LIFE AFTER *KERNOTT V JONES*

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Claims under the Trusts of Land and Appointment of Trustees Act 1996 generally

1. Claims under the Trusts of Land and Appointment of Trustees Act 1996 ("TLATA") are invariably claims under section 14 of that Act for an order declaring the nature and extent of a person's interest in property subject to a trust of land (under section 14(2)(b)) and/or for an order for sale of the property (under section 14(2)(a)). To have locus to bring a claim a party must, of course, establish that they are either a trustee of land or have an interest in the property subject to a trust of land.

2. Disputes in TLATA claims usually fall into one or more of the following classes:

   (i) Claims against the legal owner of property by a Claimant not named in the title documents at all. Most often these are claims by ex-girlfriends who buy a property in the Spring of their relationship or who move in with a boyfriend and naively assume that cohabitation alone confers some legal status or benefit obviating the need to be on the title.

   (ii) Disputes as to the quantum of beneficial ownership between (including between joint legal owners) where there is no declaration of trust.

   (iii) Claims that a declaration of trust that appears to regulate ownership should be disregarded.

   (iv) Disputes between former cohabitees (usually where they have children) as to whether a property should be sold at the breakdown of their relationship.

   (v) Accounts: i.e. disputes about whether one or other party is entitled to recompense for extraordinary contributions made before or after the breakdown of a relationship.

The relevance of legal ownership and declarations of trust

3. The leading cases are presently the decisions of the House of Lords in *Stack v Dowden* [2007] 2 A.C. 432 and that of the Supreme Court in *Jones v Kernott* [2011] UKSC 53. Both cases were concerned with properties where there was joint legal ownership but no express declaration of trust in relation to the beneficial ownership. Regard, should, however, also be had to *Malayan Credit Ltd v Jack Chia-PPH Ltd* [1986] 1 AC 549.

The burden of proof

4. First, the burden of proof in the domestic context rests with the party who is not the legal owner:

   "…the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other that a joint beneficial interest" (*Stack* at para. 56).

5. The observations in relation to sole legal ownership cases were strictly obiter but were followed in *Tackaberry v Hollis* ([2007] EWHC 2633 (Ch)) where Evans-Lombe J 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.

6. More recently, in *Jones v Kernott* the court repeated that in joint names cases *"The starting point is that equity follows the law"* albeit that the presumption can obviously be displaced. The point was, however, made that sole ownership cases are different precisely because the other party has to surmount the hurdle of proving an intention that she was to have any interest at all (see para. 51 – 52). *Jones v Kernott* is considered in more detail below.

Equity follows the law in the domestic consumer context

7. One of the major issues for determination in *Stack* was whether there should be a presumption that equity follow the law. Since the legislation of 1925 the only way in which property can be held at law (rather than in equity) is as joint tenants (it cannot be held as legal tenants in common). Nonetheless, the Lords held that *"at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved."* (para. 58). The difficulty of deducing what the parties interests are following *Jones v Kernott* is considered in detail below.

Investment properties and alternative presumptions

8. Cohabitation cases are a class apart from many other relationships. 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."*

9. 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.

10. Although it was not cited in *Laskar v Laskar* the foregoing is in step with the House of Lords' earlier decision in *Malayan Credit Ltd v Jack Chia-PPH Ltd* [1986] 1 AC 549. That case is authority that equity will presume there to have been a tenancy in common in at least the following circumstances:

    (1) where the co-owners provided the purchase money in unequal shares (although clearly that presumption favouring tenancy in common cannot apply to domestic purchases for a home following *Stack v Dowden*);

    (2) where the grant consists of a security for a loan and the grantees were contributors to the loan;

    (3) where the co-owners are partners and the subject-matter of the grant/purchase is partnership property; and

    (4) where joint purchasers hold land for their individual purposes.

Declarations of trust

11. In *Pettitt v Pettitt* ([1970] AC 777) Lord Upjohn stated that an express declaration of trust *"necessarily concludes the question of title…for all time"*. The declaration provides virtually irrebutable evidence as to the nature and extent of the beneficial interests subsisting under a trust of land. As Baroness Hale stated in *Stack "No-one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel"* (para. 49).

12. An express declaration may take a variety of forms (although the argument that a declaration that the survivor "can give a valid receipt for capital money arising on a disposition of the land" in itself amounts to an express declaration of beneficial joint tenancy was rejected in *Stack*). A declaration of trust can, of course, provide that the parties hold the land on trust for themselves (or others) as tenants in common in defined shares with the result that the property passes to a deceased co-owner's personal representative on his death rather than accruing to the co-owner by survivorship. In those circumstances the surviving co-owner holds the property on trust for himself and the personal representatives.

