that is capable of binding third parties before the date of court order imposing the constructive trust.

With proprietary estoppel, there must be unilateral conduct by the legal owners that leads the non-legal owners to expect that they will acquire an equitable interest in the home. Because of this expectation, the non-legal owners act in a certain way to their detriment and it then becomes unconscionable for the legal owners to insist that they are the sole owners of the home. The court does the minimum to prevent the legal owners' conduct from affecting the non-legal owners detrimentally. The nature of the non-legal owners' rights under proprietary estoppel does not become known until the date of the court order.

Hayton argues that the distinction between constructive trusts and proprietary estoppel is illusory. 'One judge's finding of an inferred common intention and a tacit *quid pro quo* may easily be stigmatised by another judge as a fictional fantasy, there being merely a unilateral intention and no *quid pro quo*.' The dividing line between the two may vary with different judges and with how well the non-legal owners' lawyers make out their case. Hayton argues for a move away from labelling situations as involving constructive trusts and estoppel and towards looking at 'the basic principle of unconscionability underlying both concepts'. He quotes from a number of cases where the judiciary have made statements in support of his view that the approach of the courts is to look for unconscionable behaviour on the part of the legal owner rather than setting out the detailed elements of constructive trusts or proprietary estoppel. He points out that the High Court of Australia has accepted this principle of exercising its discretion to prevent unconscionable behaviour. This would involve retrospectively remedying the unconscionable conduct of the legal owner.

## 2 How does Hayton suggest that the principle of unconscionability should affect third parties such as lenders?

### COMMENT

With agreement constructive trusts, the non-legal owners' equitable interest comes into existence when the non-legal owners act to their detriment and before the date of the court order imposing the constructive trust. This causes problems if the legal owners create third-party rights over the land. For example, if the legal owners mortgage the land to a lender, that lender may be bound by the interest of the non-legal owners under the constructive trust. With proprietary estoppel and with common intention constructive trusts, Hayton argues that the issue is less clear cut. The court has to decide issues such as whether or not there have been detrimental acts sufficient for the court to exercise its discretion in favour of the non-legal owners.

Hayton suggests that a finding of unconscionable behaviour by the legal owners should not affect third parties such as lenders. They should only be bound by the claims of the non-legal owners in two situations. The first is where the lender expressly agrees to be bound by the non-legal owners' rights. The second situation is where the lender assures the non-legal owners that they will be bound by the rights of the non-legal owners.