

Family Law Reports/2008/Volume 2 /Laskar v Laskar - [2008] 2 FLR 589

[2008] 2 FLR 589

Laskar v Laskar**[2008] EWCA Civ 347****COURT OF APPEAL****TUCKEY LJ, LORD NEUBERGER OF ABBOTSBURY AND RIMER LJ****7 FEBRUARY 2008***Property - Constructive trust - Beneficial interest - Commercial or investment property - Application of Stack v Dowden*

After occupying the property for many years as a secure tenant, the mother decided to exercise her right to buy. Having realised that she could not fund the purchase alone, the mother agreed with an adult daughter, who was living elsewhere, to make a joint application to purchase the property. The property was valued at £79,500, but because of the right to buy discount, the mother and daughter were required to pay only £50,085; £29,415 less. The mother and daughter took out a joint mortgage for £43,000; the daughter provided £3,400 of the balance, the mother about £3,600; the mother paid the costs and expenses of about £1,000. The property was duly transferred into the joint names of the mother and daughter. As previously agreed, the mother then moved in with another adult daughter and let the property out to tenants. The mother was responsible for the lettings and used the rent to meet the mortgage instalments; she also paid for repairs and other outgoings on the property. After a disagreement, the daughter sought to realise her interest in the property and to obtain an account of the rental income from it. The judge concluded that the daughter had an equitable interest in the property solely based on her contribution to the purchase price, taken at the undiscounted value, and that her beneficial interest in the property was therefore 4.28%. He also concluded that the daughter was not entitled to an account of the rental income. The daughter appealed, arguing that, following *Stack v Dowden* [2007] UKHL 17, there was a presumption that a property jointly owned in law was beneficially owned in equal shares, and that this presumption had not been rebutted. It had been accepted that the presumption of advancement as between parent and child did not apply.

Held - allowing the appeal and declaring that the daughter had a 33% interest in the property, but upholding the judge's decision to refuse an account -

(1) The presumption that, in the absence of a specific declaration of trust by the parties, domestic property conveyed into joint names was held jointly and equally in terms both of legal and of beneficial interests, applied to a family home occupied by cohabitants, but not to commercial property or property purchased as an investment. It was not right to apply the reasoning in *Stack v Dowden* to a case such as this, in which the parties' primary purpose in purchasing the property had been as an investment for rental income and capital appreciation, even though the parties' relationship was a familial one. This was a purchase in the commercial, not the domestic consumer context (see para [17]).

(2) If the presumption in *Stack v Dowden* had applied, it would have been rebutted because: the financial affairs of the parties had been kept separate; the property had not been primarily purchased as a home for either party, let alone for the parties to share, but as an investment; the contributions were significantly

different; there was no reason to believe that the mother had intended to give only one of her children a gift of this size; and the daughter had become involved in the purchase only because the mother could not afford to exercise the right to buy alone (see paras [18], [19], [22], [26]).

(3) In the absence of any relevant discussion between the parties, their respective beneficial shares should reflect the size of their contributions to the purchase price. Taking the discount into account, the contributions of the parties had been significantly

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different; the judge had been right to treat the discount as part of the mother's contribution to the purchase, because the discount could be attributed only to the mother's status as a secure tenant. However, the fact that the mortgage had been taken out in joint names was a relevant factor; the mortgage represented a contribution of £21,500 by each of the parties, rather than a contribution by the mother alone. It would, therefore, be right to substitute a decision that the daughter had a 33% interest in the property (see paras [19], [21], [27], [28], [31], [32]).

(4) Although fairness was not the basis for a decision of this kind, this outcome did not seem unjust. The relatively strict approach to the discount and to the mortgage was not unreasonable in the context of a property bought primarily as an investment; a more flexible approach would have been more generous to the mother on the mortgage and less generous to her on the discount, but that could have led to greater unpredictability as far as other cases were concerned (see para [33]).

(5) It would be disproportionate to order an account; the bulk of the rent had been used to service the mortgage, and the mother had managed the property throughout. However, the daughter's interest in the property would justify her seeking an account of the property income and outgoings from now on (see paras [35], [37]).