13. If the legal estate is transferred into joint names subject to an express trust for themselves as beneficial joint tenants the equitable rights of the joint proprietors are generally fixed definitively as those of beneficial joint tenants. Either could unilaterally sever the joint tenancy and, upon doing so, both parties become beneficial tenants in common in equal shares irrespective of their original contributions to the purchase price. The suggestion by Lord Denning (in *Bedson v Bedson* [1965] 2 QB 666) that severance might not automatically lead to a tenancy in common in equal shares was rejected by the Court of Appeal in *Goodman v Gallant* ([1986] Fam 106) and by the Lords in *Stack*.

14. The use of express declarations of trust will doubtless intensify in consequence of modern Land Registry practice. In the event of any transfer of land to joint proprietors, the statutorily prescribed Land Registry forms now facilitate the making of a declaration of trust by the transferees, thereby specifying the nature or quantum of the beneficial entitlements. All new joint proprietors are therefore encouraged to execute a written declaration of trust which settles equitable rights. The transfer will, however, be valid whether or not that part of the (TR1) form is completed (see *Stack* at para. 52). Changed Land Registry practice will not therefore remove these disputes even in joint ownership cases.

15. Exceptionally it may be possible to go behind an express declaration of trust, for example:

    (i) Where there has been "fraud or mistake" at the time of the transaction (*Pettitt v Pettitt* [1970] AC 777 at 813E). There may then be rescission of the declaration but this is difficult to establish. Mistake is not constituted merely because a lay person failed to understand the precise technical significance of the declaration of trust (see *Stack* at para. 67).

    (ii) Rectification may be granted to give effect to the clear intentions of the parties at the date of the transaction where these have been expressed only imperfectly or not at all in the declared trust.

    (iii) When proprietary estoppel is established (per Baroness Hale in *Stack* at para. 49).

    (iv) Controversially, it has recently been suggested that a constructive trust might arise "*as a result of matters which took place after an express declaration of trust"* (per Warren J. in *Clarke v Meadus* [2010] EWHC 3117 (Ch) at para. 42). NB: Contrast the House of Lords' apparently contrary observations in *Pettitt v Pettitt* at p. 813.

    (v) An equitable owner may subsequently dispose of their interest by signed writing in accordance with section 53(1)(c) of the Law of Property Act 1925.

16. Where there is an express declaration of joint tenancy it is, of course, possible for this to be converted into a tenancy in common by severance. Namely, (i) by statutory notice in writing;

(ii) by an act operating on a joint tenant's share; (iii) by mutual agreement; (iv) by mutual conduct; (v) by court order; (vi) by homicide; or (vii) by merger.

Establishing an interest

17. Where property is purchased in the sole name of one of the cohabitants and there is no express declaration of trust a Claimant must necessarily adduce convincing evidence to establish that they have some beneficial interest in the property. Such claims are generally framed in constructive trust.

Establishing a constructive trust

The core elements

18. In order to establish that property is held on trust, the key elements of a constructive trust must be established. These are broadly threefold:

    - common intention (or bargain);
    - detrimental reliance;
    - unconscionable denial of rights.

The irrelevance of timing

19. A constructive trust can be founded on a bargain or common intention formed after the legal owner's acquisition of title. In *Austin v Keele* ((1987) 10 NSWLR 283) the Privy Council indicated that there is no reason in principle why the doctrine should be limited to an intention formed at the time of the first acquisition of the property. In *Lloyds Bank Plc v Rosset* ([1991] 1 AC 107) it was suggested that only "exceptionally" could a constructive trust be founded upon an express agreement reached at some date later than that of acquisition although that restrictive note is not generally echoed in the case law. Most recently, in *James v Thomas* ([2007] EWCA Civ 1212) Sir John Chadwick stated that 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.

Two types of constructive trust

20. The primary or threshold question is whether the party claiming an interest can establish that that there was a common intention that she (it is usually the female partner who is omitted from the legal title) should have a beneficial interest in the property (per *Oxley v Hiscock* ([2004] 3 WLR 715). That common intention may be express. Alternatively, it is open to the court to infer the existence of a common intention for some kind of shared beneficial ownership if such intention is plainly evidenced by the conduct of the parties.

