Judgments

Kernott v Jones

Trust and trustee - Constructive trust - Unmarried couple - Conveyance of house into joint names of cohabiting couple without express declaration of beneficial interests - Couple separating - Woman staying in occupation with children - Principles applicable in determining beneficial interests in property Whether court justified in inferring or imputing change in intentions with regard to respective beneficial interests following separation

[**2010] EWCA Civ 578**, (Transcript)

CA, CIVIL DIVISION

WALL, JACOB, RIMER LJJ

3 MARCH, 26 MAY 2010

26 MAY 2010

A Bailey for the Appellant

R Power for the Respondent

Francis Thatcher & Co; A J Sampson & Co

WALL LJ:

[1] I have had the advantage of reading in draft the judgments of Jacob and Rimer LJJ. I find myself in agreement with the latter and in respectful disagreement with the former. This judgment explains why, in my judgment, this appeal has to be allowed.

INTRODUCTION: THE APPEAL

[2] This is a cautionary tale, which all unmarried couples who are contemplating the purchase of residential property as their home, and all solicitors who advise them, should study. The facts are not in dispute and are unusual only in the sense that a great deal of time has elapsed since the parties separated.

[3] We heard short but skilful argument from both sides on 3 March 2010, on an appeal from a decision of Mr Nicholas Strauss QC sitting as a deputy judge of the High Court. His decision [2008] EWHC 1714 (Ch) is reported at [2009] 1 All ER 947. The deputy judge had dismissed an appeal by the Appellant, Leonard Trevor Kernott, against a decision of His Honour Judge Peter Dedman (the judge) sitting in the Southend County Court on 21 April 2008. The judge had decided that the value of a property at 39, Badger Hall Avenue, Thundersley in Essex (the property) should be divided as to 90% for Patricia Ann Jones (the Claimant in the proceeding before the judge and the Respondent to this appeal) and 10% for the Appellant, who had been the Defendant in the proceedings before the judge . The judge also dismissed the Respondent's claim in

relation to a property owned and occupied by the Appellant at 114, Stanley Road, Benfleet in Essex (114. Stanley Road). The judge refused permission to appeal and ordered the Appellant to pay the Respondent's costs.

[4] The Respondent abandoned her claim to an interest in 114, Stanley Road at the hearing before the judge, and has not sought to revive it.

[5] This is, of course, a second appeal. However, permission to appeal to this court from the decision of the deputy Judge was given on paper by Lloyd LJ on 2 October 2009.

[6] The case raises a short but, in my judgment, difficult issue, which can, I think, be formulated in the following way. 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 (here the Respondent) thereafter; (a) continues to live in the property; and; (b) assumes sole responsibility for its continuing acquisition and maintenance - ie 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 argument in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929) 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?

[7] A subsidiary issue arises if the question posed in the previous paragraph is answered in the affirmative, namely whether the split 90% to 10% is correct on the facts. This is not an issue which I propose to address. If what the judge and the deputy judge did on the primary issue was permissible, and provided that there was an arguable basis for the 90%-10% split then the actual split is an exercise of judicial discretion with which the court should not interfere - see *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647, [1985] FLR 894. In this judgment, therefore, I propose to concentrate on the issue which I have posed in para 6 above, a point aptly summarised, in my judgment, by Lloyd LJ when giving permission to appeal:

> "The application of the principles as regards jointly owned property enunciated in *Stack v Dowden* in a case in which it is said that the parties' intentions have changed since the acquisition of the relevant property . . . is problematical . . . ."

THE FACTS

[8] The Respondent was born on 26 November 1954. In 1980, when she was 26, she met the Appellant, whose age we do not know. In the Spring of 1981, the Respondent purchased a caravan for about £3,750, a purchase which she funded by means of a loan of £3,750 from her bank. Some time in 1983 or 1984, the Appellant moved in to live with her in the caravan and their first, child, a daughter, was born on 8 June 1984.

[9] In May 1985, the Respondent sold the caravan for £8,000, and she and the Appellant bought the property for £30,000. The Appellant's case is that the property was in poor condition (it is common ground that its price was depressed because it had belonged for many years to the elderly mother of one of the Respondent's clients) and he says he was willing to undertake work of repair and improvement. In one of his statements, the Appellant sets out the work he did.

[10] The Respondent contributed £6,000 from the sale of the caravan, and the balance of the purchase price of the property was raised by means of an endowment mortgage. The conveyance was taken in joint

names, but there is no evidence that either party either sought or was given advice about the implications of the conveyance into joint names, or what should happen to their respective beneficial interests in the event of a separation. This is a point to which I will return at the end of this judgment.

[11] We do not have any of the relevant documents, but as was commonplace at the time, it appears that the mortgage payments were of interest only (with the result that the amount outstanding remains unchanged) and that the loan was secured by a charge of the property and also by a charge of the endowment insurance policy which, if both parties survived the end of the mortgage term, would be sufficient to repay the loan. I infer, conversely, that if either party died during the mortgage term, the insurance company would have discharged the mortgage.

[12] The Appellant and the Respondent had a second child, this time a son, in 1986, but did not marry. The Appellant was employed in the summer months as an ice cream salesman, and in the winter either claimed benefit or undertook work as a builder. The Respondent was a peripatetic hairdresser. The financial arrangement between them was that the Appellant gave the Respondent £100 per week and from that and from her own earnings she paid for housekeeping, mortgage, outgoings and the premia on the insurance policy. The Appellant was also primarily responsible for building an extension to the property, which increased its value, as the Respondent accepted, by 50% of the purchase price.

[13] The Appellant and the Respondent separated in the latter part of 1993. Thereafter, the Respondent assumed sole responsibility for the outgoings on the property, and she also assumed sole responsibility for the maintenance of the children. She made no application to the Child Support Agency, and the Appellant made no offer of maintenance for the children. He says that he had contact with the children and from time to time and purchased items for them. She says that she has redecorated the property throughout several times, and has had to replace the flat roof on the extension which the Appellant had constructed. She has installed new gates and replaced the fencing and radiators.

[14] In May 1996, the Appellant bought himself 114 Stanley Road for £57,000. He raised the deposit - with the Respondent's agreement - by means of cashing in a separate life insurance policy which they both owned and the proceeds of which they divided equally. The Respondent used her share for her own purposes. Quite what this policy was, and how the premia on it had been funded, does not emerge from the evidence.

[15] In October 1995 the property was put on the market for £69,995 but not sold. In May 2006, more than 12 years after their separation, the Appellant sought the payment of his half share, and on 19 March 2008 he purported to sever the joint tenancy.

[16] On 26 October 2007, the Respondent commenced proceedings in the Southend County Court under the Trusts of Land and Appointment of Trustees Act 1996 (the 1996 Act) claiming declarations (1) that she owned the entire beneficial interest in the property; and (2) in the alternative, if the Appellant retained an interest in the property that she had an interest in 114 Stanley Road. As I have already indicated; the alternative application (2) was abandoned at the hearing before the judge.

[17] It was common ground between the parties at the hearing before the judge that, had the Appellant sought a joint or equal beneficial interest in the property immediately following the parties' separation in 1993, he would have been entitled to it. Whether or not he would have achieved a sale of the property is another matter, and not one which we are called upon to determine. Indeed, quite how the Appellant is to be paid whatever share he is ultimately found to have in the property is not a matter which we are asked to determine.

THE HEARINGS IN THE COURTS BELOW

[18] The Respondent's application came before His Honour Judge Peter Dedman on 21 April 2008. By that stage, of course, the Appellant had served notice on the Respondent severing the joint tenancy, and the value of the property was agreed at £245,000, The mortgage outstanding was £26,664 and the equity was taken as being £218,300. 114, Stanley Road was valued at £205,000 with an outstanding mortgage of a little under £37,000.