Statutory provision considered

Housing Act 1985:Part V

Housing Act 1985:s 118

Housing Act 1985:s 119

Housing Act 1985:s 122

Housing Act 1985:s 123(1)

Housing Act 1985:s 123(3)

Housing Act 1985:s 127

Housing Act 1985:s 129

Housing Act 1985, Part V, ss 118, 119, 122, 123(1), (3), 127, 129

Cases referred to in judgment

Adekunle and Ben v Ritchie [2007] BPIR 1177, Leeds CC

Ashe v Mumford [2001] BPIR 1, [2001] 33 HLR 67, CA

Evans v Hayward [1995] 2 FLR 511, CA

Pettitt v Pettitt [1970] AC 777, [1969] 2 WLR 966, (1969) FLR Rep 555, [1969] 2 All ER 385, HL

Springette v Defoe [1992] 2 FLR 388, (1992) 24 HLR 552, (1992) 65 P & CR 1, CA

Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 WLR 831, [2007] 1 FLR 1858, [2007] BPIR 913, [2007] 2 All ER 929, [2007] NPC 47, HL

Simeon Thrower and Andrew Veen for the appellant

Richard Colbey for the respondent

Cur adv vult

LORD NEUBERGER OF ABBOTSBURY:

[1] This is an appeal from the decision of His Honour Judge Dennis Levy QC given in the Central London County Court on 7 February 2007. His decision principally concerned the beneficial ownership of a property, 70 Wood Close Hatfield, registered in the joint names of the appellant, Miss Rini Laskar, and the respondent, her mother Mrs Zuberka Laskar. The application for permission to appeal sought to challenge many of the primary findings of fact made by the judge, but Chadwick LJ refused permission to appeal against those findings. However, he permitted an appeal on the conclusion reached by the judge on those facts, namely:

'... that the appellant who was named as a joint tenant of the property at law did not have a joint or beneficial interest in the proceeds of sale.'

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The relevant facts

[2] There were substantial disputes at the trial as to the source of the purchase price for the property, as to what was said about the beneficial ownership of the property, and as to what happened after the property was purchased. For reasons that he fully explained, the judge found neither party a satisfactory witness but he managed to reach conclusions that can be summarised as follows.

[3] The respondent and her husband, the appellant's father, had been tenants of the property since before the appellant was born in 1977. Their landlord was the Welwyn Hatfield Council (the council). In 1996, the year the appellant went away to study at university, the respondent applied successfully to the council for the

tenancy to be transferred into the respondent's sole name as her husband had left her. Accordingly, she and her husband having been secure tenants under the Housing Act 1985, with effect from 1996 the respondent became the sole secure tenant.

[4] A secure tenant who has been in possession of a property for more than 2 years is entitled to buy the property, pursuant to Part V of the 1985 Act - see ss 118 and 119. That right is to be exercised by serving a notice under s 122. Section 123(1) entitles a secure tenant to nominate up to three members of his or her family to join in the purchase in certain circumstances. Section 123(3) provides that where a tenant does make such a nomination:

'... the right to buy belongs to the tenant and those members jointly and he and they shall be treated for the purposes of this Part as joint tenants.'

[5] The purchase price payable is the fair market value of the property concerned, on certain assumptions - see s 127 - subject to a discount under s 129, which is based on the number of years the secure tenant concerned has occupied the property.

[6] Following a previous unsuccessful attempt to do so, the respondent applied to the council in October 1997 to exercise her right to buy the property at a discount. In or about February 1998, apparently after she had realised that she could not fund the proposed purchase alone (the judge said that she was earning £11,000 a year at the time), the respondent agreed with the appellant that they would purchase the property together, and the application to buy proceeded in the name of both parties.

