

# Stack v Dowden revisited

*Does the House of Lords decision in Stack v Dowden bring any clarity to the current debate on cohabitation? Elissa Da Costa considers the impact of this important judgment*



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The decision in *Stack v Dowden*, handed down by the Court of Appeal in July 2005 (with the leading judgment by Chadwick LJ), was the first opportunity for the court to provide guidelines on the correct interpretation of *Oxley v Hiscock* [2004]. Whereas *Oxley* had dealt with the application and quantification of a constructive trust in a case where one party was the sole legal owner, *Stack* concerned a property in joint names. Before considering the recent House of Lords decision, it is helpful to recall the facts and examine the outcome in the Court of Appeal.

## Facts in Stack

The parties had been in a relationship since 1983 and had had four children together. The claimant, Mr Stack, brought a claim under s14 of the Trusts of Land and Appointment of Trustees Act 1996 in respect of a home that the parties had purchased in 1993 (the 1993 transfer) and which had been registered in their joint names.

The £190,000 purchase price of that property had been funded by:

- a mortgage of £65,000 for which the parties were jointly and severally liable;
- the proceeds of the sale of the 'first property', amounting to £67,000; and
- savings of £58,000 from a building society account in the sole name of the defendant, Miss Dowden.

It is also of note that the first property had been registered in the sole name of Miss Dowden.

With regard to the 1993 transfer, there were no words of trust and, like many

other couples, the parties had had no discussions at the time of the purchase as to their respective beneficial shares in the property. The transfer did, however, contain the usual declaration by the purchasers that the survivor of them was entitled to give a valid receipt for capital money. Such receipt clauses have been known to confuse lawyers, let alone lay clients.

Mr Stack sought a declaration that the property was held by the parties on trust for themselves as tenants in common in equal shares, a view shared by the first-instance judge, who found that Mr Stack had had some beneficial interest in the proceeds of sale of the first property, and that the savings in Miss Dowden's sole name had been joint savings. The judge, however, did not quantify the share of the first property to which he found the claimant to be entitled, nor did he quantify the share in the savings.

## Court of Appeal decision

In the Court of Appeal it was held that if a property had been transferred into joint names, it could usually be taken for granted that each party was intended to have some beneficial interest in the property, but the court was still required to do its best to discover from the conduct of the parties whether any inference could reasonably be drawn as to the probable common understanding about the amount of their respective shares.

In principle, there was no reason why the approach to determining the extent of the parties' respective beneficial interests should be different in this case, where the property was registered in joint names, to what it would be if the property were registered in the sole name of one cohabitant. Thus it was made clear that *Oxley* could apply equally to cases where the

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ownership was in joint names, not just where it was in the sole name of one of the parties.

Applying *Oxley*, therefore, the solution is that each party would be entitled to that share which the court considered fair, having regard to the whole course of dealing between them in relation to the property. This solution echoes the leading judgment in *Midland Bank plc v Cooke* [1995].

In addition, in *Stack* it was held that the fact of registration in joint names was clearly to be taken into account as part of 'the whole course of dealing between them in relation to the property'.

The Court of Appeal criticised the trial judge for failing to address

'partnership between them in the way they lived'.

Miss Dowden had, therefore, provided the whole of the purchase price for the property held in joint names, other than the mortgage advance. Having regard to the whole course of dealing between the parties, Chadwick LJ held that it was thus not fair for the beneficial interests in the property to be equal:

[Equality] fails to give proper weight to Miss Dowden's financial contribution to the acquisition of the property.

As to the declaration, the court held that if parties did not understand the

The issue of the 'declaration' as to the ability of the survivor of a joint tenant to give a valid receipt for money when the current transferees come to sell the property was also significant, as is evident from the case's journey upwards to the House of Lords. The declaration or receipt clause often appears in pre-1998 transfers. Where the declaration provides that the survivor of two purchasers *cannot* give a valid receipt, that is indicative of a tenancy in common, although it is unclear without more information whether that tenancy in common is in equal shares or otherwise.

On the other hand, however, where the declaration provides that a survivor *can* give a valid receipt, it does not follow that this is a beneficial joint tenancy. This is because it has been held in *Harwood v Harwood* [1991] and followed in *Huntingford v Hobbs* [1993] that such a declaration does not preclude the possibility of there being a third beneficial owner, whose name does not appear on the title deeds, and therefore the declaration is *not* conclusive on this point.