[19] The judge set out the facts, and referred to the speech of Baroness Hale of Richmond in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929, as well as to the decisions of this court in *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, [1986] 2 WLR 236 and *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, [2004] 3 All ER 703. Basing himself on the latter, and directing himself that he had to "look at the whole course of dealings between the parties to infer what the agreement between them was" - an approach which he found to have been approved by the House of Lords in *Stack v Dowden* - the judge concluded that:

> "30 The investment which the Claimant [ie Ms Jones] has made and in particular over the last 14 years with no contribution from the Defendant [ie Mr Kernott] towards the purchase of the property means that she is entitled to the larger share of the property. In addition on the evidence I was satisfied that she did so with very little contribution from him to the maintenance and support of the two children whilst they were growing up being housed, fed, watered, educated and looked after generally by the Claimant.
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> 31 In my view the Claimant has established that, whilst the intentions of the parties may well have been at the outset to provide them as a couple with a home for themselves and their progeny, those intentions have altered significantly over the years to the extent that the Defendant demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated.
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> 32 Having established that principle I have to consider what is fair and just between the parties bearing in mind what I have found with regard to the whole course of dealing between them.
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> 33 I take into account that both of the children of the family are now off hand, to the extent that they are self-supporting and that therefore the Claimant may not require as much accommodation as she did formerly but that the Defendant has his own accommodation which he has been able to afford by failing to contribute to the former property or to any significant degree to his former family.
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> 34 For the reasons I have given above I am unable to make any order in connection with the Defendant's present home of 114 Stanley Road but I consider that it is just and reasonable having regard to all of the issues raised in *Stack v Dowden* and bearing in mind that the Claimant paid the 20% deposit, that the parties thereafter were together for eight years in which assuming there was a joint contribution to the mortgage at best from the Defendant making his investment over say four years and the Claimant's investment would therefore have been over 17 or 18 years and that the Claimant has been responsible since their separation for maintaining their children without significant aid from the Defendant, that the value of the property at 39 Badger Hall Avenue should be divided as to 90% for the Claimant and 10% for the Defendant."

[20] The reserved judgment of the deputy judge on the Appellant's appeal is much longer and contains a detailed analysis of the relevant authorities, including, of course, both *Oxley v Hiscock* and *Stack v Dowden.* At para 31, the deputy judge came to the view that the cases generally, and *Stack v Dowden* in particular, was to be interpreted in the following way:

> "To the extent that the intention of the parties cannot be inferred, the court is free . . . to impute a common intention to the parties. Imputing an intention involves, as Lord Neuberger points out, attributing to the parties an intention which they did not have, or at least did [not] express to each other. The intention is one which the parties 'must be taken' to have had. It is difficult to see how this process can work, without the court supplying, to the extent that the intention of the parties cannot be deduced from their words or conduct, what the court considers to be fair. In particular, in the present case, if there is evidence of conduct from which it is right to conclude that the parties intended their respective

> shares to alter following Mr Kernott's departure, but none to indicate how, the only available criterion by which to assess the extent of the alteration is what is objectively fair, and the only available judge of that is the court."

[21] The "key passage" upon which the deputy judge based this conclusion, appears at para 4 of his judgment:

> "In cases of this kind, as was said by Baroness Hale in the Privy Council case of *Abbott v Abbott* [2007] UKPC 53 'The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.'
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> Or, as she had put it in *Stack v Dowden* at para 61 '. . . the search is still for the result which the parties must, in the light of their conduct, be taken to have intended'. However, there is a doubt which arises from her speech in that case as to whether, and if so how far, it is open to the court to consider what is 'fair', and therefore as to whether Judge Dedman's approach in this case was correct. The principal issue in this appeal is whether for the courts to consider what is fair, in assessing the amount of a party's interest in this kind of case, is to venture on to 'forbidden territory' . . . ."

[22] In summary, the deputy judge was of the view that the judge had been right on the facts to decide (1) that the parties were to be taken as having intended that their respective beneficial interests should be altered to take account of changing circumstances; and (2) that "in the absence of any indication by words or conduct as to how they should be altered, the appropriate criterion was what he considered to be fair and just". He described the parties' respective interests as "ambulatory" and said (in para 49):

> ". . . their respective interests could be quantified at any given time, but until this was done they changed over time to take account of the increasing contribution of Ms Jones and the ever more distant relationship between Mr Kernott and the property. Since the parties had no discernible intentions as to the amount of the adjustment, they must be taken to have intended that it should be whatever was fair and reasonable, as the judge held. In so holding, he did not override any different intention which, from their words or conduct, could reasonably have been attributed to them. Therefore, in my opinion, his approach can be justified as being in accordance with the common intention of the parties. Alternatively, if this is to be regarded as a fiction, it can be justified as the only option available to the court on quantification, once he had rightly decided that the parties intended their respective beneficial interests to change."

[23] As to quantum, the deputy judge applied *G v G* and decided that the proportions upon which the judge had alighted were neither unfair not unjust. He accordingly dismissed the appeal.

DISCUSSION

[24] In my judgment, the outcome of this appeal depends upon the application to its facts of two decided cases, both of which are binding upon us. Those two authorities are: (1) the decision of this court in *Oxley v Hiscock*; and (2) the decision of the House of Lords in *Stack v Dowden*. The latter, of course, is not only the more recent: being a decision of the House of Lords it is of greater authority. Thus if there is any inconsistency between the two, or if the latter overrules the former in any way, it is the latter which we much follow.

[25] *Oxley v Hiscock* was not, of course, a "joint names" case. The property in question had been conveyed into the sole name of Mr Hiscock. What, however, seems to me significant in the case is the move away from the concept of a resulting trust limited to the proportions of the parties' respective contributions to the acquisition costs. In other words, where the court can properly infer an intention to share (the first question which the court has to ask itself and answer), the answer to the second question: what should those shares be? (in the absence of an express agreement) appears to be that each party is entitled to that which the court considers fair having regard to the whole course of dealing between the parties in relation to the property, including any arrangements made to meet the various outgoings.

[26] After a magisterial review of the authorities, the solution crudely summarised in the preceding paragraph finds its expression in para 69 of Chadwick LJ's judgment:

> "In those circumstances, the second question to be answered in cases of this nature is 'what is the extent of the parties' respective beneficial interests in the property?' Again, 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 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 utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

(the emphasis is that of Baroness Hale of Richmond in *Stack v Dowden* at para 61 - see para 37 below)

[27] In para 70 of his judgment, Chadwick LJ identifies "three strands of reasoning" which have led the courts away from what he describes as "a traditional, property-based approach". They are: (1) the proposition that the interests of the parties are left by them to be determined either when their relationship comes to an end or the property is sold on the basis of what is then fair; (2) the fact that the court undertakes a survey of the whole course of dealing between the parties in order to determine what proportions the parties must be assumed to have intended from the outset for their beneficial ownership; and (3) the court makes such order as the circumstances require; this is a form of estoppel and is required to prevent a denial by the legal owner of the other party's beneficial interest.

[28] Chadwick LJ made it clear in para 71 of his judgment that he found the second of these strands the least satisfactory of the three. However, he remained of the view that the outcome required to be seen to be fair:

> "71 . . . But it can be said that, if it were their common intention that each should have some beneficial interest in the property - which is the hypothesis upon which it becomes necessary to answer the second question - then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair. But, as I have said, I think that the time has come to accept that there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel."