[7] The property was duly transferred by the council to the respondent and the appellant on 6 July 1998 pursuant to a transfer which sheds no light on the beneficial ownership of the property. The parties became the registered proprietors 17 days later. The purchase price (£50,085) was £29,415 less than the value of the property (£79,500) because of the discount under s 129. The £50,085 was partly funded by a loan made jointly to the partner by Barclays Bank plc in the sum of £43,000, which was secured on the property by way of mortgage. The balance of the purchase price (about £7,000) was funded as to about £3,400 by the appellant, and £3,600 by the respondent. As one would expect, these were costs and expenses in relation to the purchase, and they amounted to some £1,000, which was, it appears, paid by the respondent.

[8] Despite evidence to the contrary from the appellant, the judge found that there were no discussions between the parties as to the ownership of the beneficial content in the property. The judge also found that while the

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appellant was jointly liable on the mortgage, the liability 'was one which in fact she was never likely to be asked to meet'. It appears that this was on the basis that it was anticipated that the property would be let out, and that the rental income would be applied to service the mortgage. At the time of the purchase the respondent was in occupation of the property as her home with, I think one of her children; the appellant was at university and her room was occupied by a lodger. There were probably other tenants there at the time.

[9] Shortly after the property was purchased, as was anticipated at the time of the purchase, another of the respondent's daughters, Jessie, purchased a house in St Albans, and the mother moved to the St Albans house. Thereafter, the property was let to successive tenants, and it seems clear that there were a number of tenants in the property at any one time. All the lettings were affected by the respondent, who kept the rents. She paid for the repairs and other outgoings in relation to the property, and met the instalments on the mortgage.

[10] In 2003 there was a serious falling-out between the parties and in September of that year the appellant sought to realise her interest in the property and an account of the rental income from it. After some discussion the respondent severed the joint tenancy in June 2004 and the appellant then began these proceedings. Meanwhile, there were other proceedings on foot between the appellant and Jessie in relation to the St Albans house. In those proceedings the respondent supported Jessie's case. Some of the evidence at the hearing before His Honour Judge Cowell in relation to the St Albans house proceedings related to the property. On 30 November 2004, His Honour Judge Cowell gave a full judgment in which he concluded that the appellant's case in those proceedings was 'wholly fabricated'. Not surprisingly His Honour Judge Levy relied on some of His Honour Judge Cowell's findings in that judgment.

[11] In the present case, His Honour Judge Levy concluded that the appellant had an equitable interest in the property based on - and solely based on - her contribution of £3,400 towards the purchase price, which he took as the undiscounted value at the time of purchase of £79,500. Accordingly he decided that the appellant owned 4.28% of the beneficial interest in the property. He also concluded that the appellant should not be called to account in respect of the rent received on the property.

The issues to be resolved

[12] The arguments which the appellant advances as to the beneficial ownership of the property are threefold. First, that the judge should not have concluded that the presumption that a house which is jointly owned in law is beneficially owned in equal shares was rebutted on the facts of this case. In other words it is said that there is a presumption that the beneficial interests were the same as the legal interests, and that that presumption was not rebutted in this case. If that is wrong, then two further points are made. It is said that the judge should have held that, insofar as it was treated as a contribution to the purchase price, the discount of £29,415 should have been apportioned equally between the parties. Similarly it is said that the judge should have treated each party's joint liability under the mortgage of £43,000 as a contribution of £21,500 towards the purchase price.

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[13] As to the rejection of her claim for an account, the appellant says that the judge ought to have ordered an account. Even on his findings as to the beneficial ownership of the property, she says she was entitled to a share of the income; if she is right on any of her three points on the issue of beneficial ownership, she says her case for an account is even stronger.

[14] I will take these four arguments in turn.

