GUILDHALL CHAMBERS

Property News

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Team News

We are delighted to announce that **Henry Stevens** and **Daisy Brown** have joined the Property Team. Both Henry and Daisy completed pupillage with us, and both now practise across the Property and Commercial teams. They are available, at reasonable rates, for a wide range of property law matters, advisory and court-based, at the junior end of our team. As always, please contact our clerk Charlie Ellis for details of rates and availability.

Following our hugely enjoyable wine tasting evening at the Goldney Orangery in Clifton last March, we have planned a busy programme of social events for our valued solicitor clients. Watch your pigeonhole and email inbox for details and invitations!

Welcome to another edition of our Property Team Newsletter. In this edition, our attention turns again to the continuing complexities and interest of 'adverse' possession, including the fall out from *Pye v UK* in the European Court of Human Rights; a successful squatter who had believed and asserted that she was a tenant; the foreshore of the Severn Estuary; and a nasty surprise for mortgage lenders.

Tim Walsh considers the development of common intention constructive trusts in the year since *Stack v Dowden* (the subject of our last newsletter) was decided. Is this now effectively a jurisdiction for discretionary provision to long-term cohabitees, and is there really such a thing as a common intention inferred from conduct?

The Law Commission has also produced a long-awaited report on easements, so some legislative action to simplify that area (and reduce Gale to half its present length) may be on the cards.

In the meantime, as always, we are only too pleased to answer and advise on all your property law queries and puzzles, with a rapidly expanding team of specialist practitioners.

Have a good summer!

Ewan Paton
Editor

Special feature

"Adverse" possession – the continuing saga...

In recent years, many thought that extinguishment of title by the possession we used to call 'adverse' (until the House of Lords disapproved of that epithet in *Pye v Graham*) was dead or dying out. The Land Registration Act 2002 had stopped it, subject to rare and unusual exceptions, in relation to registered land where 12 years' possession had not accrued before 13/10/03. Then Nicholas Strauss QC, in *Beaulane Properties v Palmer* [2006] Ch. 69, delivered a further blow to registered land claims accruing between 2/10/00 and 13/10/03. As discussed in previous newsletters, he held the pre-LRA 2002 law on limitation and possession of registered land to amount to a "deprivation of possessions" contrary to Art. 1 1st Protocol of the ECHR, then controversially reinterpreted s75 LRA 1925 so as to prevent barring of title save by possession 'inconsistent with the true owner's intentions and future use of the property' in accordance with the somewhat antique case law of *Leigh v Jack* and others. The first Chamber of the ECHR, in *Pye v UK* (decision 15/11/05), then essentially agreed with Strauss QC, finding that English law pre-LRA 2002 was a violation of Art. 1 1st Protocol, as a deprivation of possessions not justified by a legitimate and proportionate policy.

At that point, many thought that this heralded not just a flood of compensation claims against the Government for having allowed such a human rights-violating state of the law to exist until 2003, but that it might be of general application to registered *and* unregistered land. The argument that unregistered title was in an historical sense based upon possession, so that its loss by the possession of a squatter was acceptable, looked somewhat creaky in the light of the broad statements of principle from Strasbourg. There is not a huge practical difference between having a registered land certificate (on the one hand) and a packet of clear deeds (on the other).

Now things look a little different.

Pye v UK on appeal

On 30/8/07, the Grand Chamber of the ECHR reversed (by a 10:7 majority) the decision of the lower Chamber. They held that whilst Article 1 of the 1st Protocol was at least engaged by laws on limitation and possession of land, such laws did not amount to a "deprivation of possessions" within the Article. They were rather an aspect of the "control of use" of land, regulating title and rights between private individuals. In such matters, contracting states had a wide margin of appreciation as to how the balance between those individuals' rights was struck, and how a policy was pursued. Limitation periods pursued a legitimate aim in the general interest, and were common to most contracting states. The state of English law had (or should have) been apparent to the Pye companies for a long time, and very little action on their part would have stopped time running. It had not been deprived of access to the courts. Further, the value of the land in this particular case was not a reason to hold that the general law violated Article 1: limitation periods legitimately applied to everyone, and to all cases, regardless of value.