[29] On the facts, Chadwick LJ concluded that the judge had been wrong to find equality of beneficial interests:

> "73 If the judge had found, as was alleged by Mrs Oxley in para 8 of her particulars of claim, that 'it was expressly the joint intention of the Claimant and the Defendant at the time of [35 Dickens Close] that they should share the beneficial ownership of that property equally' I would have taken the view that it would be wrong for this court to go behind that finding of fact. But, as I have said, she did not make that finding of fact; and we have seen no evidence upon which she could have done so. This must, I think, be seen as a case where there is no evidence of any discussion between the parties as to the amount of the share which each was to have. And, on that basis, the judge asked herself the wrong question. She should not have sought, by reference to the conduct of the parties while they were living together at 35 Dickens Close, to determine what intention both were then 'evincing' - unless, by that, she was able to find a common intention, communicated to each other, to determine, definitively, the shares which had been left undetermined at the time of acquisition. She might have asked herself whether their subsequent conduct, while living together at 35 Dickens Close, was consistent only with a common intention, at the time of the acquisition, that their shares should be equal; but she did not. The right question, in the circumstances of this case, was 'what would be a fair share for each party having regard to the whole course of dealing between them in relation to the property'?
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> 74 I think that that is a question to which this court can, and should, give an answer. I do not think it necessary to remit the matter to the county court. In my view to declare that the parties were entitled in equal shares would be unfair to Mr Hiscock. It would give insufficient weight to the fact that his direct contribution to the purchase price (£60,700) was substantially greater than that of Mrs Oxley (£36,300). On the basis of the judge's finding that there was in this case 'a

> classic pooling of resources' and conduct consistent with an intention to share the burden of the property (by which she must, I think, have meant the outgoings referable to ownership and cohabitation), it would be fair to treat them as having made approximately equal contributions to the balance of the purchase price (£30,000). Taking that into account with their direct contributions at the time of the purchase, I would hold that a fair division of the proceeds of sale of the property would be 60% to Mr Hiscock and 40% to Mrs Oxley.
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> 75 I would set aside the order of 20 May 2003; declare that Mrs Oxley is entitled to 40% of the proceeds of sale of 35 Dickens Close; and adjust the sum payable to her by Mr Hiscock accordingly."

[30] Mance and Scott Baker LJJ agreed with Chadwick LJ but did not add judgments of their own.

[31] As the judge in the instant case found the 90%-10% split expressly on the basis of fairness, and took into account the "whole course of dealing" between the parties, it seems to me that *Oxley v Hiscock* provides a platform from which it would be possible to dismiss this appeal, despite the fact it was not a "joint names" case. The critical question, therefore, as it seems to me, is whether or not the approach taken by Chadwick LJ in *Oxley v Hiscock* is consistent with *Stack v Dowden*, the authority to which I now turn.

[32] *Stack v Dowden* was, of course, a "joint names" case, although (as in the instant case) the land registry form contained no explicit declaration of the parties' respective beneficial interests. The judge divided the proceeds of sale of the house equally between the parties and ordered the man to be paid £900 per month until the house was sold as compensation for his exclusion from it pending the sale. This court allowed the woman's appeal against both orders and gave the woman 65% as against the man's 35%. The House of Lords dismissed the man's appeal but gave different reasons for that result to those given by this court. The current Master of the Rolls, Lord Neuberger of Abbotsbury, whilst agreeing with the 65%-35% split, dissented as to the issue of compensation for the man's exclusion from the property.

[33] The starting point, where a residential property is conveyed into the joint names of cohabitees, is clearly stated by Baroness Hale of Richmond at para 56 of *Stack v Dowden*:

> "56 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 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."

[34] And in para 58, the same message is repeated:

> "58 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 the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved."

[35] So far, so good. Baroness Hale then poses the critical question:

> "59 The question is, how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties' financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have had a contrary intention? Or is it that the contrary can be proved by looking at all the relevant circumstances in order to discern the parties' common intention?"

[36] Like Lord Walker of Gestingthorpe, whose speech in *Stack v Dowden* precedes that of Baroness Hale, the latter notes the decline of the resulting trust based on contribution to acquisition in favour of what is described as the "new pragmatism". The search was to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it (para 60). Baroness Hale then cites with approval and italicised emphasis para 69 of Chadwick LJ's judgment in *Oxley v Hiscock* which I have set out (complete with Baroness Hale of Richmond's emphases) at para 26 above.

[37] Baroness Hale then cites para 4.27 of the Law Commission's Consultation Paper *Sharing Homes*: namely:

> "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."

She comments:

> "That may be the preferable way of expressing what is essentially the same thought, for two reasons. First, it emphasizes that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1970] AC 777 without even the fig leaf of s 17 of the 1882 Act.
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> 62 Furthermore, although the parties' intentions may change over the course of time, producing what my noble and learned friend, Lord Hoffmann, referred to in the course of argument as an 'ambulatory' constructive trust, at any one time their interests must be the same for all purposes. They cannot at one and the same time intend, for example, a joint tenancy with survivorship should one of them die while they are still together, a tenancy in common in equal shares should they separate on amicable terms after the children have grown up, and a tenancy in common in unequal shares should they separate on acrimonious terms while the children are still with them."

[38] In para 64 of the report, Baroness Hale comments that the majority of cases reported since *Pettitt* and *Gissing* [1971] AC 886, [1970] 2 All ER 780, [1970] 3 WLR 255 have concerned homes conveyed into the name of one party only and it is in that context that the more flexible approach to quantification identified by Chadwick LJ in *Oxley v Hiscock* has emerged. Conversely, it was in the joint names cases that the courts had sometimes reverted to the strict application of the resulting trust (para 65).

[39] However, Baroness Hale goes on expressly to agree with Chadwick LJ when he states in paras 47 and 48 of *Oxley v Hiscock* that the concept of the resulting trust applies more readily to the first question: was there an intention to share? The question as to the *extent* of the parties' respective shares was one which the court may well have to answer by inference from the parties' subsequent conduct: the simple fact of a conveyance into joint names had to be taken into account, but was not conclusive: the question in a joint names case was not simply: what is the extent of the parties' beneficial interests? But "did the parties intend their beneficial interests to be different from their legal interests?" and, if they did, to what extent?

[40] In summary, the burden is on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and "a full examination of the facts . . . is unlikely to lead to a different result unless the facts are very unusual" (para 68).

[41] Baroness Hale then gives a list (which, of course, is not exhaustive) of the factors which may be relevant. She also accepts that, whatever the parties' intentions at the outset, these will have changed by the time that the court decides the matter. She analyses the facts of the case (which are, of course, starkly

different from the facts of this appeal) and applies the law to those facts. It was for Ms Dowden to show that the common intention, when taking a conveyance of the house into joint names or thereafter, was that they should hold the property otherwise than as beneficial joint tenants. Precise findings on many of the factors relevant to answering that question were missing, because the judge had looked at the parties' relationship and at their "entire course of conduct together". In para 86, Baroness Hale was critical of this approach:

> ". . . With the best will in the world, and acknowledging the problems of making more precise findings on many issues after this length of time, this is not an adequate answer to the question. It amounts to little more than saying that these people were in a relationship for twenty seven years and had four children together. During this time Mr Stack made unquantifiable indirect contributions to the acquisition and improvement of one house and quantifiable direct contributions to the acquisition of another. Both co-operated in looking after the home and bringing up their children."

[42] Baroness Hale went on to find "many factors" to which Ms Dowden could point to indicate that the parties had a different common intention to a 50-50 share. There was her substantially greater financial contribution to the acquisition of the property. She had also contributed more to the capital repayment of the mortgage loan. On the other hand, there was Mr Stack's earlier payments into the Building Society account which would have enabled Ms Dowden to save more of her income than would otherwise have been possible. He had also made a contribution towards the substantial improvements made to the property.

[43] Having identified the pitfalls in an arithmetical approach to ascertaining parties' intentions, Baroness Hale concludes:

> "89 . . . The one thing that can clearly be said is that, when Chatsworth Road was bought, both parties knew that Ms Dowden had contributed far more to the cash paid towards it than had Mr Stack. Furthermore, although they planned that Mr Stack would pay the interest on the loan and premiums on the joint policy, they also planned to reduce the loan as quickly as they could. These are certainly factors which could, in context, support the inference of an intention to share otherwise than equally.
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> 90 The context is supplied by the nature of the parties' conduct and attitudes towards their property and finances. This is not a case in which it can be said that the parties pooled their separate resources, even notionally, for the common good. The only things they ever had in their joint names were Chatsworth Road and the associated endowment policy. Everything else was kept strictly separate. Each made separate savings and investments most of which it was accepted were their own property. It might have been asked, 'why then did they make an exception for Chatsworth Road?' This is the obvious question. The obvious answer, which Ms Dowden has never denied, was that this time it was indeed intended that Mr Stack should have some interest in the property. In the light of all the other evidence, it cannot be conclusive as to what that interest was.
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> 91 There are other aspects to their financial relationship which tell against joint ownership. Chatsworth Road was, of course, to be a home for the parties and their four children. But they undertook separate responsibility for that part of the expenditure which each had agreed to pay. The only regular expenditure to which it is clear that Mr Stack committed himself was the interest and premiums on Chatsworth Road. All other regular commitments in both houses were undertaken by Ms Dowden. Had it been clear that he had undertaken to pay for consumables and child minding, it might have been possible to deduce some sort of commitment that each would do what they could. But Mr Stack's evidence did not even go as far as that.
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> 92 This is, therefore, a very unusual case. There cannot be many unmarried couples who have lived together for as long as this, who have had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal (still less that they intended a beneficial joint tenancy with the right of survivorship should one of them die before it was severed). Before the Court of Appeal, Ms Dowden contended for a 65% share and in my view she has made good her case for that."