The presumption of joint ownership

[15] The appellant contends that the reasoning of the majority of the House of Lords in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 1 FLR 1858 compels a finding in the present case that the beneficial ownership of the property was held in equal shares by the parties. As Chadwick LJ pointed out when giving permission to appeal, *Stack* was decided after His Honour Judge Levy gave his decision in this case. In *Stack* the two parties who purchased the house in question were living together in a long-term sexual relationship, and had children when they purchased the house, which they intended to be, and indeed was occupied as, their family home. It is by no means clear to me that the approach laid down by Baroness Hale of Richmond in that case was intended to apply in a case such as this. In this case, although the parties were mother and daughter and not in that sense in an arm's length commercial relationship, they had independent lives, and, as I have already indicated, the purchase of the property was not really for the purpose of providing a home for them. The daughter hardly lived there at the time it was purchased, and did not live there much, if at all, afterwards, and the mother did not live there for long. The property was purchased primarily as an investment.

[16] Baroness Hale of Richmond's speech began by identifying the problem to be addressed as relating to 'a cohabiting couple' - see para [40] (and see para [14] of the speech of Lord Walker of Gestingthorpe). But a number of the remarks in the course of her speech indicate that her reasoning was intended to apply to other personal relationships, at least where the property is purchased as a home for two (or indeed more than two) people who are the legal owners - see especially at para [58] with the reference to 'the domestic consumer context'. Accordingly I think His Honour Judge Behrens was right to conclude in *Adekunle and Ben v Ritchie* [2007] BPIR 1177 in the Leeds County Court that the reasoning in *Stack* applied to a case where a house was purchased by a mother and a son in joint names as a home for them both.

[17] It was argued that this case was midway between the cohabitation cases of co-ownership where property is bought for living in, such as *Stack*, and arm's length commercial cases of co-ownership, where property is bought for development or letting. In the latter sort of case, the reasoning in *Stack* would not be appropriate and the resulting trust presumption still appears to apply. In this case, the primary purpose of the purchase of the property was as an investment, not as a home. In other words this was a purchase which, at least primarily, was not in 'the domestic consumer context' but in a commercial context. To my mind it would not be right to apply the reasoning in *Stack* to such a case as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one.

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[18] If, however, the presumption in *Stack* would apply here, then I consider that it would have been rebutted anyway. On the facts in *Stack* there was a departure from the presumption of equality, and the outcome was that the shares of the beneficial interest were substantially proportionate to the financial contributions of the parties. This, in my opinion, would be a stronger case for departing from the presumption of equality even if it does apply.

[19] First, as in *Stack* (see paras [90]-[92]) the two parties in this case kept their financial affairs separate. Secondly, unlike in *Stack*, the property was not primarily purchased as a home for either party let alone for the parties to share. As I have explained, the property was primarily purchased as an investment. Thirdly, the respondent had three or four other children, one of whom was under 10 at the time; there is no reason to think that she intended the appellant to receive what would have amounted to a significant gift not shared with the other children. Fourthly, if, as I believe to be correct, for the reasons I shall shortly give, the discount is treated as a contribution to the purchase by the respondent, the parties' contributions to the purchase price were significantly different, as in *Stack* (see para [89]). Fifthly, it appears that the reason that the appellant was brought in as a co-purchaser was primarily because the respondent could not afford the purchase on her own.

[20] It is right to mention that there is another presumption, rather longer established than that in *Stack*, which could be said to apply here, namely the presumption of advancement as between parent and child. As the property was purchased in the joint names of mother and daughter, it seems to me that, insofar as the respondent's contribution was greater and would have led to her having in excess of a fifty percent share of the beneficial interest, there is a presumption that she intended a gift of that excess to her daughter. The presumption of advancement still exists, although it was said as long ago as 1970 to be a relatively weak presumption which can be rebutted on comparatively slight evidence (see per Lord Upjohn in *Pettitt v Pettitt* [1970] AC 777, (1969) FLR Rep 555, at 814 and 579 respectively). I would add that it is even weaker where, as here, the child was over 18 years of age and managed her own affairs at the time of the transaction. Mr Thrower, for the appellant, made it clear that he accepted that the presumption was not applicable and was not pressing it here. In my judgment that was realistic.

