

**WHAT'S MINE IS YOURS:
BENEFICIAL INTERESTS IN DOMESTIC AND
COMMERCIAL PROPERTY**

by

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"Joanne Wicks '*sees the whole picture*' and '*really fills clients with confidence*'": Chambers & Partners, 2009. "Joanne Wicks is respected for her authoritative advice": Legal 500, 2009. Joanne is an Editor of the Butterworths Property Law Handbook: watch out for the new edition coming out soon!

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1. “*What’s mine is yours and what is yours is mine*” says Duke Vicentio in “Measure for Measure”. Unfortunately parties to beneficial interest disputes often appear more inclined to live by a different motto: “what’s yours is mine, and what’s mine’s my own”. And depressingly often they appear to be able to get away with it. This talk seeks to explore the extent to which the House of Lords’ decision in *Stack v Dowden*¹ has changed the law, and how it has been interpreted by subsequent caselaw. Do we have a modern law of beneficial ownership of which we can all be proud? Should we look on the *Stack* decision as a missed opportunity? Or is the position just so hopeless that only legislation can hope to put things right?

Let’s Start at the Very Beginning....

2. The first step in any dispute about the ownership of property is to check for an express declaration of trust². Such a declaration is conclusive of the beneficial interests, as between the parties to the declaration, as at the date of the declaration³. It is not always the last word: an express declaration of trust may be set aside, for example on the grounds of undue influence or fraud, or rectified for mistake, it will not bind a third party claiming a beneficial interest who is not a party to the declaration, or the facts may show that the beneficial interests so declared have been subsequently altered by agreement or estoppel, but it is at least a start. Since 1 April 1998 the Land Registry’s form TR1 has included a box asking joint registered proprietors to declare whether they hold the property on trust for themselves as joint tenants or as tenants in common or on some other trusts. The volume of cases about beneficial ownership which continues to come through the Courts⁴ suggests, however, that there remain plenty of people who, for one reason or another, purchase property without the benefit of an express declaration of trust.

Presumptions and Rebuttals: The Law before *Stack v Dowden*

3. In the absence of any other evidence, the beneficial interests in a property will follow the legal interests: equity follows the law. So a house in one person’s name would be assumed to be beneficially owned by that person alone, and a house in joint names would be assumed to be held by those people on trust for themselves as beneficial joint tenants, the equitable title mirroring the legal title. But in vast majority of cases prior to *Stack v Dowden*, this principle was of little relevance, since there is almost always other relevant evidence available to the Court.

¹ [2007] UKHL 17, [2007] 2 AC 432

² A recent case about the interpretation of an express declaration of trust in this context is *Bindra v Chopra* [2008] EWHC 1715

³ *Goodman v Gallant* [1986] Fam 106; *Stack v Dowden* at [49]

⁴ For example, there are 33 beneficial interest cases reported on LEXIS as having been decided since *Stack v Dowden*. Many more, particularly County Court cases, will be unreported – and many more still will have been litigated but settled before a trial.

4. Long before the common intention constructive trust came along, Equity invented the resulting trust. The resulting trust concept assumes that most people do not make gifts. Thus if Smith pays for a house in the name of Jones, Smith is assumed to wish to retain the benefit of her investment: Jones holds the house on trust for Smith⁵. Equally if Smith and Jones each contribute to the purchase of a house in joint names, it is assumed that they intend that each should obtain an interest in the property proportionate to their contribution. The presumption of advancement balances this set of values with an assumption that certain categories of people do usually make gifts. So, for example, a husband who pays for property in his wife's name is presumed to intend a gift to her, as is a father who buys property in his child's name. The presumption of advancement applies rigidly to a particular set of defined relationships. For example, whilst a father is presumed to make a gift to his son, a mother is not⁶. However, neither the presumption of resulting trust nor the presumption of advancement is a rule of law: both may be rebutted by appropriate evidence⁷.

5. Unable to keep up with the complexities of modern relationships, the presumption of advancement has gradually dwindled away. For a considerable period of time the Courts, whilst paying lip service to its existence, have been describing it as a "judicial instrument of last resort"⁸ and have been prepared to rebut it on the slightest of evidence.

