

Ownership of the Family Home - What Role the Resulting Trust?

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In cases where the family home is purchased in joint names, equitable ownership will follow the legal title so that the courts will presume that the parties (a married or cohabiting couple) intended joint beneficial ownership in the absence of a contrary common intention: see, *Stack v Dowden* [2007] 2 AC 432.

The current position is well-illustrated by the post-*Stack* case of *Fowler v Barron* [2008] EWCA Civ 377 where the parties, an unmarried couple, had bought a home in joint names without any formal declaration of trust or express discussions as to their beneficial ownership. The male partner paid the deposit and some of the purchase price with the balance being funded by means of a mortgage in joint names. The male partner paid all the mortgage instalments, as well as the council tax and utility bills. The female partner, on the other hand, spent her income on herself and the children as well as on gifts, school clubs, trips and holidays. The Court of Appeal concluded that, following *Stack*, a presumption of joint beneficial ownership arose from the fact that the couple were legal joint owners. Although it was open to either party to rebut the presumption, the relevant intention to support a constructive trust had to be the parties' *shared* intention so that a secret (undisclosed) intention on the part of the male partner (i.e., that his female partner should only benefit in the event of his death and on the basis that they were still living together) had to be ignored.

The implications of applying the presumption

What is particularly significant about the *Fowler* decision is that a claimant may become entitled to an automatic half-share in the home (notwithstanding that (s)he has made no financial contributions to acquisition) based solely on legal title being placed in joint names. Although the transfer of the home into joint names was a conscious decision of the parties in *Fowler*, nevertheless, it was apparent that they did not take any legal advice as to the consequences of doing so. As such, the male partner was saddled with a “default rule” which he had not fully understood or contemplated at the time of the purchase. Interestingly, it was acknowledged in *Fowler* itself that the result could be criticised “because it may leave Miss Fowler better off than the case of a cohabitee who contributes (say) 20% of the purchase price”: at [47], per Arden LJ.

The potential unfairness of applying the presumption may be compounded if, sometime after the purchase of the home, the claimant spends a considerable amount of her own money on making an improvement to the property (say, for example, on building an extension to the home). Does this have the potential for enlarging her equitable share in the property still further? According to *Stack*, a successful challenge to equal beneficial ownership may arise where one party has substantially improved the property subsequent to purchase using his/her own resources. The cost of such improvements, as justifying an adjustment of beneficial shares, was seen as a significant capital expenditure that differs from regular outgoings. Similarly, in *Jones v Kernott* [2012] 1 AC 776, the Supreme Court acknowledged that the intentions of the parties as regards their beneficial interests may change (or be taken to have changed) over time as a result of altered circumstances.

Moreover, following *Jones*, it would be permissible for a court to attribute to the parties an intention to vary their beneficial interests that they had not actually expressed to each other and to impute to them an adjustment which would be fair and reasonable taking into account the whole course of dealing between them: see, *Barnes v Phillips* [2015] EWCA 1056. Such an adjustment would, presumably, allow for an appropriate enhancement of the claimant's equitable share in the home with a corresponding reduction in the other party's entitlement to a figure below the original 50 per cent share notionally allocated to him upon acquisition. From his point of view, therefore, his share in the property will have diminished still further in proportion to the amount he initially contributed to the purchase of the property. The claimant, on the other hand, will have gained a greater share (beyond the notional joint share indicated by the legal title) as a result of her expenditure on the improvement.

Of course, the claimant's partner may himself have a legitimate claim for an enlarged share based on his own financial outlay on the property post-acquisition (through, say a combination of mortgage repayments, ongoing maintenance and repairs to the house). Assuming this is broadly equivalent to the claimant's subsequent improvement, the overall result may be that the two cancel each other out so that the parties' respective beneficial shares (based on the *Stack* presumption of equality) remain unaltered despite the change of circumstances. Indeed, in *Stack*, it was openly recognised that, when a couple buy a home in joint names and become jointly responsible for the financial outgoings (including mortgage repayments), strict mathematical calculations as to who paid what may be less important. 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 they would share the eventual benefit and burden equally": at [69], per Baroness Hale.

An alternative approach?

Interestingly, Lord Neuberger in *Stack* was not supportive of the introduction of a presumption of joint beneficial ownership in joint name cases and preferred to apply a resulting trust solution where the parties had made differential contributions to the purchase price of their home: at [106]-[107]. In his Lordship's words, at [110]:

"Where the only additional relevant evidence to the fact that the property has been acquired in joint names is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held, in my view, in the same proportions as the contributions to the purchase price. That is the resulting trust solution."