Express bargain constructive trusts

21. In order to establish an express bargain constructive trust, a claimant must adduce clear evidence that she and the legal owner "*orally declared themselves in such a way as to make plain their common intention that [the claimant] should have a beneficial interest in the property*" (per Nourse LJ in *Stokes v Anderson* [1991] 1 FLR 391 at 398A). She would need to establish that there was "*some agreement, arrangement or understanding reached between them that the property was to be shared beneficially*" (*Lloyds Bank v Rosset* [1991] AC 107 at 132E) albeit that it is not necessary that there should have been express agreement as to the size of the share (*Oxley v Hiscock* [2004] 3 WLR 715).

22. If an express common intention can be established, the range of material "changes of position" or detriment that the court can consider is extremely broad. As was stated in *Rosset* at p.132, if there is a finding on an express agreement *"it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he she has acted to his or her detriment or significantly altered his or her position*

in reliance on the agreement in order to give rise to a constructive trust…". It is likely, as suggested by Browne-Wilkinson V-C in *Grant v Edwards* ([1986] Ch 638 at 657), that *"any acts done by [the claimant] to her detriment relating to the joint lives of the parties…is sufficient…The acts do not have to be inherently referable to the house"*.

Implied bargain constructive trusts

23. Even where there has been no express common intention or agreement that the Claimant should have an interest in the property, the court may yet imply such a bargain.

24. To understand the state of the present law it is necessary to consider three House of Lords' decisions. Namely, *Gissing v Gissing* ([1971] AC 886), *Lloyds Bank v Rosset* ([1991] 1 AC 107) and *Stack v Dowden*. In the much cited seminal passage from Lord Bridge's judgment in *Rosset* 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." [emphasis added].

25. That passage was obiter and not consistent with previous observations of the House of Lords in *Gissing v Gissing* ([1971] AC 886) but it nonetheless came to represent the law. 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. Hudson on Equity & Trusts illustrates the problem thus:

    "Suppose the following situation:

    A and B are a married couple. They acquire a freehold house by means of a mortgage. It is agreed that A will be the sole mortgagor and entirely responsible for the repayments. They have a child who requires special needs education. It is only possible for them, let us suppose, to obtain that special needs education by buying it privately. It is agreed that B will go to work and that she will be entirely responsible for paying for the special needs education. Let us suppose further that the cost of the education matches exactly the cost of the mortgage and also that it would have been impossible for A to pay both for the education and the mortgage.

    A strict application of the Rosset test would deny B any interest in the property on the basis that B had not contributed directly to the purchase price or the mortgage repayments…All this despite the necessity of B's contribution to familial expenses to make it possible for A to discharge all of the mortgage expenses."

26. In *Stack v Dowden* Baroness Hale conceded that there was an argument that *Rosset* set the hurdle "*rather too high*". Lord Walker stated:

    "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."

27. The question this begs, however, is when the court will imply a constructive trust in the absence of direct contributions. Following *Stack v Dowden* the whole course of the parties' conduct in relation to the property may justify the inference of a constructive trust even in the absence of direct contributions to the purchase price. What the authorities leave uncertain is when.

28. Baroness Hale returned to this topic 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 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.

29. In *James v Thomas* ([2007] EWCA Civ 1212) 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 held that:

    "….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."

30. 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.

31. In *Morris v Morris* ([2008] EWCA Civ 257) May LJ 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."

32. 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".*

33. 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 deceased partner in order to facilitate payment of the mortgage or where, as in *Fowler v Barron* ([2008] EWCA Civ 377), the decision about who pays for what in meeting family outgoings is arbitrary and makes no real difference to the parties.

Quantifying beneficial interests

34. As explained above, where there is an express declaration of trust specifying the parties' beneficial shares that is generally conclusive. Problems arise most frequently where there is a constructive trust rather than an express declaration.

35. In joint ownership cases, the presumption is one of equal beneficial ownership. As explained above, equity follows the law and there is heavy burden on the party seeking to depart from the apparent effect of joint legal ownership.

36. In *Stack v Dowden* the court was primarily concerned with the approach to quantification of beneficial interests where the legal interest was held in joint names. The Lords stressed that joint ownership is not simply part of the "whole course of dealing" in relation to the property and that *"the questions in a joint names case are not simply "what is the extent of the parties' beneficial interests?"* but *"did the parties intend their beneficial interest to be different from their legal interests?"* and *"if they did, in what way and to what extent?"*. As was observed at paragraph 66, it will almost always have been a conscious decision to put into joint names. The burden of establishing that a beneficial interest was intended to be different from the legal interests is a heavy one. In Baroness Hale's judgment trials in joint names cases are unlikely to lead to a different result unless the facts are very unusual.