6. The resulting trust presumption has three main inadequacies:
 - (1) it applies only on acquisition of property and cannot take into account later events;
 - (2) it does not give credit for indirect contributions to the purchase price; and
 - (3) it does not deal very satisfactorily with the common position where part of the purchase price for a property is raised by way of mortgage. The theory is that mortgage monies are to be treated as a contribution by the person or people in whose name(s) the mortgage is taken⁹, subject to any contrary agreement between them as to how the mortgage instalments are to be paid. This, however, can be unfair to a co-owner who provides cash¹⁰.

⁵ If, instead of Smith giving the money to Jones to enable Jones to buy a house in his own name, Smith conveys her house to him without consideration, there is a complicating factor in the shape of s.60(3) of the Law of Property Act 1925: see Megarry and Wade, *The Law of Real Property* 7th edn, para 11-014 and Snell's Equity, 31st edn, paras 23-13 – 23-15.

⁶ *Bennet v Bennet* (1879) 10 Ch D 474. cf *Laskar v Laskar* [2008] EWCA Civ 347, [2008] 1 WLR 2695 at [20] in which Lord Neuberger treated the presumption of advancement as potentially existing (though ultimately not applicable on the facts) as between mother and daughter.

⁷ *Fowkes v Pascoe* (1875) 10 Ch App 343.

⁸ *McGrath v Wallis* [1995] 2 FLR 114 at 115; *Laskar v Laskar*, above, at [20].

⁹ See eg *Laskar v Laskar*, above, at [27] – [31]

¹⁰ *Stack v Dowden* at [117]-[120] per Lord Neuberger

7. In part in response to these inadequacies, the common intention constructive trust was born and developed, in particular by the House of Lords' decisions in *Pettit v Pettit*¹¹, *Gissing v Gissing*¹² and *Lloyds Bank v Rosset*¹³. Where land is purchased in Jones' name alone, a constructive trust¹⁴ arises, and serves to displace the presumption of resulting trust, if Smith and Jones have a common intention that they should both have a beneficial interest in the property and Smith acts to her detriment in reliance upon that common intention. Equally where property is purchased in the joint names of Smith and Jones, a common intention constructive trust may arise to give effect to their intention that they should hold it for Smith alone, or in proportions different from those which would arise under a resulting trust. Pre-*Stack* authority made it clear that the common intention might arise either from express discussions or by inference from conduct, but a short trenchant comment from Lord Bridge in *Rosset* strongly suggested that only direct contributions to the purchase price would suffice to raise the inference that a non-owning cohabitant was intended to have a beneficial interest in the property.
8. The pre-*Stack* state of the law on common intention constructive trusts was much criticised. The concept of a "common intention", with its search for an apparent bargain made by people who had probably never turned their mind to the relevant questions, was "unrealistic and highly artificial"¹⁵. The focus on direct contributions to establish the inference of a common intention to share ownership of property disadvantaged those, often women, whose indirect contributions to the family finances in fact enabled their male partners to discharge the mortgage payments, and failed to give any credit at all for non-financial contributions¹⁶. Moreover the need to demonstrate that the contributions were "referable to" the common intention meant some claims failed because (mostly male) Judges would decide that (mostly female) claimants had acted from motives of love and affection for their partners and the desire to make a home together, rather than from financial self-interest¹⁷.
9. A couple of years before *Stack* was decided, the Court of Appeal decision in *Oxley v Hiscock*¹⁸ suggested a more liberal approach, stressing the need for a two-stage analysis. At the first stage it was necessary to consider whether the parties had demonstrated a common intention that the beneficial interest in the property should be shared. In the absence of express discussions, such an inference would readily be drawn where both had made some contribution to the purchase price. If that hurdle was cleared, the enquiry moved to the second

¹¹ [1970] AC 777

¹² [1971] AC 886

¹³ [1991] 1 AC 107

¹⁴ In *Gissing v Gissing* Lord Diplock suggested that it did not matter whether the trust was seen as a constructive, resulting or other form of implied trust, but this form of trust is now firmly established as a constructive trust.

¹⁵ Gray & Gray, *Elements of Land Law*, 4th edn, para 10.92

¹⁶ Gray & Gray, above, para 10-132 – 10- 133

¹⁷ See, for a post-*Stack* example of this tendency, *James v Thomas* [2007] EWCA Civ 1212, [2007] 3 FCR 696 in which Ms James had worked for a number of years without pay in her partner's building business. She was held to have done this "because she and Mr Thomas were making their life together as man and wife".