In his view, there were important practical reasons for rejecting the presumption of equality approach in such cases. The property may be bought in joint names for reasons which cast no light on the parties' intentions with regard to beneficial ownership. It may be the solicitor's decision or assumption, the lender's preference for the security of two borrowers, or the accident of how the initial contact with the solicitor was made. Indeed, cohabiting parties are often not anxious to discuss how they should divide the beneficial interest in the home they are about to buy. They would have to debate what should happen if their relationship broke down - while, in some cases, they may assume equal ownership, in others they may not. In many cases, the point may not even occur to them. If they are happy with an equal split at the beginning, one might expect them to say so. The fact that they do not do so may be more consistent with the view that they (or, at any rate, the bigger contributor) would not be happy with an outcome which presumes equal beneficial ownership for the very reason that their contributions differed: at [113].

Secondly, there was an important point about consistency of approach with the case where the purchase is in the name of one of the parties. Where there is evidence of the parties' respective contributions to the purchase price (and no other relevant evidence) and one of the parties has contributed a certain amount, the fact that the purchase is in the sole name of the other does not prevent the former owning a proportionate share of the beneficial interest on a resulting trust basis. The resulting trust presumption arises because it is assumed that neither party intended a gift of any part of his own contribution to the other party. That should logically apply to contributions irrespective of the name or names in which the property concerned is acquired – in other words, regardless of whether the court is concerned with a joint or sole name case : at [114].

Thirdly, the introduction of a presumption of equality was inconsistent with principle in so far as it reflected the resurrection of the “family assets” hypothesis rejected in earlier case law (most notably, *Pettitt v Pettitt* [1970] AC 777) and the invoking of a presumption of advancement between unmarried couples where such presumption has never applied: at [112].

The resulting trust solution was, however, no more than itself a presumption capable of being displaced by other relevant evidence as at the time of acquisition. Such evidence would often enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held. Such an intention may be express (although not complying with the requisite formalities) or inferred, and must normally be supported by some detriment, to justify intervention by equity. It would be in this way that the resulting trust would become rebutted and replaced by a constructive trust: at [124]. In the

present case, however, his Lordship considered that there was no evidence to justify departing from the apportionment of the beneficial interest at the date of acquisition indicated by the resulting trust presumption. In this connection, agreeing with the majority, the defendant had contributed far more to the acquisition of the house than had the claimant; that the parties had never pooled their separate financial resources for the common good and everything, apart from the house and associated endowment policy, had been kept strictly separate. In those circumstances, the parties had clearly not intended their shares in the property to be equal and that, accordingly, the defendant had made good her case for a 65% share of the beneficial interest.

A residual role for the resulting trust?

What then of the resulting trust? Does it still retain any residual function in cases involving ownership of the family home? The beginnings of the demise of the resulting trust in this context can be traced to a relatively early decision of the Court of Appeal in *Curley v Parkes* [2004] EWCA Civ 1515, a single ownership case, which recognised that only *initial* contributions towards the cost of purchase of the property could rank as giving rise to an equitable interest under a resulting trust. However, payments or contributions made *after* purchase (for example, towards mortgage instalments or improvements to the property) would not qualify for this purpose and, therefore, could only be used to support a claim based on a constructive trust or proprietary estoppel. This narrow interpretation of the resulting trust, coupled with a strict quantification of interest based on proportionate financial contributions, has inevitably lead to most claims to equitable ownership being framed using the concept of the constructive trust or proprietary estoppel. However, there remain some cases in which the resulting trust still plays a residual role.

The investment context

The resulting trust approach will continue to prevail where it is apparent that the property was purchased as a business venture or investment and not as a family home for the parties. In *Laskar v Laskar* [2008] EWCA 347, the mother was the tenant of a council house, which she purchased, under the right to buy scheme contained in the Housing Act 1985, at a considerable discount using partly her own money and a mortgage. The daughter also contributed a small amount towards the purchase price. In order to secure the mortgage, however, the mother transferred the property into the joint names of herself and her daughter so that both became jointly liable under it. The property was purchased primarily as an investment and, shortly after completing the purchase, both the mother and the daughter moved out and began renting it out. Throughout this period, the mother was solely responsible for the outgoings and mortgage repayments, which were funded from the rent on the property. Later, the parties fell out and the daughter brought proceedings contending that she had an equal beneficial interest in the property. In particular, she claimed that there was a

presumption at law that the beneficial interest mirrored the legal title so that joint tenants at law were entitled to equal beneficial ownership.

The Court of Appeal rejected the daughter's claim. Where property was purchased as an investment (as opposed to a family home), the presumption of joint ownership did not apply. In the present case, it was apparent that the purchase of the property was a business venture and that the daughter had been brought into the transaction solely in order to add her name as joint tenant to secure the necessary mortgage. In reality, therefore, the parties (despite their familial ties) were simply investors who had always led separate lives and maintained separate and distinct finances. The appropriate approach, therefore, was to apply the mechanism of the resulting trust in order to determine their respective shares based on their financial contributions. On this basis, it was apparent that the award of the discount, under the 1985 Act, had been made to the mother on the basis of her tenancy as sole tenant. The daughter, by contrast, had been named as joint tenant only recently and, hence, could not participate in this contribution towards the purchase price, which was attributable to the mother alone. However, since both mother and daughter were made jointly liable under the mortgage, it was appropriate to treat the mortgage as representing equal contributions to the purchase price. The Court's main ground for reaching this conclusion was that the mortgage repayments had been funded by the rent on the property (which fell to be treated as joint income) and not by the parties' own personal finances. The upshot was that the daughter was entitled to a beneficial share in the property which reflected the uplift in her mortgage contribution. There have been other cases where the resulting trust has been applied in the investment context: see, for example, *Geary v Rankine* [2012] EWCA Civ 555.