37. In the principal passages of the judgment, Baroness Hale provides the following guidance:

    "69. In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. <u>At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual</u>.

    70. This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then." [emphasis added].

38. It is noteworthy that in dismissing the appeal in *Stack v Dowden* this was just such an unusual case justifying departure from the presumption of equal beneficial ownership.

39. Lord Hope similarly concurred that the approach to beneficial ownership was dictated in the first instance by whether or not the property was in sole or joint legal ownership. Nonetheless, he observed that it was not possible to ignore the unequal contributions to the purchase of the property and that *"The relative extent of those contributions provides the best guide as to where their beneficial interest lay"*. More particularly, Lord Hope expressly

endorsed Chadwick LJ's view in *Oxley v Hiscock* at paragraph 69 of that judgment that *"regard should be had to the whole course of dealing between [the parties] in relation to the property."* Lord Walker also endorsed that approach subject to Baroness Hale's caveat at paragraph 61 of her opinion that a better way of approaching the matter may be that adopted by the Law Commission to the effect that:

"If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended."

40. Accordingly:

"…the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended… it does not enable the court to abandon that search in favour of the result which the court itself considers fair."

41. These observations must, however, be read in light of the Supreme Court's revision of the principles in *Jones v Kernott*.

42. Although the House of Lords were only concerned with joint legal ownership cases, the approach to quantification of beneficial interests has application to all constructive trust claims except those in which there has been an express agreement as to quantum. Accordingly:

    (i) In express bargain constructive trusts, where the parties have demonstrably formed some express agreement about the quantum of their respective beneficial entitlements, the court may depart from the agreement *"only if there is very good reason for doing so"* (*Mortgage Corporation v Shaire* ([2001] Ch 743 at 750 per Neuberger J (as he then was)). The express agreement will generally prevail.

    (ii) Where the parties' express agreement did not specify the shares or where the court is concerned with an implied bargain constructive trust, the court must attempt to quantify these shares in accordance with *"what the parties must, in the light of their conduct, be taken to have intended".* The test, following *Stack v Dowden*, was essentially two stage. First, the court must survey the whole course of dealing between the parties. Secondly, it must take account of all conduct which throws light on the question of what shares were intended.

The problem in *Jones v Kernott* ([2012] 1 AC 776)

43. The fifth chapter in the House of Lords' consideration of cohabitation cases came on 9 November 2011.

44. Stated shortly, the facts in *Jones v Kernott* were as follows. In 1984 Ms Jones and Mr Kernott formed a relationship and thereafter purchased a property, known as 39 Badger Hall Avenue, in joint names. It was occupied by them from May 1984 until October 1993 when their relationship ended. At trial it was common ground that the parties had held the beneficial interest in that property in equal shares until October 1993. In 1993 Mr Kernott left Badger Hall Avenue and ceased to contribute to the mortgage or other outgoings. The issue at trial was whether the parties' respective beneficial interests had been changed by the fifteen year period in which Mr Kernott had abdicated all responsibility for the outgoings on the property. The judge at first instance (Nicholas Strauss QC) found the beneficial shares had been altered and that Ms. Jones was now entitled to 90% of the value of the property on the basis that this was "fair and just".

<u>The issue</u>

45. Wall LJ summarised the issue before the Court of Appeal in the following terms: *"Where (1) an unmarried couple has acquired residential accommodation in joint names, which by common agreement was held by them beneficially in equal shares as at the date of their*

separation, and (2) one party…thereafter (a) continues to live in the property; and (b) assumes sole responsibility for its continuing acquisition and maintenance – i.e. not only supports herself and the parties' children but pays the mortgage and all the outgoings (including repairs and improvements) – can the court properly infer an agreement post separation that the parties' beneficial interests in the property alter or (to use the phrase coined by Lord Hoffman in Stack v. Dowden) become "ambulatory", thereby enabling the court – as here – to declare that, as at the date of the hearing before the court, the beneficial interests in the property are held other than equally?"

46. By a majority (Jacob LJ dissenting), the Court of Appeal rejected the "ambulatory constructive trust analysis" (at least on the facts).