Furthermore, a point made in the House of Lords by Lord Neuberger was that it would be wrong to infer joint beneficial ownership from the declaration. He opined:

It seems to me that, in the absence of any evidence of contemporaneous advice to the parties as to the effect of the declaration, the alleged inference would simply be too technical, sophisticated, and subtle to be sustainable, at least in the context of the purchase of a home by two lay people.

In addition it was pointed out by Baroness Hale in the Lords that even post-1998 transfer documents (known as the TR1, which specifically provide tick boxes for the purchasers to declare whether they hold as joint beneficial tenants, tenants in common in equal shares or otherwise, to be inserted in the form), are often not signed by the cohabiting purchasers, and thus even with the 'new' form of transfer there are still cases where there is no express declaration of the beneficial interests yet the parties are joint legal owners.

The case was to proceed to the House of Lords on two issues:

- whether the declaration as to the survivor's entitlement constituted an express trust of the beneficial interests; and

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whether there was any evidence from which to infer a common intention of the parties, communicated to each other, in relation to the first property, which had been registered in Miss Dowden's sole name. The court held that the judge had been wrong to treat Mr Stack as having any beneficial interest in that property. Furthermore, and in similar vein, the trial judge had erred in finding that Mr Stack had had an interest in Miss Dowden's savings account:

A finding of a joint property interest required more than that there was a

significance of a declaration in a transfer deed it would be impossible for them to rely on it for the purposes of drawing inferences as to their intentions. This was other than as indicative of a common intention that the parties should be bound by the declaration in respect of the matter for which it actually provided.

#### Comment

As well as providing an opportunity to give guidelines for the interpretation of *Oxley*, the case also enabled the court to reaffirm the approach of Lord Bridge in *Lloyds Bank plc v Rosset* [1990] to the determination of whether the beneficial ownership was shared in relation to the parties' first property. Mr Stack's contributions to the first property were said to be insufficient to raise the inference that the beneficial ownership was to be shared – thus the second limb of Lord Bridge's test is still a good one:

I pause to observe that neither a common intention by spouses that a house is to be renovated as a 'joint venture' nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property.

*Harwood v Harwood*  
[1991] 2 FLR 274  
*Huntingford v Hobbs*  
[1993] 1 FLR 736  
*Lloyds Bank plc v Rosset*  
[1991] 1 AC 107  
*Midland Bank plc v Cooke*  
[1995] 2 All ER 562  
*Oxley v Hiscock*  
[2005] Fam 211  
*Springette v Defoe*  
[1992] 2 FLR 388  
*Stack v Dowden*  
[2005] EWCA Civ 857;  
[2007] UKHL 17

- whether, in cases of joint legal ownership, beneficial ownership should be presumed to follow the legal ownership, and thus be presumed to be held in equal shares, subject to clear evidence of contrary intervention.

Clearly this is an attempt to clarify the law dealing with cohabitation pending the Law Commission's report and recommendations on statutory reform of this area of the law, the need for which was set out very graphically by Carnwath LJ:

To the detached observer, the result may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.

### The House of Lords decision

In the House of Lords the question became far wider than simply the effect of a 'receipt clause'. Baroness Hale discussed whether equity should follow the law in cases where the parties have purchased as joint legal owners yet failed to spell out the beneficial ownership. She asked at what stage, independently of the information required by Land Registry forms, joint transferees would execute a declaration of trust. She answers her own question thus:

At first blush, the answer appears obvious. It should only be expected that joint transferees would have spelt out their beneficial interests when they intended them to be different from their legal interests. Otherwise, it should be assumed that equity follows the law and that the beneficial interests reflect the legal interests in the property.

She continued that, although an uncontroversial proposition, it was something of an oversimplification – because all joint legal owners must hold the land on trust and s53(1)(b) of the Law of Property Act 1925 requires a declaration of such a trust to be in writing. However, s53(2) provides that this requirement 'does not affect the creation

or operation of resulting, implied or constructive trusts'. The question therefore becomes 'what are the trusts to be deduced in the circumstances?'

At paragraph 56 of her judgment Baroness Hale states 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 upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership

of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that *each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property*. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and

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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 than a joint beneficial interest.

The decision in the House of Lords is encapsulated in paragraph 58, in which Baroness Hale summarises:

The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a *prima facie* case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, at least in a domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

This principle leads to a further question, which is how, if at all, is the contrary to be proved? In answering it, Baroness Hale cited with approval Chadwick LJ in *Oxley*:

... in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount

utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home [*emphasis supplied*].