The Land Registry response

The Land Registry reacted to the decision of the Grand Chamber by issuing a supplementary Practice Guide ("Additional Practice Affecting Practice Guide 5"), stating that the decision did not have immediate direct effect on domestic English law (which was technically correct), so that for the time being applications for possessory title in which 12 years accrued during the period 2/10/00 to 13/10/03 would have to satisfy the principles set out in *Beaulane* (as to inconsistency with the true owner's intentions etc.) as representing the current position in domestic law.

They could have added that it was extremely likely, in the light of the ECHR decision, that *Beaulane* would either be successfully appealed out of time, or held to have been wrongly decided by the next domestic court seised of the issue; so that objectors who relied upon it might be engaged in an ultimately futile struggle. They did not do so.

Ofulue v Bossert [2008] EWCA Civ. 7 (29/1/08)

i Following *Pye v UK*

The Court of Appeal, when next dealing with possession and the Grand Chamber decision in *Pye v UK*, had no hesitation in following it, but held back from delivering the coup-de-grace to *Beaulane*. That reluctance was on the ground that an application for permission to appeal out of time in that case was then pending. As will be seen below, with hindsight this reluctance has proved unfortunate.

Ofulue is nevertheless an important decision, on unusual facts, on a number of key points in this area. B and her father had gone into possession of O's registered title property in 1981, having been let in by former tenant while O was in Nigeria. O returned from Nigeria twice, in 1983 and 1987, and on both occasions asked the Bs to leave. He issued possession proceedings in 1989. The Bs defended and counterclaimed (in 1990), arguing that they were either tenants of the property or entitled to an equitable interest on the back of substantial works of improvement and repair in reliance on an assurance of a tenancy. They did not then deny that O was the legal owner, but did therefore dispute his right to possession. In 1992 the Bs offered, in a "without prejudice" letter, to purchase the property. After that, B's father died, and the proceedings went to sleep until they were automatically stayed in 2000 under CPR Part 51. A subsequent application to lift the stay was refused. In 2003, after service of a notice to quit on B, fresh possession proceedings were commenced. B defended and counterclaimed on the basis of adverse possession.

The Court of Appeal upheld the trial judge's decision that B had successfully barred O's title. Having heard submissions on the effect of the Grand Chamber decision in *Pye*, they

held that they were bound under s2 HRA 1998, save in an exceptional case, to follow the decision of the Strasbourg court, and did so in this case. In particular, they held that since the Court had found the particular legal provisions and policy here to be within the 'margin of appreciation' afforded to contracting states, it was not for the Court of Appeal to re-weigh those matters and re-examine questions of legitimate aim and proportionality in an individual case, just because the facts of that case were different.

They therefore held that the duty to interpret legislation compatibly with Convention rights under s3 HRA 1998 was not engaged in this case, since the Strasbourg court had effectively determined that the pre-LRA 2002 law was Convention-compliant.

As stated, they stopped short of considering whether *Beaulane* was wrongly decided (as was the submission for B), although since Strauss QC had in that case utilised the s3 duty so as to re-interpret the LRA 1925 on the basis that the law was not convention-compliant, it is hard to see how they could possibly have upheld it.

ii Intention to possess and acknowledgement of title

The additional points of interest were the decisions that:

i whilst a statement in a pleading (now 'statement of case') was capable of amounting to an acknowledgment of title for the purposes of s29 Limitation Act 1980, the 1990 Defence and Counterclaim here (claiming a tenancy and/or an equitable interest) would not have been a sufficient acknowledgment of title. First, whilst it acknowledged O's freehold title, it disputed his immediate right to possession. It was that specific right which was the relevant "title" in this case for the purposes of s29. Secondly, obiter, it was held that although the pleading remained unamended until the proceedings were stayed in 2000, it was only a representation or acknowledgment of facts stated at the date it was made.

Such an interpretation is not free from controversy. The "title" B later sought to bar by adverse possession, in these proceedings, *was* O's freehold title. In 1990, the contest may have been over the right to immediate possession, but the relevance of the 1990 pleading was that it acknowledged then the freehold title which B now sought to bar.

ii the Bs still had the requisite "intention to possess" the property even though their open case, and belief, for most of the relevant period was that they were *tenants*. O had not accepted that they were tenants, and had therefore sought possession, which they resisted. Their intention was therefore to possess so far as was possible. It was no answer, as was said in *Pye* and other cases, that they would have been willing to pay rent if asked.