47. Having analysed the sometimes conflicting opinions in *Stack v Dowden,* Wall LJ stated that the question ultimately distilled down to whether there was "*sufficient in this case to warrant the inference that following their separation…there was a shift in the parties' intentions."* The argument ran that Ms Jones had continued to acquire the property through her contribution to the mortgage whilst Mr Kernott had ceased to contribute. In those circumstances it was contended that the beneficial interest in the property became "ambulatory" so that when the judge was called upon to determine the shares they had shifted from 50/50 in 1993 to 90/10 in 2008. At paragraph 57 it was stated that:

    "The critical question is whether or not I can properly infer from the parties' conduct since separation a joint intention that, over time, the 50-50 split would be varied so that the property is currently held 90% by the respondent and 10% by the appellant. Presumably, if the beneficial interests are "ambulatory" and the ambulation continues in the same direction, the appellant's interest in the property will at some point be extinguished."

48. The Court of Appeal was unable to *infer* a joint intention to vary the interests. The conveyance into joint names created joint beneficial interests. There had to be something to displace those interests and *"the passage of time is insufficient to do so, even if, in the meantime, the appellant has acquired alternative accommodation, and the respondent has paid all the outgoings".* Despite Mr Kernott's complete abdication of all responsibility for the property and its mortgage there was, it was said, nothing in the facts which served to displace the presumption of equality. As Rimer LJ added at paragraph 83: *"the problem with the judge's decision is that there was no evidence (or none that he identified) from which he could draw an inference of an intention by the parties to agree that their beneficial shares should be other than equal, let alone any intention as to what such shares might be."*

49. That decision was potentially harsh and seemed somewhat out of step with the House of Lords' earlier indication that the court should undertake a survey of the whole course of dealing between the parties to ascertain what the parties' must have intended. It also seemed out of step with Lord Neuberger's view in *Mortgage Corporation v Shaire* that the court can even depart from an *express* agreement if subsequent actions are *"so inconsistent with what was agreed as to lead to the conclusion that there must have been a variation or cancellation of the agreement".* What the Court of Appeal decision did do, was rely heavily upon the fact that the parties were agreed that at the time of separation they had owned 50/50. Since, following *Wilcox v Tait*, that will often be the correct point in time from which to undertake any equitable account (see below), that avoided the possibility of the "ambulatory trust" trespassing upon the equitable account. Why, after all, should parties vary the trust after its purpose has come to an end?

<u>The Decision</u>

50. Without properly addressing the interplay between quantifying beneficial entitlement and equitable accounting the majority of the Supreme Court summarised the correct approach in the following terms:

    i. The starting point remains that equity follows the law. Where parties hold property in joint names with no declaration of trust there is a presumption that they are beneficial joint tenants.

ii. There were said to be two substantial reasons why a challenge to the presumption of beneficial joint tenancy should not be lightly embarked upon. First, the purchase of a property by a couple in an intimate relationship is a strong indication of emotional and economic commitment to a joint enterprise. Secondly, there is the practical difficulty associated with trying to take an account after years of living together.

iii. There is no place at all for the presumption of a resulting trust based on unequal contributions in joint names cases involving unmarried cohabitants. The only applicable presumption is that equity follows the law.

iv. The presumption of a beneficial joint tenancy can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

v. The parties' common intention is to be deduced objectively from their conduct: *"the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party".*

vi. In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, the answer is that *"each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property"* (applying the test suggested by Chadwick LJ in *Oxley v Hiscock*). For these purposes "the whole course of dealing...in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken account as may be relevant in ascertaining the parties' actual intentions.

vii. Each case turns on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair.

viii. The concept of a "common intention" constructive trust is of central importance to "joint names" as well as "single names" cases. Nevertheless the starting point was described as different because the Claimant whose name is not on the proprietorship register has the burden of establishing some sort of common intention constructive trust whereas the claimant in a joint names case starts with the presumption of a beneficial joint tenancy.

ix. In "single names" cases, the parties' common intention to share beneficial ownership also falls to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended (expressly or by inference) then each is entitled to what is fair. The court will not, however, impute an intention to share.

51. In the unreported Court of Appeal decision *Thomson v Hurst* (30 March 2012) the Court of Appeal were invited to extend the application of the presumption in *Jones v Kernott* to facts which may not be uncommon. The Court was concerned with a cohabitating couple who had intended to purchase their home in joint names. A mortgage advisor advised that as Mr Thomson had a poor credit rating the mortgage should be in Miss Hurst's sole name and they therefore decided that Miss Hurst should also be the sole legal owner of the material property. Inevitably, the trial judge found that there was a common intention that Mr Thomson would have a beneficial interest in the property but he declared that, on the facts, that was limited to only 10% of the equity. Mr Thomson appealed and argued that the principles set out in *Stack v Dowden* and *Jones v Kernott* should apply. Namely, since the parties had intended to purchase in joint names (and he had been omitted merely because of his credit rating) he should be presumed to be entitled to a half share beneficial interest.