¹⁸ [2004] EWCA Civ 546, [2005] Fam 211

stage, namely the extent of each party's beneficial interest. If the parties had a common intention as to the shares in which they should own the property, that would govern: if in fact they had not considered the size of their respective shares, the amount of their shares would be such as the Court considered fair, on the basis of all relevant conduct.

Stack v Dowden

10. *Pettit*, *Gissing* and *Rosset* were all cases where the legal title to the property in question was in one party's sole name. Moreover, as Lord Walker observed in *Stack*, all three of them were cases where the acts of detriment relied upon by the non-owner were relatively trivial: a circumstance not encouraging of a comprehensive review of the law.
11. *Stack* was different because it concerned a property in the joint names of both parties. It was not in dispute that each had a beneficial interest and the question was the size of the share. The House of Lords (Lord Neuberger dissenting) held that in a cohabitation context the starting point was not the resulting trust approach:

“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”¹⁹.
12. It is clear that this decision was based on grounds of policy, to discourage cohabitants from litigating the detail of their lives and financial affairs at great cost, in the hope that a strictly arithmetical approach to contributions would lead to a greater than 50% recovery.
13. Their Lordships broadly agreed with the “holistic” approach of Chadwick LJ in *Oxley*, namely that the parties' intentions as to the quantification of their shares were to be garnered from the whole course of dealing between them in relation to the property, but held that it would nevertheless be a “very unusual” case where joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal ones. On its facts, *Stack* was held to be such a case. The parties had not only contributed unequally to the purchase of the property, they had also, despite a long relationship and four children, maintained entirely separate finances. Ms Dowden had a 65% share and Mr Stack a 35% share.

Equal or Joint – or Both?

14. The starting point in a joint names case – the *Stack* presumption – is that the beneficial interests mirror the legal title. Since the legal title can only be held on a joint tenancy, it follows that where the presumption applies, the conclusion should be a beneficial joint tenancy. But in fact some of their Lordships in *Stack* appear to confuse a beneficial joint tenancy with a beneficial tenancy in common in equal shares. Lord Hope says

¹⁹ Baroness Hale at [56]

“In this context joint beneficial ownership means property is assumed to be held by the beneficial owners equally”²⁰

and Baroness Hale speaks of

“a prima facie case of joint and equal beneficial interests”²¹.

In *Fowler v Barron*²² the Court of Appeal referred to “a 50% interest” and “a one-half share” in the context of the *Stack* presumption.

15. Of course severance of a beneficial joint tenancy will result in a tenancy in common in equal shares, but we will have to wait for a case concerning a dead co-owner before we can be sure whether their Lordships *really* mean that the beneficial interests are to follow the legal title.

A Modern Presumption of Advancement

16. The radical effect of the *Stack* presumption is illustrated by the case just referred to, *Fowler v Barron*. Miss Fowler and Mr Barron acquired a property in joint names. They made a conscious decision to put the house into joint names but did not take any legal advice as to the consequences of doing so and there was no discussion as to how the property should be held. Mr Barron’s evidence was that he had intended that Miss Fowler would obtain the property by survivorship only if he died before she did (since he was 47 to her 17 when the relationship started, this may not have been an unreasonable assumption to make). Mr Barron paid the deposit, the mortgage instalments and fixed costs such as the Council tax and utility bills. Miss Fowler paid for clothing, holidays, school trips and special occasions. Before the *Stack* decision, Miss Fowler would almost certainly have been held to have no beneficial interest in the property at all. She had made no contributions to the purchase of the property and no direct contributions to the repayment of the mortgage; moreover Mr Barron’s understanding of the effect of the legal joint tenancy would have counted against there being a common intention that she should have an immediate share in the property before his death. After *Stack*, the Court of Appeal held, the fact that the house had been transferred into joint names was everything. Mr Barron could not rely upon his “secret” understanding to rebut the presumption, because it was not evidence of the parties’ shared intention. Moreover, the fact that Miss Fowler had made no contribution to the cost of the property was not grounds for rebutting the presumption, since the *Stack* decision had determined that the critical factor is not necessarily the amount of the parties’ contributions. Lucky Miss Fowler. It appears that Lord Neuberger was right to warn in *Stack* that the principle espoused by the majority, which applied to cohabitants who have contributed unequally to the purchase of their home

²⁰ At [4]

²¹ At [58]

²² [2008] EWCA Civ 377, [2008] 2 FCR 1

“involves invoking a presumption of advancement between unmarried cohabitants, where such a presumption has never applied, and at a time when, as I have mentioned, the court is increasingly unenthusiastic about the presumption, even in relationships where it does apply”.