That, with respect to the Court, is not quite the same point. There is a significant difference between a squatter in outright possession, with a relative fee simple, who would be willing to accept the status of tenant *were it offered*; and someone who possesses believing that they *already are* a tenant holding under a landlord whose paramount title (by definition) they *accept*.

There was no discussion, in this case, of the occasionally-mentioned principle of the intent to possess having to be manifested "unequivocally" (see *Powell v McFarlane* (1977) 38 P&CR 452, 472: made "perfectly plain to the world at large"; and *Lambeth LBC v Blackburn* (2001) 82 P&CR 494).

In a case where the person in possession openly claims to be a tenant and defends possession proceedings on that basis, the paper owner might be forgiven for thinking "well, at worst, if I lose my possession claim, I'll still have a tenant paying rent." On one view, it is somewhat unjust for the "tenant" then to reveal, thirteen years later, that she now claims to have been accruing time, in all those years, to bar the owner's title outright. However, no separate arguments on "equivocality", misrepresentation or even estoppel appear to have been pursued on appeal in this case.

iii the offer to purchase the property, made in 1992, fell squarely within the general "without prejudice" rule. It was an implicit acknowledgment of title, so would otherwise have fallen within s29; but it was clearly made in an effort to settle a then current dispute between the parties Sale of the property would have resolved the question of possession, and the price proposed took account of matters raised in the counterclaim such as the cost of repairs. The general public policy of the rule therefore applied, and was not displaced by any human rights considerations in favour of O.

That decision must be right, as a matter of principle, although legal advisers would still be well advised to couch even "without prejudice" offers to purchase in disputes of this type in terms such as e.g. "without prejudice to our client's principal contention that your title is limitation-barred, and without therefore acknowledging that title in any way, our client is nevertheless prepared as a pragmatic matter to pay you the sum of £x in return for a confirmatory transfer of title... etc."

The decision in *Markfield Investments v Evans* [2001] 1 WLR 1321 meant that time had not effectively been stopped by the earlier, but ultimately abortive 1989 proceedings. On the basis of the above points, B and her father had accrued 12 years of possession with intent to possess before the 2002 Act came into force, and before the 2003 proceedings were commenced. So having won on all points, B could retain what was now a property (in Bow) worth a substantial sum of money.

The Beaulane appeal hits the buffers: [2008] EWCA Civ. 272

On 21st February 2008, the Court of Appeal, following an oral hearing, refused Palmer permission to appeal the decision of Strauss QC out of time. He had filed an appellants' notice on 20th September 2007, just three weeks after the decision of the Grand Chamber. However, Strauss QC's original order of 23rd March 2005 had adjourned any application for permission to appeal for 3 months, pending the outcome in *Pye v UK* (which was then before the first Chamber), with provision to apply in writing to extend that period if the decision had not been made by then.

The Court of Appeal considered the parties' correspondence through solicitors between 2005 and 2007. No formal application to extend time for permission to appeal had ever been made, although Beaulane had by December 2005 informally agreed in correspondence to wait a further three months to see whether the government appealed the first Chamber decision in Pye. Beaulane then appeared to have assumed in early 2006 that Palmer was not appealing, and an agreement was reached as to the amount of some interim costs Palmer had been ordered by Strauss QC to pay. There was also some evidence that Beaulane embarked, in the meantime, in a transaction to dispose of a share of the land, in which costs had been incurred. It was nevertheless argued on behalf of Palmer that he, and the parties, had always assumed that the "spirit of the order" made by Strauss QC was that time for an application for permission to appeal would be in abeyance pending the final resolution of the Strasbourg litigation.

The Court, considering all the criteria in CPR 3.9 on late applications and relief from sanctions for failure to comply

with rules, refused permission despite clearly being of the view that "there would be a strong probability that the appeal would succeed". Sir Peter Gibson said:

"..But I am afraid that it happens only too frequently that decision by lower courts are not appealed and that subsequently later decisions show that the earlier decision was incorrect.The law is not perfect.... The insistence on the observation of time limits may mean that incorrect decisions are left unappealed. That is a price which has to be paid."

A final twist?: the Adjudicator

Palmer's original 2003 application for first registration of possessory title to the disputed land was stayed when the High Court proceedings were issued. In rejecting the application for permission to appeal, the Court of Appeal appeared to be of the view that because Palmer's counterclaim for title by adverse possession had been dismissed in the High Court action (with now no appeal being possible), "..the Adjudicator is likely to have to dismiss the application still pending before him."