52. In an extempore judgment the Court of Appeal rejected that analysis. As yet the case has not been properly reported (indeed the Court of Appeal have still not approved the official transcript). Nonetheless, a short summary is available from which it would seem that the Court of Appeal were at pains not to extend the application of the presumptions in *Stack v Dowden* and *Jones v Kernott* (as they were in the earlier case of *Laskar v Laskar* [2008] 1 WLR 2695). Whatever the parties had intended and whatever the reasons for transferring into a sole name, the short point was that the transfer had not been into joint names. Accordingly, there was no scope for the legal presumption that they had intended to be beneficial joint tenants. It could not be assumed that, had the parties purchased in their joint names, they would have agreed to be joint beneficial owners based on the circumstances of the case.

53. As ever, such cases turn on their own facts. When quantifying beneficial entitlement (In the absence of express agreement) the court must undertake a survey of the whole course of dealing between the parties taking account of all conduct which throws light on the question what shares were intended. Presumably the fact that the parties had intended to buy as joint legal owners will be relevant to that survey and on appropriate facts may even tip the balance. The apparent importance of *Thomson v Hurst* is that it is no more than one factor among many.

Securing an order for sale

54. It does not inevitably follow that by establishing a beneficial interest, a party will go on to secure an order for sale.

55. Section 14 of TLATA confers a discretion on the court as to whether an order for sale should be made. Section 15(1) adds:

    "The matters to which the court is to have regard in determining an application for an order under section 14 include:
    (a) the intentions of the person or persons (if any) who created the trust,
    (b) the purposes for which the property subject to the trust is held,
    (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
    (d) the interests of any secured creditor of any beneficiary."

56. All cases turn on their own facts. The breakdown of a relationship between cohabitees may well point in favour of sale because the property was intended to provide a home for both of them. Where there are minor children that may well serve to prolong the purpose of the trust beyond the termination of the mutual relationship between the trustees or beneficiaries. The pre-TLATA authorities show a somewhat inconsistent approach or attitude to the relevance of the interests of children (see *Rawlings v Rawlings* [1964] P 398; *Burke v Burke* [1974] 1 WLR 1063; *Williams (JW) v Williams (MA)* 1976 Ch. 278). The pre-existing case law has not been rendered wholly redundant but section 15(1)(c) of TLATA now makes the interests of children an essential consideration.

57. The possibility of the court refusing to order sale is illustrated, by way of example, by the decision in *Stott v Ratcliffe* ((1982) 126 Sol Jo 310), a case necessarily decided under the predecessor provision of section 30 of the Law of Property Act 1925. Two elderly people purchased a property as tenants in common with the original purpose that it provide a home for them during their joint lifetimes and thereafter for the surviving co-owner. On the death of one of the co-owners, the Court of Appeal declined to order sale at the behest of the personal representatives of the deceased tenant in common where the explicit object of the acquisition of the co-owned property had been to secure a home for the survivor. This is to be contrasted with *Grindal v Hooper* (The Times, 8 February 2000) where an order for sale was made in the absence of convincing evidence of an intention to house the survivor.

Cases involving children

58. The existence of children is relevant to more than just the court's discretion to order sale under section 14 of TLATA. In many cases involving children the co-owners will be married. When the issue of an order for sale arises on divorce it is likely to be subsumed in any order which the court makes for ancillary relief under the Matrimonial Causes Act 1973. Where co-owners are not married and have children, an alternative to TLATA is to pursue an order under the Children Act 1989.

59. Under the 1989 Act the court has power to make an order for the transfer or settlement of property (see section 15 of the 1989 Act). More specifically the court may make orders under paragraph 1 of schedule 1 to the 1989 Act including:

"(d) an order requiring settlement to be made for the benefit of the child, and to the satisfaction of the court, of property:
(i) to which either parent is entitled (either in possession or reversion); and
(ii) which is so specified in the order;

(e) an order requiring either or both parents of a child:
(i) to transfer to the applicant, for the benefit of the child; or
(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order."

60. There are, however, constraints on the court when exercising its discretion in such a case. Where parents are unmarried, the mother has no right to be supported by the other and therefore the court is likely to wish to avoid conferring a windfall upon her. Generally, the court is likely to restrict the duration of such orders in favour of the children until they have completed their education. Thereafter the property reverts to the parent(s) because the children cease to have any continuing claim (see *T v S (Financial Provision for Children)* [1994] 2 FLR 883).