Although Chadwick LJ provided a non-exhaustive list of factors for dealing with the extent and quantification of the beneficial interest, it was noted in the House of Lords that another factor to consider is the likely conscious decision to purchase the home in joint names. Baroness Hale added that even if the parties have not executed the TR1 document, they will have signed the contract preceding it, commenting:

... committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it a moment's thought.

Having said that, there are often reasons other than acquiring joint beneficial interests for purchasing in joint names, such as the desire of mortgagees who consider it in their interest that there is joint and several liability for the mortgage.

It was also made clear that in joint-names cases the legal battle to establish other than joint beneficial ownership is unlikely to lead to a different result 'unless the facts are very unusual'. Yet, 'context is everything' and Baroness Hale opined that:

- the domestic context is very different from the commercial world;
- each case will turn on its own facts; and
- many more factors than financial contributions may be relevant to divining the parties' true intentions (see 'Stack checklist' box below).

Even having regard to the fact that mercenary considerations may be more prevalent in cohabitation cases than in marriage, and taking all factors into consideration, it was reiterated that cases in which the joint legal owners are to be taken to have intended that their

suggests that the quantum was calculated on a resulting trust basis, Chadwick LJ clearly preferred the *Midland Bank* constructive trust approach to the strict resulting trust approach of *Springette v Defoe* [1992].

However, Lord Neuberger's view was that in cases where there are unequal contributions, as in the case under review:

... the resulting trust solution is the one to be adopted. However, it is no more than a presumption, albeit an important one.

**The impact of Stack in practice**

Initially it was considered that this decision would be limited to the minority

that the beneficial interests should be held differently to the legal interests is not a task to be embarked on lightly.

It was also indicated that the floodgates were not expected to open for all those with transfers into joint names wishing to challenge the presumption of equal shares merely because of a disparity in contribution. The facts of the case must be very unusual to warrant a successful challenge to that presumption.

**Proceed with caution**

The decision has also sent out a further warning to conveyancers and the public alike that, when purchasing something as large and expensive as a family home, it is always prudent to record the beneficial ownership at the time of purchase.

It also increases the pressure on Parliament to create legislation specifically for cohabitants, many of whom do not understand that they do not share the same rights as married couples. ■

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beneficial interests should be different from their legal interests will be very unusual. It may also be the case (also envisaged by Lord Bridge in *Lloyds Bank*) that the parties' initial intentions subsequently changed, perhaps in the light of a party making substantial improvements to the property.

**The outcome for Mr Stack and Miss Dowden**

The facts of *Stack* were considered to be very unusual, particularly as, despite the considerable length of the relationship, and the existence of four children, the parties had kept their financial affairs 'rigidly separate'. This was considered 'strongly indicative that they did not intend their shares, even in the property that was put into both their names, to be equal'.

Mr Stack's appeal was dismissed and the shares contended for in the Court of Appeal upheld, thus leaving Miss Dowden with 65%.

**Resulting trust principles**

It seemed that after *Oxley* the Court of Appeal regarded the resulting trust approach, the legal version of the biblical 'as ye sow, so shall ye reap', as outdated and unsatisfactory. Although an analysis of the outcome in *Oxley*

of cohabitation/beneficial interest cases where the transfer document pre-dated 1 April 1998. However, it is clear that it is a very helpful decision in cases where the property is conveyed into joint names and for one reason or another the purchasers fail to declare their beneficial interests on the transfer form.

**Litigation deterrent**

Due to the guidance given in this case, the decision is likely to prevent some cases litigating – because it is clear that the House of Lords upheld the presumption that equity follows the law unless the case is unusual.

Even if the case is unusual, there is a vast array of factors to consider before considering that the beneficial interests should be any different to the parties' legal interests. The *Stack* checklist will prove very helpful to practitioners in assessing the merits of a case.

As usual, in the interests of costs and proportionality, parties will have to consider whether the costs of litigating, given the chances of success, are worthwhile. The nebulous nature of the law hitherto has often given cases like this a nuisance value, making litigation a potentially lucrative exercise for one party.

Now the message from the House of Lords is that attempting to demonstrate

**Stack checklist**

Baroness Hale suggested a further non-exhaustive list of factors in *Stack* that should be considered when determining beneficial interest:

- any advice or discussions at the time of the transfer which cast light on the parties' 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 money;
- 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; and
- how they discharged the outgoings on the property and their other household expenses.