The application was nevertheless restored, and the Adjudicator (Edward Cousins) handed down his decision on 26th June 2008. He noted the series of findings of fact there had been on possession in favour of Palmer in the High Court proceedings. He noted that any lingering doubts over the compatibility of English law with the ECHR had been resolved by the *Ofulue* case. Although the Court of Appeal had not expressly overruled *Beaulane*, he elsewhere stated that it had "effectively been overruled" (para.32).

He then resiled from that somewhat by holding that he was effectively still bound by that decision on the principle of *stare decisis*, because it had not been formally overruled, and that Palmer's counterclaim in that case stood dismissed. Noting how unusual and "unsatisfactory" this situation was, he then gave Palmer permission to appeal to the High Court, saying:

"to do otherwise than to grant permission to appeal to Mr. Palmer would be a denial of justice to him in circumstances where clear findings of fact were made in his favour and the legal principles on the human rights issues as found by the Deputy Judge have now been considered to be flawed."

Sadly, for those interested in these issues, intelligence has just reached us that Mr. Palmer will not be appealing. So we will never know whether a High Court judge would have felt able to depart from the decision of Strauss QC, or whether (as was quite possible) he would have held that such an unappealed decision amounted to a res judicata between these parties. In any event, it is now only a matter of time before another judge in another case finally lays it to rest.

A surprise for dilatory lenders

Nat West Bank v Ashe (trustee in bankruptcy of Babai) [2008] EWCA Civ. 55

How would you like not to pay your mortgage for 13 years, keep living in your house, then have the mortgage discharged?

In 1989, the Bs granted the Bank a second charge over their property to secure "all monies" due on Mr. B's accounts with them. In 1992 it made formal demand for repayment on the accounts. There were some negotiations about paying by instalments, and payment of a few small sums. The last payment made was in January 1993. After that, very little happened for the next 13 years. Mr. B was made bankrupt in 1993. But no further payments were made, by he or his trustee in bankruptcy. The Bs continued living in the property. The bank did not bring possession proceedings. It was in fact the trustee who finally brought proceedings, in September 2006, claiming that the property was now his free of mortgage, because the bank's charge and remedies were limitation-barred. He succeeded. This may cause considerable concern to banks everywhere, if facts such as these are rare but not wholly uncommon.

On orthodox principles, the mortgagee acquires the immediate right to possession under a mortgage "as soon as the ink is dry on it", in the absence of express provision varying or postponing that right: see e.g. *Four Maids Limited v Dudley Marshall* [1957] Ch. 317. By virtue of section 15, and Schedule 1 paragraph 3 of the Limitation Act 1980, a mortgagee's right of possession under a mortgage is in principle subject to the 12 year limitation period for actions for the recovery of land. Schedule 1 paragraph 3 speaks of a person with an estate or interest in land having been "assured otherwise than by will" to him, with the person who made the assurance being in possession of the land when it was made. In such cases, time is deemed to run from the date of the "assurance". The Court held that the bank's "assurance" was the charge, so that time began to run when it was executed with the Bs in possession.

Usually, this causes no difficulty, because every part payment made by the mortgagor operates as an acknowledgment of title for the purposes of section 29 Limitation Act 1980, so as to reset time running. Here, there had been no part payments for 13 years. The Bank therefore had to argue that the Bs were not "persons in whose favour the period of limitation can run", and therefore not in "adverse possession" within the meaning of Sch. 1 para. 8. This was on the basis that they occupied as mortgagors with the express or implied permission of the Bank, until the Bank asked them to vacate or brought proceedings.

The Court of Appeal disagreed. Schedule 1 paragraph 8 of the Limitation Act 1980, provides that no right of action to recover land:

" shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (..."adverse possession")"

They held that, following *Pye v Graham*, it was clear that "adverse" possession simply meant "ordinary" possession with intent to possess. The Bs' possession of the property was referable to their property interest in it:

"... This was not objected to by the Bank. It must have been tacitly accepted by the Bank in the context of the charge, but the Bank's right of action and its tolerance of their possession did not prevent them from being in ordinary possession of the property which satisfied the requirements of paragraph 8."