Accounts

61. TLATA claims are often a four stage process. (1) Does a Claimant have an interest in the Property? (2) If so, what size interest do they have? (3) Should that interest be realised with an order for sale? (4) What, if any, equitable accounts should be undertaken?

62. Equitable accounting is alive and well post-*Stack* but that case has complicated matters. 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.

<u>Occupation rent</u>

63. 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.

64. The Court of Appeal have since applied *Stack* in *Murphy v Gooch* ([2007] EWCA Civ) adding:

"[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."

65. 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 (in relation to occupation). 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.

66. In *French v Barcham* [2009] 1 All ER 145 the court was concerned with an equitable account sought by a trustee in bankruptcy. Mr and Mrs Barcham had acquired the material property as joint legal owners. A bankruptcy order was made against Mr Barcham in 1994. It was common ground that the Barchams had acquired the material property as beneficial tenants in common in equal shares. The question that arose was as to what, if any, deductions should be made from Mrs Barcham's half share of the net proceeds of sale to reflect the fact that since Mr Barcham's bankruptcy Mrs Barcham had remained in occupation. On appeal it was successfully argued that Mrs. Barcham's half-share should be reduced by a sum equal to one half of the property's letting value from time to time since Mr Barcham's bankruptcy.

67. An essential prerequisite of the power to award compensation under section 13(6) of the 1996 Act (e.g. what may loosely be termed an occupation rent) is the entitlement under section 12 of the beneficiary claiming the compensation to occupy the land, i.e. the right of the beneficiary to occupy the land at any time by reason of that interest. What triggers the award of compensation is the exclusion of that right of occupation. A trustee in bankruptcy has no statutory right of occupation because of the terms of section 12(2) of the Act (there is no right to occupy "if it is either unavailable or unsuitable" for occupation by the beneficiary) and there is therefore no scope for the operation of section 13.

68. As stated above, in *Stack v Dowden* it had been stated that the statutory powers in the 1996 Act had replaced the old doctrine of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. *Stack* was, however, a case in which both parties had a right of occupation and, in *French v Barcham*, Blackburne J expressed the view that the House of Lords were not thereby suggesting that in cases where one of the parties has no statutory right of occupation, the statutory provisions had the effect that that party could no longer claim an occupation rent in any circumstances whatever. In short, the statutory scheme of the 1996 Act has not extinguished the role of the old fashioned equitable account which can still be called upon where the statutory scheme does not apply. This will be particularly relevant in accounts sought by trustees in bankruptcy. It may also have far wider relevance in view of the fact that section 13 appears to only look at the matter prospectively in the context of an occupying beneficiary's continued occupation. There may, therefore, be a wide range of circumstances where both beneficiaries had a right of occupation but the statutory regime would not apply.

69. *French v Barcham* is also valuable in addressing the vexed question of whether ouster is a pre-requisite to an award of an occupation rent: The Judge undertook a careful review of the authorities which merits full reading before reaching the general conclusion that: *"when on inquiry it would be unreasonable, looking at the matter practically, to expect the co-owner who is not in occupation to exercise his right as a co-owner to take occupation of the property, for example because of the nature of the property or the identity and relationship to each other of the co-owners, it would normally be fair and equitable to charge the occupying co-owner an occupation rent."*

The period material to the account

70. In *Clarke v Harlowe* ([2005] EWCA Civ 857) it was decided at first instance that in a cohabitation case any account should commence from the date of separation:

"37. In the ordinary case of cohabitation the common purpose of the implied trust subsists whilst the relationship subsists. During that period whilst the ordinary arrangements for the discharge of the outgoings subsist there is no breach or failure by any one of the parties to honour any obligation owed to the other. Thus in the usual case there is no room or reason for equitable accounting. It is common ground, for example, that Christopher Harlowe paid all the mortgage instalments in respect of Bank House prior to the separation. It is not suggested (and could not be suggested) that Margot Clarke was under any obligation to reimburse him any part of those payments at the time. It thus could not be suggested that there was any basis for equitable accounting in respect of the mortgage instalments prior to the separation.

38. After the relationship ends and the parties separate the common purpose of the implied trust has generally come to an end. At that stage there are no common arrangements between the parties with the result that each ought to discharge his or her proportionate share of the outgoings. There is thus at that time an obligation on each of the parties. If one party fails to honour its obligation an appropriate account can be taken on the sale of the property. As is clear from the authorities the account can include an obligation to pay an occupation rent.

