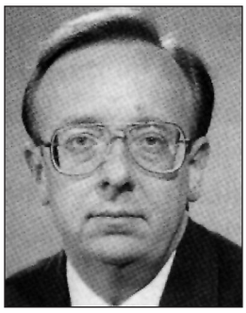
Beneficial entitlement after *Stack*

Mark Pawlowski looks at two decisions on assessing beneficial entitlement subsequent to the House of Lords' ruling in Stack v Dowden



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'It is apparent from *Stack* that the court's primary inquiry rests on identifying the parties' financial outlay when assessing beneficial entitlement.'

The new approach to determining beneficial entitlement in co-ownership cases, as advocated by the House of Lords in *Stack v Dowden* [2007], has been extended recently so as to apply not only to cohabiting couples living together in a platonic or sexual relationship, but also to cases where the property has been purchased by family members. In *Adekunle v Ritchie* [2007] HHJ Behrens QC extended the *Stack* approach to a co-ownership dispute involving a mother-and-son holding. Here, in the very unusual circumstances of the case, the presumption that beneficial ownership should follow the legal title was displaced, giving the mother a two-thirds beneficial share in the family property.

Prior to *Stack*, doubts were also expressed by several commentators as to whether or not an indirect financial contribution (ie a contribution to household expenses, which releases the legal owner's own income to pay the mortgage) may qualify so as to support a constructive trust. The point was briefly canvassed in *Stack* by Lord Walker and has now been the subject of the recent Privy Council decision in *Abbott v Abbott* [2007].

Both these recent decisions form the basis of this article.

The approach in *Stack*

The parties (an unmarried couple) purchased a home (Chatsworth Road) in their joint names. The deposit was paid from a savings account, which had been held in the respondent's (Dowden's) name. Upon completion, the balance was funded from the sale of a previous property (Purves Road) which had been in the respondent's sole name. There was evidence that the appellant (Stack) had done some alterations and improvements to this property but he was unable to put a figure on their value.

The balance of the purchase price for the Chatsworth Road property was obtained through a mortgage advance, which was in joint names. At the time of the purchase, the parties had been living together for some time and had four children. The transfer document had included a clause that the survivor of them was entitled to give a valid receipt for capital money arising from a sale of the property. However, it was unclear whether the parties had discussed how they wished to own the property. The parties eventually separated and the appellant sought a declaration that the property was held on trust by both of them as tenants in common in equal shares.

The approach taken by the House of Lords was largely uncontroversial and already enshrined in basic principles of land and trust law. The starting point is that equity follows the law so that, in joint ownership cases, the onus is on the joint owner to establish that they own more than a joint beneficial interest. The crucial question is: did the parties intend their beneficial interests to be different from their legal interests? If so, in what way are they different, and to what extent? In the majority of cases where an old (pre-1998) form of transfer has been used, it is unlikely that a mere disparity in contributions towards the purchase price will attract a successful challenge to a beneficial joint tenancy. Indeed, many more factors (other than just financial contributions) will be relevant

in determining the parties' true intentions. According to Baroness Hale (who gave the leading opinion in *Stack*), these may include:

- any advice or discussions at the time of transfer;
- the reasons why the home was acquired in joint names;
- the reasons why (if this is the case) the survivor was authorised to give a receipt for 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 later;
- how the parties arranged their finances (ie separately, together, or a bit of both);
- how they discharged the outgoings and household expenses; and
- the parties' individual characters and personalities.

When a couple buy a home in joint names and become jointly responsible for the mortgage, strict mathematical calculations as to who paid what may be less significant. In these circumstances:

> ... it may 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.
> (Baroness Hale, para 69.)

In view of this, cases where joint owners will be held to have intended that their beneficial interests should be different from their legal ownership will be 'very unusual', according to her Ladyship.

On the facts in the appeal, her Ladyship concluded that the respondent had established a common intention that the parties' respective equitable interests should be different from a *prima facie* beneficial joint tenancy. Most importantly, the respondent had contributed far more financially to the acquisition of the property, both in terms of the initial purchase money and subsequent capital repayments on the loan. On the other hand, the appellant had made a significant contribution towards the substantial improvement of the earlier (Purves Road) property. It was significant, however, that the parties had never pooled their separate resources for the common good. Both parties undertook separate responsibility for that part of the expenditure which each agreed to pay. These aspects to their financial relationship, in particular, pointed strongly against joint beneficial ownership. In the result, the Lords agreed that the parties' respective shares should stand at 35% for the appellant and 65% for the respondent.