This, with respect, might be said to beg (or avoid) the question raised by paragraph 8. If "ordinary possession" is really all that is required, then the qualification of it being the possession of a "..person in whose favour the period of limitation can run" appears superfluous. The opinions in *Pye v Graham* saw that proviso as making exceptions for specific categories of possessor, such as tenants, licensees and the like, whose possession (as a matter of principle or policy) would simply not be treated as causing time to run. The policy issue in this case is whether mortgagors in possession *should* be put in that category; perhaps e.g. because of the commonplace nature of occupied mortgaged property, and the near universal understanding that the mortgagee's 'immediate' right of possession is something of a legal fiction. That is not answered merely by saying "they are in ordinary possession".

The Court accepted that it might come as an "unpleasant surprise" to lenders to learn that mortgagors were in "adverse" possession of mortgaged properties, but pointed out that the Law Commission, in its Land Registration Bill and Commentary report (No. 271 of 2001) which presaged the 2002 Act, had been of the same view.

Ewan Paton

The Crown can be a squatter too

Roberts v Crown Estates Commissioners [2008] EWCA Civ. 98

This decision, one of a number of cases involving Mr. Roberts following his acquisition of numerous Welsh Lordships of Manors and Lordship Marchers, confirms that there is no constitutional principle preventing the Crown from acquiring title by possession and the operation of the Limitation Act just like any of its subjects. An attempt to argue an historical principle that it could only do so where its original entry to land was lawful (and not by disseisin), which principle had survived the passing of successive Limitation Acts, was comprehensively rejected.

Mr. Roberts claimed title to the foreshore and up to the midpoint of the Severn Estuary in the Magor area by virtue of his ownership of the Lordship Marcher of Magor. The Crown also claimed title to such land as residual royal demesne, but by agreement its alternative claim – to have barred any contrary title in any event by possession and the operation of the Limitation Act – was dealt with as a preliminary issue. The Crown Estates Commissioners had, over a considerable period, exercised control of the foreshore and estuary by granting dredging licences over it, and generally managing it as they had managed other English and Welsh foreshore areas up to the '12 mile limit'. They did so in the belief that it owned this area of foreshore and estuary along with all the others, although the evidence was that its policy was to concede title if someone could prove a better title with sufficient evidence.

The Court of Appeal, upholding the decision of Lindsay J., held that it was doubtful whether there ever had been a constitutional principle that the Crown could not disseise a person of his land. No such principle was apparent, or even argued, in *Attorney General v Tomline* (No3) (1880) LR 15 Ch D 150 CA. In any event, successive Limitation Acts, culminating in section 37 of the 1980 Act, made it clear that the principles of barring title by possession applied to claims by and against the Crown. The Crown Proceedings Act 1947 had also removed the bar on a subject bringing an action against the Crown claiming that the Crown had committed a wrong. The acts of the Commissioners here amounted to sufficient control and ordinary possession of the land in question, appropriate to its nature. Further, its intention was a sufficient intention to possess the land to the exclusion of others as far as possible. Belief in ownership of land will generally provide the sufficient intention, and (as has been established in other authorities) a mere willingness to cede title should someone emerge with a good claim supported by evidence does not negate the fairly basic intention required for these purposes.

Ewan Paton

Law reform news: Easements and Covenants

The Law Commission has, at last, published its consultation paper on the reform of easements, profits and covenants, Consultation Paper no. 186, (published 28/3/08).

This has been a major project, on an important part of property law. Its wide implications are amply demonstrated in the Land Registry figures which say that 65% of freehold titles are subject to easements and 79% to restrictive covenants.

The Law Commission's stated aim – as is usual – is to modernise and simplify the law, and to remove anomalies. In line with this, the whole area is subjected to expert scrutiny and numerous technical problems are discussed. The main innovations suggested are:

a the streamlining of prescription of easements;

b a new 'land obligation' regime to take the place of the law of covenants, and including positive covenants;

c the modernisation of current covenant discharge rules and their application to easements and profits.

None of this is a huge surprise, and nobody would disagree with much of it. For example, they propose some streamlining of the methods of prescription, (4.171 ff.), a standard target for academics and critics. Likewise, some of the historical problems with the law of covenants are well-rehearsed. Amusingly, and of interest to those with clients developing blocks of flats, they note that as of 20th Feb 2008, only 14 commonholds have been registered in the whole of England and Wales (11.4); confirming practitioners' suspicions that these 2002 provisions were something of an elegant legislative white elephant.

