Articles

STACK v DOWDEN

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Reform is overdue in cohabitee disputes. The current law is:

> 'deeply unsympathetic to the dynamics of family living. The structural principles of property law often sit badly beside the social phenomena which they attempt to regulate. The traditional law of trusts, which "assumes bargains, and not rights", is ill suited to deal with those who contribute towards the success of a family partnership without any anticipation of material reward.' (K Gray and S Gray, *Elements of Land Law* (LexisNexis, 2004), at para 10.128).

Pending the final Law Commission report (due August 2007) and subsequent legislation, the House of Lords' ruling in *Stack v Dowden* [2007] UKHL 17, [2007] FLR (forthcoming), sets out a number of important guidelines for all cohabitee disputes, including the applicable starting points and a revision of the *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 2 FLR 669 approach to be taken as to quantification in constructive trust cases.

BACKGROUND

The Lords described *Stack v Dowden* as a very unusual, even exceptional, case. Barry Stack and Dehra Dowden had been in a relationship from 1975 and cohabited from 1983. There were four children of the 27-year relationship. However, they never pooled their resources and their financial affairs were kept 'rigidly separate'. They first lived together in a property at Purves Road, London NW10 bought in Ms Dowden's sole name, funded by a mortgage for £22,000 and £8,000 from her savings. There was considerable doubt over the source of those savings: the trial judge found that they were 'joint savings'; the Court of Appeal held there was 'no evidence' to support such a finding; and the Lords held that while there was some evidence to suggest Mr Stack had paid money to Ms Dowden it was 'something of a leap' to characterise the funds as joint savings. After substantial renovation works, Purves Road was sold in 1993 for £90,000 with net proceeds of £66,613.

The parties then bought 114 Chatsworth Road, Willesden Green in joint names for £190,000, funded by Ms Dowden's savings of £128,813 (which included the net proceeds of sale from Purves Road) and the balance by way of a mortgage in joint names. There was no express declaration of trust although the transfer did contain a declaration that the survivor of them would give a valid receipt for capital money. The mortgage was duly repaid by a series of lump sums whereby Mr Stack contributed £27,000 and Ms Dowden £38,435. The parties separated in October 2002 and in April 2003 Mr Stack undertook within injunctive proceedings not to return to the property, which was sold in November 2005 with net proceeds of £754,345. Baroness Hale of Richmond remarked that there were a number of ways to calculate the parties' respective financial contributions to the property but that even supposing the most generous interpretation in Mr Stack's favour, his financial contributions yielded roughly 36% of the total contributions. The issue between the parties was whether the proceeds of sale should be divided 50/50 or 65/35, a net difference of £111,000.

FIRST INSTANCE AND COURT OF APPEAL

At first instance, the trial judge held that:

> 'over this very long association between the parties, they have both put their all

> into doing the best for themselves and their family as they could [and] in the circumstances after such a very long relationship a 50/50 share is an appropriate division.'

In respect of occupation rent, Ms Dowden was ordered to pay £8,100 to Mr Stack for the period up to trial and £900 a month thereafter. The Court of Appeal ([2005] EWCA Civ 857, [2006] 1 FLR 254) found that Mr Stack had no beneficial interest in Purves Road, that the principles enunciated in *Oxley v Hiscock* should be followed as regards the quantification of their respective shares and a fair share was 65/35. The order for ongoing occupation rent of £900 per month was discharged. Carnwath LJ famously likened cohabitee disputes to: 'a witch's brew, into which various esoteric ingredients have been stirred over the years' (at para [75]).

HOUSE OF LORDS

The Lords unanimously dismissed Mr Stack's main appeal which had sought a 50% rather than 35% share in the property and by a majority of 4:1 dismissed the appeal with regards occupation rent (Lord Neuburger of Abbotsbury dissenting). However, the Lords divided 4:1 as to their reasons for dismissing Mr Stack's main appeal:

- the majority (Baroness Hale delivering the main opinion) held that the law had 'moved on' whereby a common intention could be inferred or imputed and regard should be had to the whole course of dealing between the parties as to their respective shares;
- Lord Neuburger doubted that a different approach was justified and preferred the traditional resulting trust approach.

MAJORITY OPINIONS

Starting point

> 'The key to simplifying the law in this area lies in the identification of the correct starting point. Each case will, of course, turn on its own facts. But law can, and should, provide the right framework' (Lord Hope of Craighead, at para[3]).

That is to be achieved in 'domestic' or 'cohabitee' cases by presuming that equity will follow the law (Lord Hope, at para [4]). The burden is on the claimant to prove otherwise and in the case of a jointly owned property, that will be a heavy burden: 'not to be lightly embarked upon … unless the facts are very unusual' (Baroness Hale, at para [68]). *Stack v Dowden* was such an exceptional case (Lord Walker of Gestingthorpe, at para [33]).

Special law applicable to cohabitee disputes

By a majority, the Lords recognised that the law had moved on: 'cohabiting couples are in a different kind of relationship' to other disputes involving property, such as commercial property disputes, and different considerations would apply:

> '[T]he law had developed in recognition that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant' (Baroness Hale, at para [42]).