More recently, the Privy Council in *Marr v Collie* [2018] AC 631 has indicated that, where property is purchased in the joint names of the parties in a domestic relationship as an investment (as opposed to a home), a resulting trust solution may not be the inevitable answer as to how beneficial ownership is to be determined. In the words of Lord Kerr, at [49]:

“It is entirely conceivable that partners in a relationship would buy, as an investment, property which is conveyed into their joint names with the intention that beneficial ownership should be shared equally between them, even though they contributed in different shares to the purchase price.”

The key to determining whether the presumption of joint beneficial ownership or, alternatively, the presumption of a resulting trust, should apply falls to be answered by looking at the parties' common intention. If the evidence points to a mutual wish, despite contributing in unequal shares to the purchase of the property, that joint beneficial ownership should reflect the parties' joint legal ownership, then the *Stack* presumption should apply. If, on the other hand, that is not their wish (or they have not formed any intention as to beneficial ownership), a resulting trust will provide the appropriate solution.

Lack of close relationship

It seems also that a lack of close relationship between the parties will exclude the determination of beneficial ownership under a common intention constructive trust. Instead, the courts will apply a solution based on a resulting trust despite the domestic context of the transaction. In *Wodzicki v Wodzicki* [2017] EWCA Civ 95, for example, the property was registered in the joint names of the appellant's father and his second wife, but had been occupied exclusively by the appellant since its purchase in 1988. Throughout this time, the father and his wife lived in France. In 2010, the father died intestate and his wife wrote to the appellant suggesting that she would gift her the property if the appellant gave up any entitlement under French inheritance law. The appellant did not, however, pursue the suggestion and the wife later brought proceedings for possession of the property. At first instance, the trial judge held that the parties had intended the property to be the appellant's long-term home and that she (the appellant) and the father's wife were entitled to beneficial ownership in the proportions to which they had contributed to its purchase, maintenance and outgoings on the basis of a resulting trust. Significantly, the Court of Appeal agreed with this approach. The trial judge had been correct to reject the daughter's claim that she was the sole beneficial owner under a common intention constructive trust as there was nothing close about the appellant's relationship with the father's wife. The approach taken in *Stack*, which was applicable to cohabiting couples, was not, therefore, appropriate in this context. Accordingly, the appellant's beneficial interest was limited to her contributions (if any) that she had made to the repayment of the mortgage loan under a resulting trust and, beyond that, the father's wife was the sole beneficial owner of the property: at [28].

The degree of closeness of the parties' relationship will, of course, depend on all the circumstances. Thus, in *Gallarotti v Sebastianelli* [2012] EWCA Civ 865, the parties were friends who had bought a flat together. The flat was transferred into the sole name of one of the friends who also took out a mortgage for the balance of the purchase price. The friendship terminated and the non-owning friend was excluded from the flat, who then brought a claim that he had a beneficial interest in the flat relying on a common intention constructive trust. The claim succeeded. Significantly, in this case, the parties' friendship had lasted over many years (since 1988) and was strong, albeit platonic.

Conclusion

The presumption of equality in joint ownership cases is based on the fundamental premise that the parties make a deliberate choice to put the family home into joint names with a clear and informed understanding of the legal consequences of doing so. The reality, however, as highlighted by Lord Neuberger's judgment in *Stack*, may be very different. The facts in *Fowler* demonstrate that the parties may not always be given proper legal advice before embarking on a joint purchase of the home. The result, it is suggested, may operate unfairly on the party who has contributed significantly more to the purchase price at the time of acquisition. Moreover, the potential unfairness to the bigger contributor may be compounded if the other party (who has contributed less to the initial purchase price) subsequently pays for

an improvement to the property which enlarges his/her share substantially beyond the joint share notionally ascribed to the parties on joint acquisition. Such an outcome may, however, be moderated in circumstances where *both* parties have made a significant financial outlay to the property post-acquisition so that their equal beneficial ownership remains unaltered despite the change of circumstances.

In terms of the continuing role of the resulting trust, this now plays an admittedly limited function in resolving property disputes involving the family home. As we have seen, the resulting trust will be applied in cases where there is a commercial context to the purchase of the home, or where there is a lack of close relationship between the parties. Apart from the commercial and non-personal relationship context, there will still be other cases where the resulting trust continues to be relevant in determining beneficial ownership. Such cases may arise where, in the context of single ownership, the only relevant contributions are those made by either (or both) parties at the time of acquisition.