In line with previous work, there is a desire to get as much as possible on the register, and to minimise 'off-register' creation and termination of rights. There are also some sensible tidying-up suggestions, e.g. for consistency of interpretation in easements, whether reserved or granted, express or implied (4.21, 4.22), and for 'short form' easements and land obligations.(4.25, 12.25). The confusion about leasehold easements after *Wall v Collins* [2007] EWCA Civ 444 is dealt with sensibly (5.86), as are some of the fiendish 'part or every part' issues of attachment of benefit and burden of covenants/land obligations, in part 10.

Some of the issues are very difficult, showing the extra dimension with which property lawyers have to work – that of time. Changing anything is difficult, and risks making everything complicated, because either existing rights have to be altered (running into Human Rights problems) or else two or more regimes have to operate, depending on when a right was created – see, e.g. Part 13's discussion of the options for phasing out or retaining existing restrictive covenants if land obligations should come in. And that is leaving out the added layers of unregistered land and pre-1926 covenants.

The net effect of the proposals, for easements, seems likely to be that there will be fewer of them. For example, the paper canvasses opinion on getting rid of negative easements (15.40), wants to make it easier to prove an easement has been abandoned (5.23 – 31), (4.104) to stop Law of Property Act 1925 s.62 changing precarious licences into easements, and, generally, to simplify and reduce the methods of obtaining an easement by implication (4.106, 4.142 – 5).

While presented neutrally, one discerns in the report some signs of a pro-building, pro 'progress' instinct. The formulation adopted for excessive use of easements is based on 'commercial common sense', requiring a substantial extra burden from a change of land use before the objection will work (5.48. 5.51). It is also arguable that the formulation of the 'no ouster' criterion for allowable easements is deliberately designed to promote car-parking as an easement (3.42-55), a matter on which the current law is not wholly clear, but which is one of the most frequent causes of disputes.

Ewan Paton ***with thanks to Dr. GC Seabourne, University of Bristol***

Special feature

Beneficial Interests in Cohabited Property – An update

In April of last year the House of Lords' decision in *Stack v Dowden* ([2007] 2 A.C. 432) excited such interest that we produced a special newsletter devoted exclusively to its potential ramifications. In fact the central issue in that case was quite a narrow one. Namely, where will the beneficial interest in a property lie where there is joint legal ownership but no express declaration of trust? Baroness Hale, delivering the leading opinion, concluded that there was so strong a presumption that joint legal owners intend that their beneficial interest shall be the same as their legal interest that cases in which the court reaches a different conclusion "will be very unusual". She then promptly concluded that that was just such an unusual case. Other observations in their Lordships' opinions did, however, extend the significance of *Stack* well beyond the narrow issue for determination. This article does not revisit those opinions in any detail but is intended to provide a brief overview of subsequent decisions in cohabitation cases.

The presumption in sole ownership cases

Stack was not concerned with cases of sole legal ownership although obiter comments by Lord Hope indicated that it should be given wider application. Insofar as it needed saying, in *Tackaberry v Hollis* ([2007] EWHC 2633 (Ch)) Evans-Lombe J. has since held that where land is acquired in the sole name of an acquiring party, the burden of proof rests on a non-acquiring party to show that there was some agreement between the parties (whether express or inferred), that the beneficial ownership of the property was to be shared between them. On the facts of that case (a claim by siblings against the estate of their deceased brother), that burden was not surmounted.

The Rosset issue

Those familiar with this area will recall the "critical distinction" that was made in *Lloyds Bank v Rosset* ([1991] 1 AC 107) between cases in which there was a finding of an actual agreement, arrangement or understanding between the parties (based on evidence of express discussions) and those cases in which such an express bargain was absent.

In the much cited seminal (but strictly obiter) passage from Lord Bridge's opinion in that case the law was summarised in the following terms:

"In sharp contrast with this situation [i.e. express agreement constructive trusts] is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an agreement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. ***In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."***

The inequity caused by that somewhat arbitrary refusal to take account of indirect contributions to the family economy in cases of so-called implied bargain constructive trusts is obvious. In *Stack* Lord Walker observed that:

"Lord Bridge's extreme doubt "whether anything less will do" was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in Gissing (see especially Lord Reid [1971] AC 886 at 896G - 897B and Lord Diplock at 909 D-H)...Whether or not Lord Bridge's observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction, while bearing in mind that the Law Commission may soon come forward with proposals which, if enacted by Parliament, may recast the law in this area."

Baroness Hale also observed that there was an argument that the hurdle had been set "rather too high".