[44] Lord Hoffman agreed with Baroness Hale's reasoning, as did Lord Hope and Lord Walker of Gestingthorpe. Both of the latter made speeches, although Lord Walker's is the more relevant for present purposes.

[45] Lord Neuberger of Abbotsbury adopted a much more conservative approach. He favoured "the resulting trust analysis" which, he concluded, resulted in the appeal being dismissed. In the alternative, he drew a distinction between an "inferred" intention and an "imputed intention". In para 126 - 131 of the report he said:

> "126 An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.
>
> 127 To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area, but it also would involve a judge in an exercise which was difficult, subjective and uncertain. (Hence the advantage of the resulting trust presumption). It would be difficult because the judge would be constructing an intention where none existed at the time, and where the parties may well not have been able to agree. It would be subjective for obvious reasons. It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle, identified by Baroness Hale at paragraph 61, that the court's view of fairness is not the correct yardstick for determining the parties' shares (and see *Pettitt* at 801C-F, 809C-G and 826C).
>
> 128 A constructive trust does not only arise from an express or implied agreement or understanding. It can also arise in a number of circumstances in which it can be said that the conscience of the legal owner is affected. For instance, it may well be that facts which justified a proprietary estoppel against one of the parties in favour of the other would give rise to a constructive trust. However, in agreement with Lord Walker, I do not consider it necessary or appropriate to discuss proprietary estoppel further in this case.
>
> 129 It is hard to identify, particularly in the abstract, the factors which can be taken into account to infer an agreement or understanding, and the effect of such factors. Each case will be highly fact-sensitive, and what is relevant, and how, may be contentious, whether one is considering actions, discussions or statements, even where there is no dispute as to what was done or said.
>
> 130 In the present case, for instance, there is a disagreement as to the effect of the declaration in the transfer of the house to the parties that the survivor 'can give a valid receipt for capital money arising on the disposition of the land'. At any rate in the absence of any evidence that the effect of this provision was explained to the parties, I would reject the contention that it has the effect of operating as a declaration of joint beneficial ownership. That contention is based on inference, and the legal basis of that inference is open to argument. Indeed, at the time the home was acquired, any well-informed solicitor would have advised that the law was that such a declaration probably would not give rise to such an inference, in the light of the Court of Appeal's decision in *Huntingford v Hobbs* [1993] 1 FLR 736. Quite apart from that, 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.
>
> 131 Any assessment of the parties' intentions with regard to the ownership of the beneficial interest by reference to what they said and did must take into account all the circumstances of their relationship, in the same way as the interpretation of a contract must be effected by reference to all the surrounding circumstances. However, that does not mean that all the circumstances of the relationship are of primary or equal relevance to the issue."

[46] In summary, therefore, Lord Neuberger saw no reason to depart from the resulting trust analysis as at the date of acquisition. Of course, the relevant beneficial interests thereby established could be subsequently altered, although Lord Neuberger did not accept Lord Hoffman's used of the word "ambulatory". Compelling evidence was required to infer a change, and such evidence would normally "involve discussions, statements or action subsequent to the acquisition". However:

> "Even the fact that one party pays all the outgoings and the other does nothing would not seem to me to justify any adjustment to the original ownership of the beneficial interest (subject to the possible exception of mortgage repayments)."

[47] Lord Neuberger was unhappy with Chadwick LJ's approach in *Oxley v Hiscock,* namely that 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, he argued, fairness was not the appropriate yardstick. Secondly, the formulation appeared to contemplate an imputed intention. Thirdly, "the whole course of dealing . . . in relation to the property" was too imprecise, as it gave insufficient guidance as to what was 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.

[48] Lord Neuberger also disagreed 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. At the same time, however, he accepted the formulation that the court should "undertak[e] 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".

[49] In summary, therefore, Lord Neuberger's position is, I think, set out in paras 146 and 147 of the report:

> "146 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. To say that factors such as a long relationship, children, a joint bank account, and sharing daily outgoings of themselves are enough, or even of potential central importance, appears to me not merely wrong in principle, but a recipe for uncertainty, subjectivity, and a long and expensive examination of facts. It could also be said to be arbitrary, as, if such factors of themselves justify a departure from the original apportionment, I find it hard to see how it could be to anything other than equality. If a departure from the original apportionment was solely based on such factors, it seems to me that the judge would almost always have to reach an 'all or nothing' decision. Thus, in this case, he would have to ask whether, viewed in the round, the personal and financial characteristics of the relationship between Mr Stack and Ms Dowden, after they acquired the house, justified a change in ownership of the beneficial interest from 35-65 to 50-50, even though nothing they did or said related to the ownership of that interest (save, perhaps, the repayments of the mortgage). In my view, that involves approaching the question in the wrong way. Subject, perhaps, to exceptional cases, whose possibility it would be unrealistic not to acknowledge, an argument for an alteration in the way in which the beneficial interest is held cannot, in my opinion, succeed, unless it can be shown that there was a discussion, statement or action which, viewed in its context, namely the parties' relationship, implied an actual agreement or understanding to effect such an alteration.
>
> 147 Turning to the present case, I consider that there are no grounds for varying the split of the beneficial ownership, which arose in 1993 on the acquisition of the house, as a result of any events which occurred subsequently, at any rate to an extent more favourable to Mr Stack than the 35% accepted by the Court of Appeal. Subject to one exception, there was nothing said or done by the parties which could justify a change from that which arose at the date of acquisition."

THE APPLICATION OF THE AUTHORITIES TO THIS APPEAL

[50] I have not found this an easy appeal to resolve. On the one hand, I think there is considerable force in Lord Neuberger's analysis. On the other, of course, I remind myself that his was the minority view.

[51] What renders this case unusual is, of course, the long period of delay before the Appellant severed the joint tenancy and sought his half share. During that period, which lasted some 12 years, he made no contribution towards the property either by way or improvements, outgoings or mortgage payments. I leave on one side his failure to maintain the children, as the Respondent had a remedy in this regard which she chose not to exercise, although his failure to maintain the children might well be relevant were the Appellant to seek to charge the Respondent for her occupation of the property, and were the process of equitable accounting applied between them.

[52] There is, moreover, a total lack of evidence about the parties' intentions. They do not appear to have discussed the matter. The severance of the joint tenancy by the Appellant in March 2008 is clear evidence that as at that date he regarded the beneficial shares each had in the property as joint - see *Goodman v Gallant* [1986] Fam 106, [1986] 1 All ER 311, [1986] 2 WLR 236. That, alas, is about the only piece of objective evidence as to the parties' intentions.

[53] Furthermore, his decision to wait until the children were older when the Respondent no longer needed the property as a home for herself and the children is consistent with cases such as *Mesher v Mesher* [1980] 1 All ER 126n, when the courts allowed a wife with young children to live in a jointly owned property thereby postponing the realisation of the husband's half share during the children's respective minorities. Indeed, were this a commercial transaction between parties at arm's length, I am in little doubt that the beneficial interests would have remained the equal shares that they were at the time of the separation and that the proceeds of sale would be divided equally between the parties.