Decision in *Adekunle*

The parties (mother and youngest son) bought the family home in 1989 jointly, although the standard form of transfer document contained no express declaration of the beneficial interests between them. In 2005 the mother died intestate, leaving ten children. Following her death, the son claimed that the property now belonged to him under the doctrine of survivorship. The other children, on the other hand, argued that the property should be sold and the net proceeds divided between the deceased's ten children equally. The central issue, therefore, was whether, applying the new approach in *Stack*, the presumption of a beneficial joint tenancy should prevail, or be rebutted by countervailing circumstances.

Although the transfer, as mentioned earlier, contained no express declaration of trust, the office copies included the usual Form 62 restriction in the proprietorship register to the effect that 'no disposition by one proprietor of the land (being the survivor of joint proprietors and not being a trust corporation) under which capital money arises is to be registered except under an order of the registrar or the Court'. This, however, applying *Huntingford v Hobbs* [1993] (expressly approved in *Stack*), could not amount to an express declaration of trust. At best, such a restriction would only be useful in determining the parties' intentions where the parties had actually understood its significance. In the instant case, there was no evidence of what legal advice had been given to the parties at the time of purchase.

In the absence, therefore, of any express declaration of trust, the question of the parties' beneficial entitlement fell to be determined, applying the formula set out by Baroness Hale in *Stack*, by looking at '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' (*Adekunle*, para 63). It would, however, as acknowledged by the learned judge, take 'very unusual circumstances' to rebut the presumption that beneficial interests follow the parties' legal ownership.

In *Adekunle* the context of the purchase of the property was very different from that of a normal purchase in joint names. In the first place, the purchase was of a council house by a tenant (the mother) with the benefit of a generous (50%) discount. She was not in a position to fund the mortgage without the assistance of her youngest son, who was also living at the property. That was the reason it was purchased in joint names. Moreover, the primary reason for the purchase was to provide a home for the mother. Like *Stack*, the parties' finances were also separate. Also of significance was the fact that the mother had nine other children, with whom she was on good terms, so there was no reason to believe that she would have wished to exclude them from her estate. There was also the inference (albeit slight) from the Form 62 restriction, mentioned earlier, that the parties did not intend that there should be a beneficial joint tenancy.

In these circumstances, therefore, it was apparent that the parties (mother and son) had not intended a beneficial joint tenancy (with a right of survivorship) or that their shares should be equal. A number of factors, however, pointed to the conclusion that the son should have some kind of a beneficial interest in the property:

(1) the property was conveyed into joint names;
(2) he was jointly and severally liable under the mortgage;
(3) he was occupying the property at the time of purchase; and
(4) he contributed to the mortgage.

His contribution, however, was significantly less than that of his mother, who had been able to obtain a 50% discount of the purchase price by reason of her status as tenant with the local authority. In the result, taking a broad 'holistic approach', the Court concluded that the son should have a one-third beneficial interest in the property.

Indirect contributions

The High Court decision in *Le Foe v Le Foe* [2001] openly recognised that indirect contributions may qualify in assessing

The nature of the inquiry

Until recently, there has been surprisingly little judicial guidance on the precise nature and scope of the parties' dealings that will influence the court in assessing the appropriate division of beneficial ownership in the property. It will be recalled that, according to Chadwick LJ in *Oxley v Hiscock* [2004], the correct approach was to consider what was 'fair having regard to the whole course of dealings between them in relation to the property'. But will the courts limit their search for 'the whole course of dealings' to just a strict financial inquiry or will they adopt a more robust analysis of the wider circumstances of the parties' relationship?