[21] Accordingly, even if the presumption of equality laid down in *Stack* does apply in this case, or even if the presumption of advancement could apply, it seems to me that, for the reasons I have given, either presumption would be rebutted on these facts. Accordingly, as in *Stack* (as explained by Lord Hope of

Craighead in para [11]), I can see no reason not to fall back on the resulting trust analysis, namely that in the absence of any relevant discussion between the parties, their respective beneficial shares should reflect the size of their contributions to the purchase price, subject to any subsequent actions or discussions having the effect of varying those shares.

The discount

[22] When it comes to assessing the contributions to the purchase price the appellant argues either that no account should be taken of the discount of £29,415 or that it should be attributable equally to both parties. I do not agree. In the absence of authority the position seems to me to be this. The reason the property could be bought at a discount - indeed, the reason the property could

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be bought at all - was that the respondent had been the secure tenant of the property and had resided there in that capacity for a substantial period; see the sections of the Housing Act 1985 to which I have referred. It was therefore the respondent, and solely the respondent, to whom the discount of £29,415 could be attributed. The fact that she exercised her privilege under s 123 of the 1985 Act to share her statutory right to buy with her daughter does not seem to me in any way to alter that conclusion. Sharing with a third party the right to buy in law as against the council is not the same thing as sharing the consequences of the right to buy in equity as against a third party.

[23] As pointed out in argument by Rimer LJ, s 123(3) is concerned to emphasise that the parties are joint tenants, and it identifies their rights in terms of the legal estate. However, it goes no further than that so far as the consequences of their beneficial interests are concerned. Indeed, during the course of his argument I rather understood Mr Thrower to accept that his argument on this aspect was simply another way of making the point he was seeking to make more generally in reliance on *Stack v Dowden*.

[24] My view as to how the discount should be attributed is strongly reinforced by authority. In particular, it was clearly assumed to be correct in the decision of this court in *Springette v Defoe* [1992] 2 FLR 388, especially at 395. Although some of the reasoning in that case was disapproved in *Stack*, nothing in *Stack* called that aspect of the decision into question. It also seems to me that this conclusion is consistent with the subsequent decision of this court in *Evans v Hayward* [1995] 2 FLR 511, where the reasoning of Dillon LJ, at 515A, led to the conclusion that the tenant whose occupation gave rise to the discount was entitled to be credited with the discount when assessing the parties' shares in the beneficial interest, even though at the time the right to buy was exercised the two parties were joint tenants. It was a stronger case for arguing that the discount should be apportioned equally between the parties than this case, because in this case, of course, the appellant was never a tenant of the property: she was merely deemed to be a joint tenant under s 123(3).

[25] It is true that in *Ashe v Mumford* [2001] BPIR 1 this court upheld the trial judge's decision that the discount should not be apportioned in this way between the parties. However, it seems clear to me from the judgment of Jonathan Parker LJ that he accepted that it was the prima facie solution, but that the facts of that case were very unusual indeed and justified a different conclusion.

[26] In those circumstances I think the judge was right to treat the discount as in effect a contribution by the respondent to the purchase.

The effect of taking the mortgage in joint names

[27] There is obvious force in the appellant's contention that, as she and the respondent took out a mortgage in joint names for £43,000, for which they were jointly and separately liable, in respect of a

property which they jointly owned, this should be treated in effect as representing equal contributions of £21,500 by each party to the acquisition of the property. It is right to mention that I pointed out in paras [118]-[119] in *Stack* that, although simple and clear, such a treatment of a mortgage liability might be questionable in terms of principle and authority.

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[28] However, it appears to me that in this case it would be right to treat the mortgage loan of £43,000 as representing a contribution of £21,500 by each of the parties as the two joint purchasers of the property.

[29] There was no agreement or understanding between the parties that one or other of them was to be responsible for the repayments. The repayments had effectively been met out of the income from the property, which, so far as one can gather, was intended from the inception, and the property was, as I have mentioned, primarily purchased and has been retained as an investment. In those circumstances I would have thought that there was a very strong case for apportioning the mortgage equally between the parties when it comes to assessing their respective contributions to the purchase price.