Imputation or Inference?

17. As Lord Neuberger explains²³

“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 not such intention. Imputation involves concluding what the parties would have intended, whereas inference involved concluding what they did intend.”

18. The distinction may be clear enough in theory, but in practice it is often difficult to tell whether Judges are really “inferring” the existence of a common intention or imposing their view of the bargain the parties ought to have made. It is particularly difficult to see how the Courts can properly infer a common intention to share beneficial ownership in cases in which one partner has lied to another about the reason for keeping their name off the title²⁴: the more obvious inference is that the liar does not want his partner to have any share at all in the property.

19. The speeches in *Stack* are very opaque about the inference/imputation issue. Lord Walker describes it as the “most crucial” of the questions to emerge from *Pettit* and *Gissing* and gives a careful and learned analysis of the speeches in those cases, concluding

“it might have been better for the long term development of the law if this House’s rejection of “imputation” in *Pettit v Pettit* had been openly departed from...rather than being circumvented by the rather ambiguous (and perhaps deliberately ambiguous) language of “inference””.

He does not, however, follow this comment to its apparent conclusion by making clear that the Courts should be permitted to impute an intention where none exists. Baroness Hale, with whom Lords Hoffman and Hope agreed, in one place suggests that imputation may be acceptable²⁵ and in another that it is not²⁶.

20. Nicholas Strauss QC, sitting as a Deputy Judge, has considered this issue in detail in a recent case, *Jones v Kernott*²⁷, ultimately concluding that although the Court may not override the parties’ true intentions where those

²³ In *Stack* at [124]

²⁴ E.g. *Eves v Eves* [1975] 1 WLR 1338; *Grant v Edwards* [1986] Ch 638.

²⁵ “the search is to ascertain the parties’ shared intentions, actual, inferred or imputed...” [60]

²⁶ “...the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended...it does not enable the court to abandon that search in favour of the result which the court itself considers fair” [61]

are known, it may impute intentions to the parties, and thereby achieve fairness, where there is no evidence at all from which the Court can draw any inferences²⁸. In that case it was clear that the parties had intended to realign their beneficial interests when their relationship had ended, but it was not clear exactly how they had intended to realign them.

The Commercial/Domestic Divide

21. The House of Lords made it clear that they were developing the *Stack* presumption in the context of a cohabitation situation and that the same principle might not apply in a commercial case. In *Adekunle v Ritchie*²⁹ the same reasoning was applied to the joint purchase of a home by a mother and son and in *Edwards v Edwards*³⁰ to the joint purchase of commercial property by a husband and wife.
22. However, having given a strong dissent in *Stack* it is perhaps not surprising that Lord Neuberger took the opportunity in *Laskar v Laskar*³¹ to distinguish it. There, a mother and daughter had bought the mother's council house, with the benefit of a discount, in order to rent it out as an investment. The Court of Appeal (including Lord Neuberger) held that the *Stack* presumption did not apply and the case was analysed on resulting trust principles. It is rather difficult to see why the fact that a property is intended as a home should make such a difference to the presumption: surely it is the nature of the relationship between the parties, rather than the nature of the property, which matters. The notion of a strict divide between the commercial and the domestic spheres is, in any event, difficult to justify³².

Sole Name Cases

23. Very shortly after the *Stack* decision, Baroness Hale took the opportunity whilst sitting in the Privy Council in *Abbott v Abbott*³³ to make it clear that the liberalising "holistic" approach *Stack* had taken to ascertaining the parties' common intention at the quantification stage applies equally to the first stage, that of determining whether the claimant has a beneficial interest at all. Nevertheless difficult questions remain about the impact of *Stack* in the case where legal title to the property in question is in one party's sole name.
24. It will be recalled that the *Stack* presumption is that the beneficial interests mirror the legal interests and that the presumption is a strong one: it will apparently be a "very unusual" case in which the presumption is rebutted.