39. These considerations lead me to conclude that in the ordinary case there are sound reasons for holding that equitable accounting commences at the date of the separation. In general payment for outgoings or improvements prior to the date of separation is in accordance with the arrangements between the parties and the common purpose of the implied trust. There is no breach or failure to honour those arrangements and thus no room for equitable accounting. There may however be exceptional cases where it can clearly be shown that one or other of the parties is in breach of the arrangements to pay for specified improvements or outgoings. In such a case I do not see why there should not be equitable accounting even though the parties are not separated."

71. In *Wilcox v Tait* ([2006] EWCA Civ 1867) (CA)) Miss Wilcox and Mr Tait had cohabited in a jointly owned property held on trust for themselves as beneficial tenants in common. The property had been purchased in 1990 with the aid of a mortgage and the relationship eventually broke down in 1999. Mr Tait argued that equitable accounting meant that Miss Wilcox should give credit for half of the mortgage payments made by him from the inception of the mortgage until the day of trial. At first instance, the Judge accepted that argument and expressly did not follow the decision in *Clarke v Harlowe* which, it had been argued, had been decided *per incurium*.

72. As an aside, the case is significant because the Court of Appeal stated that as the primary relief sought was a declaration as to a beneficial interest coupled with an order for sale, the judge ought to have granted a declaration and ordered a sale by public auction with liberty for Mr Tait to bid. The Judge in that case had simply relied upon a dated valuation and that was held to be an improper approach. Further, the equitable accounting exercise should not have been undertaken until the property had been sold and there was a fund in place for distribution.

73. In relation to an account it was stated that it is in the nature of equitable accounting that there can be no hard and fast rule or principle that in a cohabitation case equitable accountability commences at any particular date. What is the appropriate date for the commencement of equitable accounting, assuming it is appropriate at all, must depend upon the facts of each case. Nonetheless, *Clarke v Harlowe* was not decided *per incuriam* and accordingly:

"62…it is in any event risky in my judgment to attempt to formulate general principles to be applied in carrying out an equitable accounting exercise in any given case, if for no other reason than that, as the judge put it in the instant case, equitable accounting, is "fact sensitive". What can at least be said is that an exercise of equitable accounting is not to be

confused with an enquiry as to the extent of the parties' respective beneficial interests in the property in question. Questions of equitable accounting only arise once the extent of the parties' beneficial interests has been determined, since the requirement to account (where it exists) is a reflection of and derives from those beneficial interests.

65. As to the period to which equitable accounting should relate, in a case such as the instant case where the property has been used as a home for both parties but the relationship between the parties has come to an end (what was described in argument as a cohabitation case), the judge was in my judgment right to conclude that that depends upon the intentions of the parties as to how the relevant expenditure should be borne as between them.

66. That said, I agree with Judge Behrens in Clarke v Harlowe that in the ordinary cohabitation case it is open to the court to infer from the fact of cohabitation that during the period of cohabitation it was the common intention of the parties that neither should thereafter have to account to the other in respect of expenditure incurred by the other on the property during that period for their joint benefit. Whether the court draws that inference in the given case will of course depend on the facts of that case."

74. In the subsequent case of *Young v Lauretani* ([2007] EWHC 1244 (Ch)) Lindsay J. had to consider the application of *Wilcox v Tait* to a dispute between cohabitees in which both harboured hopes of buying the other's interest in the property. This would be difficult or impossible to achieve if the property had to be sold before the equitable accounting exercise.

"[59] The principles in Wilcox v Tait which has a comprehensive review of authorities in the area, suggest that in many cases it is prudent to await the sale of the property in dispute before equitable accounting is further dealt with. However, in the case at hand, both parties wish to be able to buy the property in question and so there must be some prospect that the delays and expenses of a sale to a third party might be avoided. Moreover, without equitable accounting being investigated at least in outline, neither side will be able to be sure how much they can afford to offer to acquire the property. Accordingly it seems to me that there is a good argument for not awaiting the sale before indicating, at least in outline, how the proceeds of sale ought to be divided between Mr. Young and Miss Laurentani."

75. As a straightforward application of *Clarke v Harlowe* and *Wilcox v Tait* the Judge then declined to undertake any account in respect of the period before the couple ceased to cohabit because when they were living together *"All can be taken to have been thrown into one indivisible pot not to be sought to be divided and such as not to be subjected to the sort of analysis that might have been appropriate between commercial parties".*

76. After they had ceased to live together, however, Miss Lauretani was held liable to account for one half of the mortgage payments and for half of an occupation rent.

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