[54] On the other hand, as Baroness Hale remarked at the outset of her opinion, although the law to be applied is the same, "an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between . . . cohabitant and cohabitant". In these circumstances, the question becomes whether there is sufficient in this case to warrant the inference that following their separation and the acquisition by the Appellant of a fresh property in his own name there was a shift in the parties' intentions. On this argument, the Respondent continued to acquire the property: the Appellant ceased to make any contribution towards it. In these circumstances, the Appellant's interest in the property becomes, in Lord Hoffman's phrase "ambulatory" and it became the function of the judge to decide - at a given point - what the respective beneficial interests should be. On this argument, whilst 50-50 was right on acquisition - and indeed on separation as the parties agreed - the position thereafter altered over time.

CONCLUSION

[55] The office of the judge, as Bacon famously remarked, "is '*jus dicere'* and not '*jus dare'".* This is not a case under the Matrimonial Causes Act 1973, and the government has not implemented the Law Commission's proposals relating to unmarried couples. This court must resolve this appeal under the law relating to trusts as explained in *Oxley v Hiscock* and *Stack v Dowden*.

[56] I start from Baroness Hale's premises that the conveyance into joint names means that the beneficial interests in the property are joint - see *Stack v Dowden* at paras 56 and 58 cited at paras 33 and 34 of this judgment.

[57] 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.

[58] This is a point which I have considered anxiously, and at the end of the day I simply cannot infer such an intention from the parties' conduct. In my judgment, the conveyance into joint names, following *Stack v Dowden* created joint beneficial interests, and the parties agreed that when they separated they had equal interests. There has to be something to displace those interests, and I have come to the conclusion that 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. In my judgment, the Appellant has a 50% interest in the property, and both the judge and the deputy judge were wrong to conclude otherwise.

[59] In my judgment there is no tension between *Stack v Dowden* and *Oxley v Hiscock* when applied to the facts of this case. The former starts with the parties having joint beneficial interests in the property: in the latter, there was an intention to share, but no definition of the respective interests. Looking at para 73 of *Oxley v Hiscock*, which I have set out at para 29 above, (If the judge had found . . . that it was expressly the joint intention . . . that they should share the beneficial ownership . . . equally) the result would have been 50:50. Thus if one applies *Oxley v Hiscock* to the facts of this case, the result is equality of interests, and there is nothing in *Oxley v Hiscock* which, in my judgment, displaces the *Stack v Dowden* presumption of equality based on the transfer into joint names. Rather, Mr Hiscock got 60% because there was no declaration of equal beneficial interests and he had contributed substantially more to the purchase price than Mrs Oxley, even though their contribution to the running costs were equal. By like token, and absent an inferred joint intention to reduce Mr Dowden's share to nothing over time, I see nothing in the facts of the instant case which entitles the court to reach the result achieved by the judge and the deputy judge.

[60] I remind myself that I am deciding a narrow point. I am not deciding whether there should be a sale or at what point the Appellant should realise his interest in the property. I am deciding what that interest is. In short, in my judgment, there is nothing on the facts of this case to displace the presumption of equality.

[61] I described this case as a cautionary tale. So, in my judgment, it is. The purchase of residential accommodation is perhaps the single most important financial transaction which any individual transacts in a lifetime. It is therefore of the utmost importance, as it seems to me, that those who engage in these transactions, and those who advise them, should take the greatest care over such transactions, and must - particularly if they are unmarried or if their clients are unmarried - address their minds to the size and fate of the respective beneficial interests on acquisition, separation and thereafter. It is simply impossible for a court to analyse personal transactions over years between cohabitants, and the costs of so doing are likely to be disproportionate in any event. Cohabiting partners must, it seems to me, contemplate and address the unthinkable, namely that their relationship will break down and that they will fall out over what they do and do not own.

[62] If this Appellant and this Respondent had truly intended that the Appellant's beneficial interest in the property should reduce post separation, or if the property was to belong to the Respondent when the Appellant acquired his own house, they should have so decided and acted accordingly by adjusting their beneficial interests in the property. I cannot spell such an intention out of their actions. If anything I find equal interests on separation and an agreement by the Appellant to defer realisation for a number of years prior to the severance of the joint tenancy, an action which, in my judgment, crystallises his 50% interest.

[63] I would, accordingly allow the appeal, and declare that the parties hold the severed joint tenancy as tenants in common in equal shares.

RIMER LJ:

[64] I have had the advantage of reading in draft the judgments of Wall LJ (as he was at the hearing of this appeal) and of Jacob LJ. Like Wall LJ, I would allow the appeal and declare that the parties hold 39 Badger Hall Avenue, Thundersley, Benfleet, Essex ("the house") as tenants in common in equal shares.

[65] I agree with my Lords that the principles that Judge Dedman was required to apply are those adopted by the majority of the House of Lords in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929. In practice, that means those explained by Baroness Hale of Richmond, with whom Lord Hoffmann was content simply to agree, and with whom Lord Hope of Craighead and Lord Walker of Gestingthorpe also agreed in concurring speeches of their own. Lord Neuberger of Abbotsbury dissented as to the principles

favoured by the majority although agreed as to the disposition of the appeal.

[66] Baroness Hale explained, at 40, that the principles applicable for the determination of the beneficial shares in a joint names purchase in which there is no express declaration as to such shares are the same for a co-habiting as for a married couple. She said, at 54, that in such a case it should be assumed that equity follows the law and that the beneficial interests reflect the legal interests; and, at 56 and in the last sentence of 58, that this means joint beneficial ownership. She added, at 56, that the burden is upon the joint owner who claims to have other than a joint beneficial interest to prove it.

[67] I take all that to be the majority's agreed position. Lord Hope, at 4, said that "joint beneficial ownership" is the starting point in a joint names case; and, at 5, that it is for the party who contends that "the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts". Lord Walker said, at 14, that the starting presumption in a joint ownership case as between a married or co-habiting couple is that their beneficial shares are "equal", with "a considerable burden [being] on whichever of them asserts that their beneficial interests are unequal, and do not follow the law". I do not believe that in referring to the beneficial interests as "equal" Lord Walker (any more than Lord Hope at 4 and 11) meant that they were other than "joint", since only if they were joint would they follow the law.

[68] The facts of this case are that the parties bought the house in joint names in May 1985 and occupied it with their two children until November 1993, when the Appellant, Mr Kernott, moved out and the parties separated. The Respondent, Patricia Jones, stayed in the house with the children, who in November 1993 were 9 and 7 respectively and are now in their 20s. The house cost £30,000, Ms Jones provided the deposit of £6,000 and the balance was borrowed on an interest-only mortgage secured by a charge on the house and on an endowment policy taken out in joint names. Both parties contributed to the expenses of the house whilst they were occupying it, including to the mortgage interest and endowment policy premium payments. Mr Kernott also spent time, effort and money in carrying out improvements to the house, including building an extension.

[69] Ms Jones conceded at that trial that had the house been sold in November 1993, she and Mr Kernott would have been entitled to the net proceeds equally. That concession was made because, as Mr Power accepted, Ms Jones could not then have rebutted the starting presumption that the beneficial interest followed the legal interest. Since November 1993, Ms Jones has remained in occupation of the house and has alone maintained it and discharged all outgoings in respect of it, including the mortgage interest and endowment policy premiums. The issue was whether those facts justified the conclusion that by October 2007 (the date of her claim) the beneficial ownership had changed from equal to unequal shares under a beneficial tenancy in common, with Ms Jones having the larger share.

[70] The judge found that it had and that Ms Jones had a 90% share and Mr Kernott a 10% share. He therefore held that Ms Jones had discharged the heavy burden that *Stack* shows was upon her of proving that by October 2007 the beneficial ownership of the house was held other than jointly. The question in this second appeal is whether, given the concession as to the equal beneficial ownership at November 1993, there was a factual basis for the judge's conclusion that by October 2007 the parties' respective beneficial shares had changed to those he declared. To answer that question, I must return to Baroness Hale in *Stack* in order to see how a joint purchaser such as Ms Jones might disprove the presumption that her beneficial interest followed her legal interest. Baroness Hale embarked upon her consideration of that at 59 and concluded it in para 70.

