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Beneficial interests in co-habited property

***Stack v Dowden* [2007] UKHL 857, 25th April 2007**

Such was the interest in, and potential importance of, the decision of the House of Lords in *Stack v Dowden* that we decided it merited a separate newsletter. So in these pages, **Tim Walsh** summarises and digests the decision and its implications, then **Ewan Paton** offers some additional comments and questions arising from it.

Unless and until Parliament legislates comprehensively in this area, it will continue to require specialist property law advice in all but the simplest cases. All members of our team regularly advise and act in beneficial interest disputes over properties great and small. If you, or your colleagues in your Family department, have any queries in such cases, we hope we will be your first port of call.

Stack v Dowden: the decision

The House of Lords has again been called upon to clarify the law in disputes about the beneficial ownership of the family home after the breakdown of relationships between couples who cohabit without being married or without entering into a civil partnership. Whilst there was unanimity in dismissing the appeal on its facts, the four opinions do not offer uniform guidance on the correct approach in a number of material respects.

The Facts

Mr. Stack and Miss Dowden entered into a relationship in 1975 and began cohabiting in a property in Purves Road in 1983. That property was purchased in Miss Dowden's sole name. In August 1993 Mr. Stack and Miss Dowden purchased a property in Chatsworth Road as their family home. That property was conveyed into their joint names. The transfer contained no declaration of trust but did contain a declaration that the survivor could give a good receipt for capital moneys arising from a disposition of all or part of the property.

The Chatsworth Road property was purchased for £190,000. That property was purchased utilising funds from three sources. Namely:

i £67,000 from the sale of the Purves Road property. Miss Dowden had paid the entirety of the mortgage on that property although Mr. Stack had carried out a great deal of redecoration, repairs and alterations. There was a dispute about whether he had contributed something towards an £8,000 deposit to the Purves Road purchase although that evidence was very limited.

ii £65,000 was provided by a mortgage in joint names.

iii £58,000 was provided out of savings in an account in Miss Dowden's name.

Subsequent to the purchase, mortgage interest and endowment policy premiums were paid exclusively by Mr. Stack (and totalled £34,000) and the mortgage loan was in fact repaid in lump sums totalling £27,000 from Mr. Stack and £38,000 from Miss Dowden.

The relationship broke down and litigation ensued. The Court of Appeal, applying *Oxley v Hiscock* [2004] 3 WLR 715 awarded Miss Dowden 65 per cent of the proceeds of sale of the property. Mr. Stack appealed to the House of Lords.

The Opinions

The leading opinion was provided by Baroness Hale. All four opinions do, however, merit scrutiny.

There was consensus *"that just as 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 on the person seeking to show that beneficial ownership is different from legal ownership. In sole ownership cases it is upon the non-owner to show that he has any interest at all. A conveyance into joint names indicates both legal and beneficial joint tenancy unless the contrary is proved. Further, a transfer into joint names will generally be sufficient to surmount what is always the first hurdle in cases of this type. Namely, the hurdle of establishing a common intention of shared beneficial ownership.

There was, moreover, consensus in all of the opinions in rejecting the argument that declaring that the survivor *"can give a valid receipt for capital money arising on a disposition of land"* in itself amounts to an express declaration of a beneficial joint tenancy. That had been rightly rejected by a trilogy of earlier cases in the Court of Appeal.

The principal question considered in Baroness Hale's opinion, however, was that of quantification of the beneficial interest, a point upon which the leading authority was *Oxley v Hiscock*. More particularly, the House of Lords were concerned in *Stack v Dowden* with the approach to quantification of beneficial interests where the legal interest was held in joint names and on this point Baroness Hale disagreed with the Court of Appeal. Joint ownership is not simply part of the "whole course of dealing" in relation to the property.

The opinion stresses 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. Because 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 opinion trials in joint names cases are unlikely to lead to a different result unless the facts are very unusual.

In the principal passages of the opinion, 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. 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.