²⁷ [2009] EWHC 1713

²⁸ This may be difficult to reconcile with the Court of Appeal's rejection as "impermissible" of the question what the Court considers fair in *Holman v Howes* [2007] EWCA Civ 877. See also *Tackaberry v Hollis* [2007] EWHC 2633, in which the Court adopted the dissenting speech of Lord Neuberger, which clearly rejected "imputation".

²⁹ [2007] WTLR 1505

³⁰ [2008] All ER (D) 79

³¹ above

³² Consider a jointly owned bed and breakfast property, or a family pub which is also a home. How are such properties to be categorised?

³³ [2007] UKPC 53

Moreover, the House of Lords were apparently deliberately aligning the joint names cases with the sole name cases: the legal title is said to be the starting point in both.

25. Carried to its logical conclusion, this would suggest that the House of Lords has made it very much more difficult for a claimant to establish a beneficial interest in a sole name case than it was before. *Oxley v Hiscock* had said that in a sole name case an intention to share beneficial ownership would “readily” be inferred from the fact that each party had made some kind of financial contribution towards the purchase. But the move away from the financial contributions of the parties as the starting point for analysis has put that position in doubt. There is some evidence that this doubt has led to inconsistent approaches amongst first instance Judges³⁴.

Changes after Acquisition

26. Before *Stack* it was generally accepted that a common intention constructive trust might arise at some time after the relevant property had been acquired, or the parties’ intentions about the extent of their beneficial interests might change over time. The House of Lords confirmed that the trust might be “ambulatory” in nature, changing with the changing circumstances of the parties.
27. Shortly after the decision in *Stack*, the Court of Appeal had to deal with this issue in *James v Thomas*³⁵. Ms James had formed a relationship with Mr Thomas in 1989 and moved in to live with him in the house he had purchased some four years earlier. For a number of years she worked full time without pay in his building business – driving tipper trucks, digging trenches, picking up materials and the like. In 1999 she became an equal partner in the business, but still received no income from it. Instead all the profits of the business were paid into an account in Mr Thomas’ name from which the mortgage and all household expenses were paid. The property was extensively renovated and both parties carried out works to the property and to acquire some adjoining land. The Court of Appeal confirmed that a constructive trust can arise some years after the property has been acquired by, and registered in the sole name of, one party. But, it said, in the absence of an express post-acquisition agreement, the Court would be slow to infer from conduct alone that the parties intended to vary existing beneficial interests established at the time of acquisition³⁶. Ms Thomas’ claim to a beneficial interest was rejected.
28. This unwillingness to infer a common intention to share where the parties were not living together when the property was purchased does not appear entirely logical. The *Stack* presumption is based on the concept that cohabitants willingly make gifts to one another. In circumstances where a large percentage of the price of a

³⁴ In *Jones v Kernott* [2009] EWHC 1713 Nicholas Strauss QC, sitting as a Deputy Judge, preferred to follow *Oxley v Hiscock*: see para [26]. But in *Thomson v Humphrey* [2009] All ER (D) 280, the full text of which is not available at the time of writing these notes, the Judge appears to have referred to the “high burden of proof” on a claimant making a claim against a property in her partner’s sole name.

³⁵ [2007] EWCA Civ 1212, [2007] 3 FCR 696

³⁶ This principle has since been applied in *Morris v Morris* [2008] EWCA Civ 257, *Mirza v Mirza* [2009] EWHC 003 and *Putnam & Sons v Taylor* [2009] EWHC 317.

property is borrowed on mortgage, the property is in practice being “acquired” over a long period of time. It is difficult to see why a cohabitant’s contributions to the mortgage instalments in the months immediately following the purchase should “readily” raise the inference of a common intention to share, but contributions, say, a year later, do not.

29. Certainly the Courts appear to be more comfortable concluding that a cohabitant who originally had a beneficial interest in a property has relinquished it³⁷ than they do holding that a cohabitant has acquired a beneficial interest in a property originally bought by his or her partner.

Complex, Arbitrary, Uncertain

30. That is how the Law Commission summed up this area in 2001³⁸. It is difficult to see that it is any better in 2009. Indeed, the *Stack* decision appears to have introduced additional complexity into the field, and to require the drawing of further arbitrary distinctions, rendering outcomes for clients even less certain than they were before. What joy!

³⁷ As in *Jones v Kernott*, above, and *Kali v Chawla* [2007] EWHC 2357.

³⁸ Law Com No. 274