[71] Baroness Hale explained that the determination of whether someone such as Ms Jones has proved that by 2007 she and Mr Kernott had beneficial shares in the house other than joint shares requires a "search . . . to ascertain the parties' shared intentions, actual, inferred, or imputed, with respect to the property in the light of their whole course of conduct in relation to it". (Paragraph 60). She said again, at 61, that the search is "for

the result which reflects what the parties must, in the light of their conduct, be taken to have intended". In the same paragraph she said that it is not open to the court to abandon that search "in favour of the result which the court itself considers fair", so rejecting the approach favoured by Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, at 69, [2004] 3 All ER 703 (a sole name case). By citing with approval an extract from a Law Commission paper, she made it plain that the parties' intentions for which the court is searching are not just that the shares should be other than joint but also what they should be. At 62 she recognised that such intentions may change over time, producing what Lord Hoffmann had described in argument as an "ambulatory constructive trust". At 66 she pointed out that the question raised by a joint names case is "did the parties intend their beneficial interests to be different from their legal interests?" and, if they did, in what way and to what extent. At 68 she repeated that the burden will be on the person seeking to show that they did so intend, and how; and that (in effect), in joint names cases, an examination of the facts is unlikely to result in the discharge of that burden unless they are very unusual. She added:

> ". . . Nor may disputes be confined to the parties themselves. People with an interest in the deceased's estate may well wish to assert that he had a beneficial tenancy in common. It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase."

The first two sentences allude to the feature of a beneficial joint tenancy (as opposed to a beneficial tenancy in common) under which the beneficial interest of a deceased co-owner will accrue to the survivor. The third sentence appears to amount to a rejection of any notion that an unequal contribution to a joint names purchase will by itself enable the greater contributor to assert a greater beneficial interest than the presumed joint interest. Finally, at 69 Baroness Hale provided a non-exhaustive list of the factors that may be relevant "to divining the parties' true intentions". Having earlier explained in 68 that a full examination of the facts will be unlikely, save in very unusual cases, to justify a departure from the starting presumption that the beneficial interest follows the legal interest, Baroness Hale made the point again.

[72] All that Baroness Hale said might, therefore, suggest that a bid by a joint purchaser to establish a greater beneficial interest than a joint interest will involve the steepest of climbs, usually resulting in a failure to attain the summit. In *Stack* itself, however, the House was satisfied that Ms Dowden and Mr Stack had 65% and 35% beneficial interests rather than the joint beneficial interests presumed from their purchase in joint names, such shares broadly approximating to their respective contributions to the purchase. Ms Dowden had - as Mr Stack knew - contributed far more cash to the original purchase of the property than he had. In addition, save that the parties had bought the property in joint names, they had otherwise kept their financial affairs rigidly separate, a context which Baroness Hale said, at 92, made *Stack* "a very unusual case". She explained that the fact of the unequal contributions in such context supported the inference that the parties intended to share otherwise than equally (see 87 to 90) and instead to enjoy a beneficial tenancy in common in the shares mentioned. *Stack* was not a case in which there had been any *actual* expression by the parties of an intention to that effect.

[73] Lord Walker agreed, at 33, that *Stack* was an exceptional case. It is perhaps less clear to what extent Lord Hope did as well. He said, at 11:

> "In a case such as this, where the parties had already been living together for about 18 years and had four children when 114 Chatsworth Road was purchased in joint names and payments on the mortgage secured on that property were in effect contributed to by each of them equally, there would be much to be said for adhering to the presumption of English law that the beneficial interests were divided between them equally. But I do not think that it is possible to ignore the fact that the contributions which they made to the purchase of that property were not equal. The relative extent of those contributions provides the best guide as to where their beneficial interests lay, in the absence of compelling evidence that by the end of their relationship they did indeed intend to share the beneficial interests equally. The evidence does not go that far. On the contrary, while they pooled their resources in the running of the household, in larger matters they maintained their financial independence from each other throughout their relationship."

[74] The second and third quoted sentences appear to be saying that the mere fact of the unequal contribution to the purchase price justified a departure from the presumption that the joint names purchase pointed to joint beneficial interests; a conclusion that could only be displaced by compelling evidence to the contrary. That perhaps comes close to reversing the presumption from which, in agreement with Baroness Hale, Lord Hope had started at 4 and repeated in the first quoted sentence. Having said that, I nevertheless understand Lord Hope to have embraced with the majority the principle that the question of whether, in a joint names case, there has been a rebuttal of the presumption of a "joint beneficial interest" has to be answered by reference to the outcome of a search as to the parties' shared intentions with respect to the property, although he did not expressly so explain his own reasoning for concurring in dismissing the appeal.

[75] I suspect that *Stack* may be regarded by trial judges as presenting something of a challenge. I am not sure, with respect, what is to be made of the emphasis by Baroness Hale and Lord Walker that *Stack* was an exceptional case. The unequal contributions to the purchase in that case would not, I would think, be unusual and it was that fact that appears to have influenced Lord Hope. The "context" to which Baroness Hale referred may be unusual, I do not know, but the facts in every case will be different and each case has to be decided on its own facts.

[76] The key feature of *Stack* is, however, the task that the majority sets for trial judges, namely that of searching for the parties' shared intentions - "actual, inferred or imputed" - with respect to the property. Since an 'inferred' intention must also be an "actual" intention, I presume that Baroness Hale used the word "actual" as a synonym for "express", referring thereby to an intention that the parties had expressly uttered, either orally or in writing. Contested cases in which there is an issue as to whether there has been any such expression of intention are, I suspect, probably relatively rare. The likelihood is that in most contested joint purchase cases the parties will have remained silent as to whether they intended their beneficial shares to be other than joint. In such a case one exercise clearly set by *Stack* is to investigate whether there is any basis for inferring an intention that their shares were to be of particular proportions (an intention which, from the parties' standpoint, might perhaps more conventionally be regarded as an implied one). In most cases such a quest may well be elusive, because if the parties actually had any such intention, they would have voiced it; and if they did not voice it, that will probably be because they did not have one, with the consequence that there will be no basis for inferring otherwise. There will therefore in many cases perhaps be a degree of artificiality in the search for an intention that the parties did not utter but could have done. Taking the facts of *Stack* itself, it may not perhaps be obvious to everyone how the facts described by Baroness Hale justified the inference of an unspoken intention that the beneficial shares were to be held in the declared proportions.

[77] As for Baroness Hale's statement in 60 that the court must or can also look for the parties' *imputed* intention, I do not, with the greatest respect, understand what she meant. It is possible that she was using it as a synonym for *inferred* (cf such use by Lord Pearson in *Gissing v Gissing* [1971] AC 886, at 902G to H, [1970] 2 All ER 780, [1970] 3 WLR 255), in which case it adds nothing. If not, it is possible that she was suggesting that the facts in any case might enable the court to ascribe to the parties an intention that they neither expressed nor inferentially had: in other words, that the court can invent an intention for them. That, however, appears unlikely, since it is inconsistent with Baroness Hale's repeated reference to the fact that the goal is to find the parties' intentions, which must mean their real intentions. Further, the court could and would presumably only consider so imputing an intention to them if it had drawn a blank in its search for an express or an inferred intention but wanted to impose upon the parties its own assessment of what would be a fair resolution of their differences. But Baroness Hale's rejection of that as an option at para 61 must logically exclude that explanation. In his dissenting speech, Lord Neuberger, at 125 to 127 advanced an apparently comprehensive demolition of the "imputation" theory. I recognise that those paragraphs cannot be invoked as support for the view that Baroness Hale's unexplained use of the word "imputed" was not intended to mean what it might be read as meaning. But if she was using the word in its ordinary meaning, it is in my view also difficult to see how the imputing to the parties of a non-existent intention can stand with her emphasis that the burden of rebutting the presumed joint beneficial interest is heavy and that only in very unusual cases will it be discharged. That is because, if the "imputing" of an intention is open to trial judges, they could in principle do it in every case in which an assessment of the relevant history reflects an unequal

contribution to the purchase. I accordingly do not myself interpret *Stack* as having intended to enable courts to find, by way of the imputation route, an intention where none was expressly uttered nor inferentially formed.