Baroness Hale has since returned to these passages in the Privy Council case of *Abbott v Abbott* ([2007] UKPC 53). The facts of that case mean that observations on the need (or otherwise) for direct financial contributions were again obiter. Significantly, however, having cited Lord Walker's observations, she reiterated that the search is to ascertain the parties' shared intentions with respect to the property "in the light of their whole course of conduct in relation to it". Read in context, those observations appear to clearly anticipate that a common intention constructive trust can be inferred from something less than direct contributions to the initial purchase price or mortgage instalments.

In November, the Court of Appeal in *James v Thomas* ([2007] EWCA Civ 1212) had to consider these authorities in the context of a claim brought by Miss James in relation to a property first acquired by Mr. Thomas some three years before the commencement of their relationship. A constructive trust claim was advanced on the basis that such a trust could be inferred from the conduct of the parties (it was not alleged that there had been any express agreement or understanding that the property in question would be shared). In dismissing Miss James' appeal, Sir John Chadwick made two significant observations. First, if the circumstances so demand, a constructive trust can arise some years after the property has been acquired by one party who (at the time of acquisition) was, beyond dispute, the sole beneficial owner. Secondly:

"....in the absence of an express post-acquisition agreement, a court will be slow in infer from conduct alone that parties intended to vary existing beneficial interests established at the time of the acquisition."

He went on to criticise the trial judge's observation that Miss James could not rely on indirect contributions to the mortgage from the fruits of her labour in the couple's business since *"...as a matter of law, a common intention that Miss James should be entitled to a beneficial share in the property might be inferred from evidence of the parties' conduct during the whole course of their dealings in relation to the property."* Significantly, however, her "Herculean labours" working without remuneration, digging trenches and driving dumper trucks were not apt to give rise to an inference that the parties had agreed that she was to have a share in the property because those labours were explicable on other grounds.

More recently the Court of Appeal in *Morris v Morris* ([2008] EWCA Civ 257) was faced with a first instance decision in which the trial judge had considered the above passage from *Lloyds Bank v Rosset* whilst observing that both *Pettit v Pettit* [1970] AC 77 and *Gissing v Gissing* [1971] AC 886 contemplated the possibility that conduct other than a direct contribution towards the purchase

price might, depending on the circumstances, sufficiently raise the inference of an agreement between the parties. May L.J. endorsed the observations noted above from *James v Thomas* and added (at para. 36):

"…for the purpose of constructive trust – at least since Stack v Dowden*…- in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition."*

Sir Peter Gibson arguably went still further when he observed (at paragraph 23) that the authorities make clear that a common intention constructive trust based only on conduct *"will only be found in exceptional circumstances".*

Subsequent to the Court of Appeal decision in *Morris* came the decision in *Fowler v Barron* ([2008] EWCA Civ 377). That case involved an almost textbook application of the principles in *Stack*. The property had been acquired in joint names with a mortgage in joint names, although Mr. Barron's evidence was that this was to facilitate survivorship should he predecease Miss Fowler. Mr. Barron had paid the deposit, the mortgage instalments and the direct fixed costs of the property such as utility bills. At first instance, the judge held that the property was beneficially owned by Mr. Barron alone by reason of resulting trust. Allowing the appeal, Arden L.J. held that the judge below had failed to consider the whole course of the parties' conduct and had erred in principle by concentrating only on financial contributions. Mr. Barron's private, uncommunicated, motive for putting the property in joint names was irrelevant. The presumption of joint beneficial ownership was a strong one which was not rebutted even where there was no contribution to the acquisition costs by Miss Fowler.

In the context of *Rosset*, whilst the Court of Appeal in *Fowler* were not concerned with indirect contributions by a non-legal owner, in finding for Miss Fowler, Arden L.J. (at para. 41) nonetheless made telling observations about the practicalities of the family economy. In short, it could be inferred that the parties intended that it should make no difference to their interests in the property which party paid for what expense.

On the state of the present authorities, therefore, the position is arguably as follows. Absent an express agreement, direct contributions to the acquisition cost of the property will readily justify the inference of a common intention constructive trust (i.e. in favour of the non-legal owner). Absent either an express agreement or a direct contribution to the purchase price, the whole course of the parties' conduct in relation to the property may yet justify the inference of a constructive trust. In *Morris v Morris* counsel were unable to identify a single case in which a variation of the beneficial interests had been held to have occurred based on conduct alone. The most obvious case in which such an inference is possible, however, is where contributions by one partner effectively free up the resources of the other in order to facilitate payment of the mortgage or where, as in *Fowler v Barron*, the decision about who pays for what in meeting family outgoings is arbitrary and makes no real difference to the parties.