Quantification of share: *Oxley v Hiscock* modified

The majority in the Lords held that the parties' shares in *Stack v Dowden* fell to be determined under a constructive rather than a resulting trust: a common intention could be inferred or (more controversially) imputed as to their respective shares:

> 'The law has indeed moved on and in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.' (Baroness Hale, at para [60])

A resulting trust would readily yield to a constructive trust and thereby greater

flexibility in determining shares rather than a strict money contribution basis.

With regards to quantification of share, the House of Lords followed *Oxley v Hiscock*; without evidence of what was said and done at the time, the court would have regard to the 'whole course of dealing' with one important caveat: the court should be concerned with throwing light on the parties' intentions rather than ascertaining a fair share. The Lords unanimously preferred the formulation as set out in the Law Commission's *Sharing Homes* (2000), para 4.7), ie 'undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question of what shares were intended' (see paras [61] and [145]):

> 'First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1970] AC 777 without even the fig leaf of s 17 of the 1882 Act.' (Baroness Hale, at para [61])

Proving the contrary

In divining the parties' intentions, the court should have regard to many more factors than financial contributions. Baroness Hale set out a number of such factors at para [69], and concluded:

> 'the arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally.'

In addition, substantial improvements undertaken should be taken into account and one party's significant manual labour is capable of being a contribution (Lord Walker, at para [36]; Lord Neuburger, at para [139]).

In terms of financial contribution to the acquisition of the property, a wide view should be taken of when a property is acquired:

> 'Now that almost all houses and flats are bought with mortgage finance … the process of buying a house does very often continue, in a real sense throughout the period of ownership … the law should recognise that by taking a wide view of what is capable of counting as a contribution towards the acquisition of a residence, while remaining sceptical of the value of alleged improvements that are really insignificant, or elaborate arguments (suggestive of creative accounting) as to how the family finances were arranged.' (Lord Walker, at para [34])

Equitable accounting

The old doctrines of equitable accounting have been replaced by the statutory powers set out at ss 12(1) and 13 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA). The power to exclude occupation must be exercised reasonably (s 13(2)) and compensation could be ordered to a person whose right had been excluded or restricted (s 13(6)), having regard to the checklist at s 15(1).

Conveyancing and Form TR1

The Lords unanimously followed *Huntingford v Hobbs* [1993] 1 FLR 736 in holding that the survivorship clause in Form 19(JP) was not of itself an express declaration of land. Baroness Hale commended the use of Form TR1 (in place since 1 April 1998): 'If this is invariably complied with, the problem confronting us here will eventually disappear. Unfortunately, however, the transfer will be valid whether or not this part of the form is completed'. She suggested a revision whereby the declaration of trust box would be mandatory but: 'the form might then include an option for those who deliberately preferred not to commit themselves as to the beneficial interests at the outset and to rely on the principles discussed below' (at para [52]).

LORD NEUBURGER'S OPINION

While concurring that Mr Stack's main appeal should be dismissed, Lord Neuburger dissented as to the grounds:

> 'The fact that the Law Commission has characterised the present state of the law as "unduly complex, arbitrary and uncertain", does not, in my opinion, justify our changing it … In my judgment, it is therefore inappropriate for the law when applied to cases of this sort to depart from the well-established principles laid down over the years.' (at paras [104], [106])

Lord Neuburger doubted that cohabitee cases justified a different approach on principle from cases arising in a commercial context (at para [107]) and preferred the traditional Chancery approach. The parties' shares should be resolved on a resulting trust basis, which, coincidentally, would have led to the same outcome: 'I note that the Court of Appeal's recent decision in this case and in *Oxley v Hiscock* (above) (both of which were rightly decided) produced an outcome which would be dictated by a resulting trust solution' (at para [106]). A resulting trust was no more than a presumption, albeit an important one, 'descriptive of a shift in the evidential onus on a question of fact' (at para [123]). In the case of a constructive trust, 'an intention may be inferred as well as express [but] it may no, at least in my opinion, be imputed'. In other words, it would be unprincipled to impute a subjective intention. Fairness was not the correct yardstick in determining shares (at para [128]) and the 'whole course of dealing' was relevant only as background to the question of the parties' common intention (at para [145]).

As regards occupation rent, Lord Neuburger held that the court ought to have ordered compensation of £900 per month:

> 'Nor is it as if any wrongful act by Mr Stack caused his exclusion: it was simply due to the relationship breaking down. The fact was that, after the order of 11 April 2003 expired, Mr Stack accepted his exclusion should not count against him. To hold that a reasonable acceptance of exclusion would make it more difficult to claim compensation would put a premium on unreasonableness and encourage litigation.' (at para [156]).

CONCLUSION

By a majority, the Lords accepted that the law had 'moved on' and cohabitee disputes required a wider consideration of factors than commercial property disputes. However, *Stack v Dowden* is far from the radical approach once envisaged by Nourse LJ in *Stokes v Anderson* [1991] 1 FLR 391, at 399. It has been left to Parliament to fundamentally recast this area of law and overturn the 'witch's brew'.