[78] I return to the case under appeal. Having regard to the guidance in *Stack,* and the concession that at the time of the parties' separation in 1993 the starting presumption of joint beneficial ownership had not been rebutted, the question for the judge was whether there was any factual basis justifying a finding that, by the time of Ms Jones's claim, she and Mr Kernott intended their beneficial shares in the house to be other than equal; and, if so, what they intended their revised shares to be. There was no finding (and I presume no evidence) that during the more than 14 years between the separation in 1993 and the trial they had ever had a discussion about a change of their beneficial ownership. So far as the witness statements are concerned, all that they said about the house upon and following the separation was what Mr Kernott said in para 20 of his statement of 28 February 2008. That was that when the parties separated in 1993, he asked Ms Jones what would happen to the house, to which she is said to have replied "you will get your share when I am ready". Mr Kernott said he had "periodically broached the subject with Ms Jones and her response has always been the same"; and that he decided not to press the matter until the children were a bit older and were less dependent. Ms Jones made a responsive statement on 1 April 2008, although she made no comment on what he had said in para 20. The judge made no finding as to whether or not he accepted what Mr Kernott had there said. I regard that as unfortunate since it seems to me to have been a relevant piece of evidence. If the judge did accept it, it invited an inquiry as to what "share" Ms Jones meant by her reference to Mr Kernott's "share"? Was it to a 50% share or to one that was steadily diminishing as the years went by? Whether this was canvassed in the oral evidence is something neither the judge nor the papers tell us.

[79] Starting from the position that at the time of the separation in November 1993, the parties had equal beneficial shares in the house, the key part of the judge's judgment as to whether by 2007 they had evinced an intention to re-distribute the beneficial ownership is contained in paras 30 to 34, which Wall LJ has cited. I regard that as a difficult passage. First, to the extent that the judge may have factored into his considerations (in paras 30 and 34) that Ms Jones had made a larger contribution to the purchase of the house during the period *before* the separation, I question its relevance given the accepted starting position as at November 1993 just mentioned. The relevant question was whether the parties' subsequent conduct justified the finding of an intention to change their then agreed beneficial shares.

[80] As to that the judge made no finding that there was any express agreement about that. That is no surprise because there was obviously no such agreement. He pointed to the undisputed facts that since the separation Ms Jones had alone paid the mortgage interest, endowment policy premiums and outgoings in respect of the house; and that Mr Kernott's financial contribution to her household was limited to modest assistance towards the maintenance and support of the children. His justification for a finding that the parties' intentions as to the beneficial ownership of the house had changed appears to have been based exclusively on what he said in para 31, of which the key part is the finding that Mr Kernott had:

> ". . . demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated."

[81] The judge was, I understand, there saying no more than that from 1993 until about 2007 Mr Kernott had paid nothing towards the house or its outgoings, nor manifested any interest in it. From that he appears to have felt able to infer that both parties intended a departure from the equal beneficial interest in the house that they both had in 1993. Having arrived at that conclusion, he considered, in para 32, that his task was to assess "what is fair and just between the parties bearing in mind what I have found with regard to the whole course of dealing with them". He then, in para 34, arrived at the 90% and 10% split.

[82] It is correct that following the separation Ms Jones paid all the outgoings in respect of the house, including the mortgage interest and the endowment premiums. Her evidence was that she had not sought a contribution from Mr Kernott, although as a joint legal owner with joint responsibility as such, he ought to have contributed to such payments. Equally, although he was a beneficial owner, Mr Kernott was neither occupying the house nor receiving anything by way of a return from it (for example, an occupation rent), although Ms Jones's discharge of the mortgage interest and endowment policy premiums could or might well be regarded as (probably more than) satisfying any claim he might have had to an occupation rent. That mix of facts cannot, however, in my view without more - and there was nothing more of relevance - have justified the inference of a joint intention that Ms Jones should have some, presumably, steadily increasing beneficial share in the house as the years rolled by (I put it that way because it is improbable that the judge would have arrived at the same beneficial division if he had been deciding the case in, say, 1998: his assessment of a "fair and just" solution would surely then have required him to give Ms Jones a smaller share than he gave her in 2008). I record that Mr Power made something of the fact that following the separation Ms Jones and Mr Kernott co-operated in the surrender of their life insurance policy, so enabling her to have some cosmetic surgery and him to apply his share in paying the deposit on the house he bought at 114 Stanley Road, Benfleet. I do not, however, understand how that assists the argument that the parties intended to change their beneficial shares in the house.

[83] In my view, therefore, 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. Jacob LJ defends the judge's decision on the basis that he was in the best position to assess the evidence, find the facts and draw appropriate inferences from primary facts; and he points out that an appellate court must exercise caution before reversing a judge on the facts. With all of that I in principle entirely agree. But it does not enable the upholding of a decision for which the evidence, findings and reasoning simply provide no support. Judge Dedman's key conclusions, imprecisely expressed, were (a) that the parties had changed their intentions as to their beneficial shares (he did not in fact express it quite so concretely, but I presume that is what he was finding); (b) that it was then for him to find what would be a fair split between them of the beneficial interest in the house; which (c) he then fixed at the shares he did. He identified no evidence justifying conclusion (a), because there was none. He was also wrong to hold that it was for him to decide what a fair split in the beneficial ownership was, because as Baroness Hale explained in *Stack,* the parties must themselves have evinced their intentions as to that, either expressly or impliedly, whereas the judgment shows that they had not; and she also made it plain, at 61, that the imposition of a "fair" solution upon the parties was not an option open to him. I have explained why I consider that *Stack* cannot be interpreted as justifying the *imputing* of an intention to the parties which they neither expressed nor inferentially had.

[84] I am conscious that Ms Jones may perhaps question the fairness of an outcome which leaves her with the same 50% share she had in 1993. But its fairness can only be assessed by reference to the principles governing such disputes as these. The decision in *Stack* requires Claimants such as Ms Jones to surmount a high evidential hurdle in making good their case, which she failed to do. Toulson LJ well summarised the challenge it set in his judgment in *Fowler v Barron* [2008] EWCA Civ 377, at 51, [2008] 2 FLR 1, [2008] Fam Law 636:

> "Where there has been no express agreement, arrangement or understanding between the parties, the court has to search for their inferred common intention. In an ordinary domestic case, the conveyance of property into the parties' joint names suggests that the parties intended to be joint sharers of the property in the absence of cogent evidence to suggest otherwise, and therefore there is a strong presumption that their beneficial interests were intended to be equal. The burden rests on the party challenging that presumption to show that the parties should be taken to have intended that their beneficial interests should be different from their legal interests. Lord Walker at 33 and Baroness Hale at 69 emphasised that the burden is heavy and that 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."

[85] I say nothing as to whether, upon any future sale of the house, Ms Jones would be entitled, as a matter of equitable accounting, to charge Mr Kernott's share of the proceeds with any part of the mortgage interest

payments and/or endowment policy premiums and/or other household outgoings that she alone has paid since the parties separated in 1993. Such questions are not before us.

[86] For these reasons, I would allow the appeal and make the declaration to which I referred at the beginning of this judgment.

JACOB LJ:

[87] Regrettably, I do not agree with the solution to this appeal favoured by the other members of this court. The essence of my reasoning runs in a series of steps:

> (i) Did the courts below (and especially the trial judge) apply the wrong legal test? My answer to that is no.
>
> (ii) Given that the correct legal test was applied, a test which involves drawing an inference from primary facts, what is the correct approach for a Court of Appeal? My answer to that is that considerable deference should be given to the primary fact finder, the trial judge. Only if the inferences which he drew cannot be supported, should an appeal court interfere. The test is one of perversity.
>
> (iii) The decision reached by Judge Dedman, upheld by Deputy Judge Nicholas Straus QC was not perverse. So it should stand.

I turn to consider each step in more detail.

THE LAW

[88] The key authority is *Stack v Dowdon* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929. Notwithstanding the reasoned expression of concurrence by other members of the House, it is clear that the majority concurred in the reasoning of Baroness Hale. Lord Hoffmann simply agreed with her. Lord Hope was "in full agreement" with her opinion. Lord Walker although giving his own opinion also considered that the appeal should be dismissed "for the reasons given by Lady Hale".