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]

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.

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 opinion 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 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."

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."

The approach advocated by Lord Neuberger may be stated in slightly different terms:

i First, where there is no evidence other than the fact that the property was acquired as a home for the legal co-owners in joint names, the beneficial ownership will also be joint, so that it is held in equal shares.

ii Secondly, where the only additional evidence is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of the acquisition will be held in the same proportions as the contributions to the purchase price. This was characterised as the "resulting trust solution" and he advocated that this should be adopted whenever there are unequal contributions.

iii The resulting trust solution was, however, only an important presumption. Thirdly, therefore, the resulting trust analysis may be rebutted, replaced or supplemented by a constructive trust where there is other relevant evidence to enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interest would be held (primarily at the time of the acquisition).

It is not possible to reconcile the approaches of Lord Neuberger and Baroness Hale and, whilst Lord Hope only expressly endorses Baroness Hale's analysis, it is at least arguable that his reasoning that the *"relative extent of ... contributions provides the best guide as to where their beneficial interest lay"* is more readily reconciled with Lord Neuberger's resulting trust solution.

For Lord Neuberger, the crucial time is the date of acquisition and "compelling evidence" is required before one can infer that, subsequent to the acquisition of the home, the parties intended a change in the shares in which the beneficial ownership is held. Discussions, statements or actions may allow a common understanding as to such a change to be inferred. Improvements to the home (beyond mere decoration) may justify an adjustment of the apportionment of the beneficial interest but capital repayments towards the mortgage may be less compelling.

Paragraph 144 of Lord Neuberger's opinion is more robust than other opinions in the case when it states:

"144. I am unhappy with the formulation of Chadwick LJ in Oxley at paragraph 69... namely that the beneficial ownership should be apportioned by reference to what is "fair having regard to the whole course of dealing between [the parties] in relation to the property". First, fairness is not the appropriate yardstick. Secondly, the formulation appears to contemplate an imputed intention. Thirdly, "the whole course of dealing ... in relation to the property" is too imprecise, as it gives insufficient guidance as to what is primarily relevant, namely dealings which cast light on the beneficial ownership of the property, and too limited, as all aspects of the relationship could be relevant in providing the context by reference to which any alleged discussion, statement and actions must be assessed. As already explained, I also disagree with Chadwick LJ's implicit suggestion in the same paragraph that "the arrangements which [the parties] make with regard to the outgoings" (other than mortgage repayments) are likely to be of primary relevance to the issue of the ownership of the beneficial interest in the home."

Having disagreed with the approach of Chadwick LJ (endorsed to some extent in at least two of the other opinions), Lord Neuberger advocates adopting an approach in which the court should *"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"*. "The whole course of dealing" is relevant only as background as it is with actions, discussions and statements which relate to the parties' agreement and understanding as to ownership of the beneficial interest in the home with which the court should be concerned. As is observed in paragraph 146 of the opinion:

"In other words, where the resulting trust presumption (or indeed any other basis of apportionment) applies at the date of acquisition, I am unpersuaded that (save perhaps in a most unusual case) anything other than subsequent discussions, statements or actions, which can fairly be said to imply a positive intention to depart from that apportionment, will do to justify a change in the way in which the beneficial interest is owned."

This would be an important shift in the correct analytical approach to be adopted, but was not a view adopted by any other of their Lordships.

Lord Walker – More ambiguity about *Rosset*

Lord Walker endorsed Baroness Hale's opinion without reservation but proceeded to make some important obiter observations on the law as understood following *Lloyds Bank v Rosset* [1991] 1 AC 107. Those familiar with this area will recall the "critical distinction" that was made in that case 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 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." [emphasis added]

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."

In *Stack v Dowden* the Lords could have exhaustively considered this problem since Mr. Stack's claim to an interest in the Purves Road property raised these issues to some degree. Whilst Baroness Hale concedes that there is an argument that Rosset set the hurdle "rather too high", only Lord Walker provides any direct consideration of these matters:

"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."