In the light of *Stack*, the conclusion now is that the relevant inquiry must be restricted to that conduct which throws light specifically on what beneficial shares were intended. The focus, therefore, is away from the court imposing its own sense of fairness or justice on the parties. Fairness and other matters comprising 'the whole course of dealing' are relevant now only as background. The distinction, however, between primary and secondary factors may not be an easy one to draw in practice. How purely 'background' factors are to be applied in the assessment process is not made entirely clear in *Stack* – the only suggestion is that, although such factors will not by themselves be enough to displace the presumption of joint beneficial ownership, they may be used in providing an evidential context when coupled with evidence of financial expenditure, from which the requisite common intention may be inferred. This is certainly the approach taken in *Adekunle*, where the learned judge relied primarily on financial outlay (the mother's substantial discount) in both displacing the presumption of a joint beneficial tenancy and in assessing the son's beneficial share in the property. Whilst other factors are clearly taken into account as forming 'the context of the acquisition of the property', it is apparent that financial contributions play a decisive role in the court's assessment. In the words of the learned judge (para 68):

> It is plain that [the son's] financial contribution was significantly less than that of his mother. On a strictly arithmetical (resulting trust) basis it would be difficult to justify a beneficial interest of more than 25%: however the new approach requires me to take the holistic approach… in order to ascertain what shares were intended.

The suggestion here is that, in line with *Stack*, the court's inquiry remains limited to analysing primarily the parties' financial arrangements, with wider circumstances (governing their relationship) operating only as secondary factors by way of evidential context and background.

beneficial entitlement, notwithstanding the remarks of Lord Bridge in *Lloyds Bank v Rosset & anr* [1991] that, in the context of an inferred common intention constructive trust, only a direct financial contribution will suffice.

Interestingly, in *Stack* Lord Walker added to the debate by expressly doubting whether Lord Bridge's observation on this point 'took full account of the views… expressed in *Gissing v Gissing* [1971] (see, especially Lord Reid at 896G-897B and Lord Diplock at 909D-H)'. His Lordship noted that this observation had 'attracted some trenchant criticism' from academics as potentially productive of injustice (para 26). Significantly, his Lordship felt that, whether or not Lord Bridge's observation was justified in 1990, the law had now moved on.

The point has arisen again recently in *Abbott*, referred to earlier, where Baroness Hale (delivering the judgment of the Privy Council) fully endorsed Lord Walker's views that indirect financial contributions were not to be excluded when determining the parties' intentions as to ownership of a property. In *Abbott* the husband's mother transferred a plot of land into his name, so that he and his wife could build their matrimonial home on it. The home was built and the husband was the legal owner. His mother, however, contributed towards the construction costs and the couple took out a bridging loan and then a mortgage. The wife also made herself jointly and severally liable for the repayment of the capital and interest on the mortgage. Throughout the marriage, the couple's income went into a joint bank account and all payments on the mortgage were made out of that account. The couple eventually separated.

The Privy Council, on appeal from the Court of Appeal of Antigua and Barbuda, concluded that, following *Stack*, the correct approach was to take into account the parties' whole course of dealing in relation to the property in determining beneficial entitlement. The Eastern Caribbean Court of Appeal had, therefore, erred in taking the view that the wife could only acquire an equitable interest by way of direct contributions to the mortgage payments. In particular, it was wrong for the Court to have ignored the fact that the parties had arranged their finances entirely jointly and undertook joint liability for the repayment of the mortgage.

Conclusion

It is apparent from *Stack* that the court's primary inquiry rests on identifying the parties' financial outlay when assessing beneficial entitlement. The intriguing question is the extent to which the court may go beyond mere financial matters (direct or indirect) and explore the parties' respective commitments in terms of their domestic and spousal contributions (eg as childminder and homemaker).

The answer to this question, at least for the time being, is that such contributions have only a limited role to play in determining equitable ownership. Factors such as the parties living together for a long time or having children will provide only secondary evidence of the parties' relationship in relation to occupation of the home – they will not be enough by themselves to warrant any adjustment to their beneficial shares. ■

Abbott v Abbott
(Unreported, 26 July 2007, Privy Council)
Adekunle v Ritchie
(Unreported, 17 August 2007, Leeds County Court)
Gissing v Gissing
[1971] AC 886
Huntingford v Hobbs
[1993] 1 FLR 736
Le Foe v Le Foe
[2001] 2 FLR 970
Lloyds Bank v Rosset & anr
[1991] 1 AC 107
Oxley v Hiscock
[2004] WTLR 709
Stack v Dowden
[2007] WTLR 1053