[89] The dissenting opinion of Lord Neuberger, favouring the application of a resulting trust to the solution of who owns what by way of a beneficial interest when there are disputes between former partners as to ownership of property is, albeit powerfully reasoned, not the law. With great respect, although it may be an appeal to future lawmakers or to the Supreme Court to reconsider *Stack*, it is otherwise no more than a cry in the wilderness It does not help those who have to solve that sort of problem under the current law

[90] Those problems are very real. Even though this case is a "cautionary tale," decisions of this court will not change the way people behave. In the real world unmarried couples seldom enter into express agreements into what should happen to property should the relationship fail and often do not settle matters clearly when they do. Life is untidier than that. In reality human emotional relationships simply do not operate as if they were commercial contracts and it is idle to wish that they did.

[91] So what then, is the law, as set forth in the opinion of Lady Hale? I think it can be taken quite shortly:

(1) Whether property is held legally by one party or the other or is held jointly, the presumption is that the beneficial interest corresponds to the legal interest.

(2) In particular: "In the domestic consumer context a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved" (Lady Hale at 58).

(3) The burden lies "on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests and in what way" (per Lady Hale at 68).

(4) Moreover the onus is heavy:

"At the end of the day, having taken all this [including the host of factors mentioned by Lady Hale in 68) 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" (Lady Hale at 68).

(5) The legal test can be stated shortly "The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it" (Lady Hale at 61].

(6) The exercise of finding whether there were shared intentions and if so what they were is not easy. It involves a multifactorial examination of the circumstances. It is worth quoting all of what Lady Hale says about this for it shows the sort of considerations involved:

"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."

DID THE TRIAL JUDGE APPLY THE CORRECT LEGAL TEST?

[92] The Judge said at 7 after referring to *Stack*:

> "Both [parties] agree that the usual starting point in a division of property in circumstances similar to these is equality, that is to say each of the parties should be entitled to half of the property at the date of crystallisation of the trust for sale."

So he clearly started from the correct presumption - see (1) and (2) above.

[93] Moreover he rightly recognised that Lady Hale's speech was the "lead judgment". He specifically acknowledged Lady Hale's statement as to where the onus lies. He expressly noted the importance of 69-70 of Lady Hale's speech, which is another reason why I have quoted them in full. He noted her phase "how the purchase was financed, both initially and *subsequently*". By italicising *subsequently* he made it clear that was recognising that subsequent financing was a relevant consideration.

[94] Thus far there can be no criticism of the Judge. He was accurately reciting the law as laid down by Lady Hale. No more and no less.

[95] The Judge then went on to consider the facts of this case, commencing, correctly by reminding himself again that the burden of proof lay on Ms Jones. I shall come back to the facts he found in more detail when considering possibly perversity. For the present I go to his conclusion at 31:

> "In my view the Claimant has established that, whilst the intentions of the parties may well have been at the outset to provide them as a couple with a home for themselves and their progeny, those intentions have altered significantly over the years to the extent that the Defendant demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated."

[96] So in this important passage the Judge is, rightly and in accordance with *Stack,* still focussing on the parties' intentions. He is saying they have changed over the years. That is just what Lady Hale contemplates as a possibility at 70.

[97] Next the judge says this "32 Having established that principle I have to consider what is fair and just between the parties bearing in mind what I have found with regard to the whole course of dealing between them". If this were a free-standing passage it might be arguable that the Judge was applying the wrong test - one of just deciding what was "fair and just". Such an approach would be inconsistent with the "parties shared intentions" test of Lady Hale and, incidentally also inconsistent with a resulting trust analysis. But the passage is not free-standing. It follows repeated references to *Stack* and the need to discern the parties' intentions. So I do not think the Judge was at this point simply abandoning *Stack.* What he is saying in context is that the parties' shared intentions must be taken to be (they can be "inferred or imputed") is that they should each have a fair and just share. That is what the Deputy Judge also thought.

[98] Accordingly I conclude that the Judge made no error of law.

THE APPROACH ON APPEAL

[99] Given the shared intention that each party should have "fair shares" the Judge went on to hold that appropriate proportions were 90/10% - proportions with which, if was right to infer or impute an agreement, like Wall LJ I would not interfere.

[100] The real question therefore is whether the Judge's finding of a shared intention as to "fair shares" can be challenged on appeal. If the question was whether they had actually so agreed, no one would dispute that it was one of primary fact, outstandingly one for a trial judge. Only perversity - an error in principle - (eg lack of any evidence) would suffice for a successful appeal on such question of primary fact.

[101] Is it different where the question of "shared intention" is decided by inference or imputation from primary facts? I think not to any great degree. For whilst this court is freer to draw different inferences from findings of primary fact than it is to depart from such findings, it should still be very slow to do so. This is because it is the trial judge who becomes immersed in the detail, who sees the witnesses and is best placed to make the finding. Whether a shared intention can be inferred or imputed is, as Lady Hale makes plain, a multifactorial decision. It will depend not only on a number of primary facts but also on things like whether the judge, who has seen the witnesses, considers there was in effect a tacit agreement between them.

[102] The approach on appeal to this sort of question was elegantly stated by Lord Hoffmann in *Biogen v Medeva* [1997] RPC 1 at p 45, 38 BMLR 149:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation . . . ."

[103] I think that approach applied to this sort of case.

WAS THE JUDGE'S DECISION PERVERSE?

[104] The Judge found the following primary facts about the position of the couple up until Mr Kernot left the home in 1993:

(1) Ms Jones paid the paid the whole deposit on the property.

(2) Mr Kernot paid £100 per week towards household expenses.

(3) Ms Jones paid the mortgage and the bills etc.

(4) Overall the contribution made towards the purchase of the property by Mr Jones was "quite modest".

(5) Mr Kernot did contribute by way of an addition of an extension and repairs.

(6) The parties had an insurance policy and an endowment policy allied to the mortgage. It was paid for by the parties jointly.

[105] The upshot of this, it was common ground, meant that at the time Mr Kernot left the home in 1993 the parties' shared intentions as to beneficial interest were in accordance with the basic *Stack* presumption

namely in the case of joint legal ownership, equality.

[106] So the key question is whether a different intention is to be inferred or imputed from the facts following the departure of Mr Kernot. As to these the Judge found:

> (1) Ms Jones paid for everything concerning the house and living save for "very little contribution . . . to the maintenance and support of the two children". This included all mortgage payments, the payments on the endowment policy, and all outgoings by way of household expenses, council tax, payments and repairs to the building.
>
> (2) The insurance policy was encashed just before Mr Kernot left the home "in order that [he] might raise the capital to invest as a deposit on the purchase of [a house in his own name for his home]". Ms Jones had some of the money raised by the encashment too.
>
> (3) Mr Kernot "demonstrated that" he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated.
>
> (4) Such was the position for no less than 14 years.

[107] Was this, I ask, such a fragile a basis for inferring or imputing a shared intention that after the split the parties' shares in the house were to be "ambulatory" (Lord Hoffmann's phrase) that no Judge could reasonably have so concluded?

[108] I think not. Of particular significance is the cashing in of the insurance policy for Mr Kernot to get himself a new house upon which he could concentrate thereafter. Next there is the fact that by making no payments concerning the house he was enabled to make the payments required for his own house. And there also is the sheer period of the time (14 years) during which he said and did nothing about his share in the house.

[109] If one asks oneself how did these matters come to be, it is not impossible to conclude that they did so by a shared intention that the parties' interests in the house were to vary over time, rather than that his interest as a proportion of the value of the house should remain fixed and immutable. It is possible to infer or impute such a shared intention. And the Judge, having seen and heard the parties was in a better position to decide the matter - and particularly the intentions of the parties - than we are.

[110] Accordingly I would not interfere with Judge's conclusion. It is not necessary or correct for this court to consider the matter afresh. I would dismiss this appeal.

Appeal dismissed.