The question this begs, however, is how (if at all) *Stack v Dowden* has changed the position with regard to the requirement for a direct contribution to the purchase price (in implied bargain constructive trust cases). In the balance of his opinion no clear guidance is given and whilst it is stated that the law should recognise the reality of home acquisition *"by taking a wide view of what is capable of counting as a contribution towards the acquisition of a residence"* (see para. 34), those comments are arguably concerned with the question of quantification of any beneficial interest rather than the first and fundamental question of whether there was a common intention that the beneficial interest should be shared between the parties.

The editors of *Snell's Equity* observe that in this context:

"...for this purpose expenditure on furniture and household expenses cannot be taken into account, much less decorating the house and supervising the carrying out of repairs in it, doing housework and bringing up the family. Such conduct does not so readily support in inference that the claimant intends to acquire an interest in the house. Indeed, it seems that such expenditure cannot be taken into account even though it thereby assists the other party in paying the costs of acquisition." (para. 22-40) [emphasis added]

There must at least be some doubt now as to whether this was or is still the law.

Tim Walsh

Comment: A disappointment and missed opportunity

As Tim Walsh's article above makes clear, any practitioners relying upon their Lordships to use this appeal as the opportunity for a comprehensive restatement of implied trust principles in cohabitee cases will find the case a disappointing read. The majority opinions (Lord Neuberger's is a dissent in all but the result on the main issue) leave a number of questions unanswered, or only partially answered. Cynics or conspiracy theorists might even regard this as a veiled invitation for Parliament to legislate for out-and-out discretionary provision sooner rather than later. In the meantime, we are left to consider the following:

1 Will the presumption from joint legal ownership often matter in practice?

Conveyancers will note that the appeal in *Stack* only arose because of the ambiguity of the pre-1998 Form TR1, containing no joint tenancy/tenancy in common box to be 'x'd. This or any other express declaration is of course conclusive as to beneficial interests in the absence of grounds for rectification or setting aside for fraud or undue influence. Even before the form was changed, it was well-established that a conveyancer who failed to advise joint legal purchasers on the available beneficial ownership options could be professionally negligent. So the particular issue in *Stack* is unlikely to arise very often in practice. The main battleground will remain those cases of *sole* legal ownership where the other cohabitee asserts an interest.

2 Just how strong is the presumption that beneficial will follow legal ownership?

As Lord Neuberger pointed out, there is nothing new in stating that a weak presumption arises that 'equity follows the law' in the absence of any other evidence, whether in a sole or joint legal ownership case. But save perhaps for disputes between latter-day executors of estates, where all original parties are dead and all conveyancing files destroyed, there is rarely if ever *no* evidence available at all. There will always be some material to consider, from the parties themselves or the financial circumstances of the purchase. The real issue is what evidence will count, and how much, towards establishing an interest.

3 How relevant are unequal purchase money contributions?

Even in a joint legal ownership case such as *Stack*, after her repeated reminders of how difficult and unusual it would be to rebut the presumption of equal ownership, Baroness Hale found it easily enough rebutted by the large disparity in purchase money contributions and the relative separateness of the parties' finances, on which basis the Court of Appeal's quantification of the interests was ultimately upheld. Whether one takes those contributions as the "best guide" (per Lord Hope) to quantifying the interest, but among a number of other factors which may later be considered, or as an analytical resulting trust starting point only to be rebutted by clear evidence to the contrary (per Lord Neuberger), the practical result may be the same in many cases.