[30] The judge's remark that the appellant would not have expected to pay any sums due under the mortgage was attributable to the fact that the mortgage was anticipated to be serviced from the rental income from the property (as happened). Therefore that conclusion applies equally to the respondent and the appellant. It may be that the judge does not extend his remark to the respondent as she was to collect the rent and pay the mortgage instalments.

[31] In these circumstances, not merely because it has the advantage of simplicity and appears to be initially correct, but because on the facts of this case it would be right, the £43,000 mortgage should be treated as a joint contribution to the purchase price. On any view it seems to me that it was clearly wrong to treat the £43,000 as a contribution to the purchase price by the respondent alone, which is what the judge did.

Conclusions on the beneficial interest

[32] In light of these conclusions on these three points, I am of the view that it would be right to substitute for the judge's decision that the appellant has 4.28% of the beneficial interest in order that she has a 33% interest in the property. I arrive at that conclusion on the basis that the respondent's contribution was the aggregate of £21,500 (half of the mortgage) £29,500 (the discount) and £3,600 (her share of the balance), and that the appellant's contribution was £21,500 (half the mortgage) and £3,400 (her share of the balance). That produces a share of 33%.

[33] It is sensible to stand back and see whether that looks a fair result. It was pointed out in *Stack* that what seems fair to the court is not the basis upon which one reaches a decision in this sort of case but it does seem to me that it is not unhelpful to see whether the outcome looked at in this way seems unjust, because, if it is, it may be worth revisiting the reasoning. In my view, the appointment of 2:1 does reflect the overall justice of the case. It can be said that there is to some degree a trade off between giving the mother the whole of the discount and dividing the mortgage on a 50:50 basis. Each involves a relatively strict mathematical approach, which, in the context of a property bought primarily as an investment, seems not unreasonable. If one were to adopt a more flexible approach, which could lead to greater unpredictability so far as other cases are concerned, one might have been more generous to the respondent on the mortgage and less generous to the respondent on the discount.

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The account

[34] That leaves the question of an account. The judge decided not to order an account. Mr Thrower submits that there should be an account, particularly, no doubt, in the light of the conclusion I have reached on the beneficial interests. I consider, however, that he was correct in not pressing particularly hard for this. It is a discretionary remedy, and I do not think that it would be appropriate to order an account for the following reasons.

[35] First, it would be disproportionate to order an account. It appears clear that the bulk of the rent which has been produced from the property will have been used for servicing the mortgage and paying for the upkeep and other outgoings on the property. Secondly, the respondent has managed the property, maintaining it, letting it, organising all the outgoings and so on. While no doubt that could be credited in some way in her favour on any account, it would significantly reduce the amount of money, if any, to be paid to the appellant. It would also lead, I suspect, to a great deal of argument and expense in determining how much should be so allowed.

[36] Thirdly, on any view it would seem to me quite inappropriate to order an account going back much before 2004. The appellant must have known what was going on from the beginning and she was initially quite happy to leave matters as they were. There was no formal claim for an account until 2004. For much of the subsequent period, the respondent would have presumed that she was not going to be obliged to account, namely from the date of His Honour Judge Levy's refusal to order an account. Finally, nowhere in the judge's analysis or in my alternative analysis, has the £1,000 contribution the respondent made to the costs and expenses of purchase of the property been taken into account in her favour. It seems to me that that is not irrelevant when considering whether to order an account.

[37] In those circumstances, I would refuse to order an account, but, in fairness to the appellant, I would add that, as she has a 33% beneficial interest in the property, that will from now on justify her seeking an account of the income and outgoings in respect of the property.

Disposition

[38] To conclude, I would vary His Honour Judge Levy's order, to the extent of declaring that the appellant's beneficial interest is 33% rather than 4.28%, but I would uphold his decision to refuse an account.

RIMER LJ:

[39] I agree.

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TUCKEY LJ:

[40] I also agree.

Order varied.

Solicitors: Instructed under the Public Access Rules of the Bar (2004) for the claimant.

Instructed under the Public Access Rules of the Bar (2004) for the defendant.

PHILIPPA JOHNSON

Law Reporter