Quantification of the beneficial interest

In *Stack* Baroness Hale rejected the approach to quantifying beneficial interests (in the absence of express agreement) previously advocated by Chadwick L.J. in *Oxley v Hiscock* ([2004] 3 WLR 75). Instead, the task was formulated as requiring a two stage approach. First, the court must survey the whole course of dealing between the parties and, secondly, it must take account of all conduct which throws light on the question of what shares were intended. In *Holman v Howes* ([2007] EWCA Civ 877) the appellant sought to rely upon five matters which post-dated acquisition and did not appear to be indicative of any agreement between the parties, "past or later". These included not pursuing maintenance payments and assuming the obligations of ownership over the property. *Holman v Howes* is important because the Court of Appeal stressed that although a broad survey of the parties' conduct must be undertaken, the primary task is to identify conduct shedding light on what shares were intended. Not all matters are relevant to the second limb of the enquiry and, on the facts, the matters sought to be relied upon were rejected as irrelevant. Indeed, *"to take them into account would be to go back to the impermissible question of what the court considers fair."*

Investment properties

With the downturn in the property market, it is likely that a great many more disputes will arise in relation to buy-to-let properties. Frequently, such properties are purchased by those in a familial relationship but *Stack* did not address the limits of the presumption that equity followed the law. In *Adekunle v Ritchie* (21 August 2007 unreported) HHJ Behrens concluded that that presumption should apply to a case where a house was purchased by a mother and a son in joint names as a home for both of them. Lord Neuberger, sitting in the Court of Appeal in *Laskar v Laskar* ([2008] EWCA Civ 347) has since approved that decision. In *Laskar* itself, however, a mother and daughter purchased the property in joint names but the primary purpose of that purchase was as an investment, not as a home. In the circumstances, the purchase was best viewed in a commercial context leading to the conclusion that *"…it would not be right to apply the reasoning in Stack v Dowden to such a case as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one."*

The correct approach in such cases is to fall back on a resulting trust analysis. Namely, that in the absence of any relevant discussion between the parties, their respective beneficial shares should reflect the size of their contributions to the purchase price, subject to any subsequent actions or discussions having the effect of varying those shares.

Equitable accounting

Historically, equity developed the doctrine of equitable accounting to facilitate the striking of a balance between co-owners when their relationship had broken down. The thrust of the equitable guidelines was that, where it was just to do so, co-owners could be given credit for monies paid and expenditure incurred on jointly owned property and a co-owner in sole occupation could be charged with or required to give credit to his co-owner for an occupation rent. There was, however, some conflicting authority of whether an occupation rent was payable in the absence of at least constructive ouster from the jointly owned property. In *Stack* the House of Lords was unanimously of the view that the court's power to order payment to a co-owner of an occupation rent was no longer governed by the doctrine of equitable accounting but was instead governed by sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996. It was stated, however, that it would be a rare case in which the new principles would produce a different result. The Court of Appeal have since applied *Stack* in *Murphy v Gooch* ([2007] EWCA Civ) and in so doing, categorically stated that ouster was irrelevant. The Court of Appeal then added:

"[14] Under the previous equitable doctrine the court was concerned only with considerations relevant to achieving a just result between the parties. The statutory innovation is section 15, which requires the court in determining applications for an order under section 14 to include [the matters listed in the statute]…The wider ambit of relevant considerations means the task of the court must now be, not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and in particular (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified."

It is worth noting, however, that Lord Neuberger has since indicated extra-judicially that the House of Lords may have gone too far in their observations that equitable accounting had been replaced by the statutory regime in TLATA. First, TLATA should properly be viewed as a gloss on the equitable doctrine rather than a replacement. Secondly, TLATA appears to apply only to future payments whereas equitable accounting covers the past as well as future payments.

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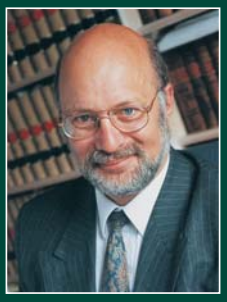

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