4 What else can the Court look at?

i to get over the 'first hurdle' in a sole legal owner case

As Tim sets out above, perhaps the most critical and controversial issue left by *Rosset* and *Oxley v Hiscock* – namely what sort of contribution will 'get you in' to an implied bargain common intention constructive trust claim (or an *Oxley*, or *Rosset*-type 2 case, in practitioner parlance) – is left dangling in the wind with the observations of Lord Walker that the law has "moved on", and Baroness Hale's acknowledgment that it is arguable that the *Rosset* threshold of direct contribution to purchase or

mortgage is "rather too high". It can now only be a matter of time before the next case reaches the Court of Appeal, and perhaps the Lords from there, on whether other contributions which indirectly assist an acquisition or the payment of a mortgage will suffice.

ii to quantify an interest in this category?

Take your pick from Baroness Hale's paragraph 69, set out by Tim above. Many of the examples given are, however, unhelpful in the absence of guidance or some explanation of *how* and *why* they matter. "Advice or discussions at the time of the transfer" are likely to take cases into the *first* Rosset category, and if particular shares are mentioned in such discussions, they have generally been understood to be determinative. "The purpose for which the home was acquired, the nature of the parties' relationship [and] whether they had children" add little unless the law takes the potential legislative step of presuming "the family home" as "family property", from which result their Lordships clearly stopped short.

Why will "very different" inferences be drawn from "who pays what" towards outgoings as between cases of sole and joint legal ownership? In many cases of sole legal ownership, the pattern and incidence of household contributions is often equal, with the sole legal ownership and mortgage liability being merely a convenience based on one party's 'mortgageability' or entitlement to a right-to-buy discount. How and when will the parties' "personalities and characters" affect the outcome? Will a naturally 'caring and sharing' sole legal owner find him or herself at a disadvantage compared to a calculating 'cold fish'?

6 What is the Court actually looking for, or doing?

The only part of *Oxley* expressly disavowed by Baroness Hale was the reference to the court quantifying "that share *which the court considers fair* having regard to the whole course of dealing between them in relation to the property." She preferred the Law Commission formulation of such conduct "throw[ing] light on the question of *what shares were intended*". So in theory, the courts are not yet sitting under the fabled palm tree when quantifying the interest, but are looking for the true intentions of parties.

Or are they? Earlier (at paragraph 61) Baroness Hale refers to the search for "the parties' shared intentions, *actual*, *inferred* or *imputed*...". Lord Neuberger later correctly makes the distinction between, on the one hand, finding or inferring the existence of an intention, and on the other, "imputing" one – which means, bluntly, making one up where none actually existed, because it is felt it ought to have existed (paragraph 126).

One could, in this regard, enter into philosophical debate about the true meaning of an "intention" (pitting Descartes against Wittgenstein: whether an intention is a real thing inside someone's head, or simply a descriptive label attached to conduct anyway). Without doing so, it seems that in this context the courts will inevitably simply be looking at conduct, and at Baroness Hale's list of factors in paragraph 69, and deciding at *some* level what is "fair". In most of these cases, the issue of shares of beneficial ownership has *ex hypothesi* not been considered by the parties at all. All we have to go on are their conduct and contributions, to be ranked on some basis of relative "worth". It remains somewhat disingenuous for the law to pretend otherwise. If we are to have discretionary property adjustment based on fairness, let us be open about it. Better still, let Parliament legislate for it after a proper social and political debate.

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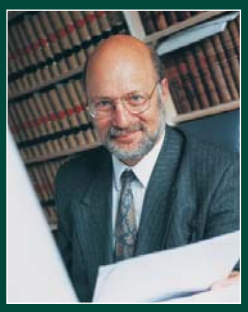

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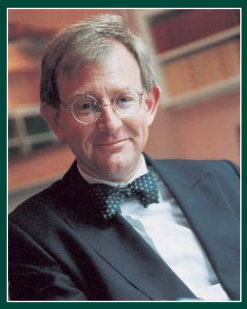

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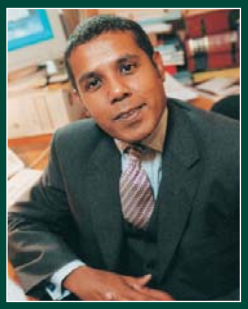

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