

STACK v DOWDEN : THE DEATH OF RTs?

1. LORD HOPE OF CRAIGHEAD

Cites a case wherein a property was purchased jointly but the claim failed due to **unjust enrichment based on bad faith** (not keeping her side of the bargain). This concept was also employed where a contribution to purchase price and refurbishment was returned to a co-habitant.

On the facts of SvD (living together 18 years and with four children before purchase of Chatsworth Road in joint names and mortgage payments contributed equally) might be a presumption that BIs shared equally: BUT impossible to ignore that contributions to the purchase price were not equal. The respective sizes of the contributions provide the best guide to BIs in the absence of compelling evidence that by the end of their relationship they intended to share BIs equally. SvD nonesuch: they pooled their resources in the running of the household but otherwise kept their finances separate in relation to “larger matters”.

Indirect contributions such as making improvements that add significant value to the property and complete mingling of finances can also be relevant to BIs as well as respective financial contributions to the purchase of the trust property.

Approves Chadwick LJ’s view in Oxley v Hiscock that regard should be had to the whole course of dealing between the parties (but see later comments particularly Lord Neuberger in this regard).

2. LORD WALKER OF GESTINGHEAD

There will be a considerable evidential burden on those seeking to show that BIs unequal where trust property (TP) is registered in joint names with no express declaration of trust.

Pettitt v Pettitt had put a stop to Lord Denning’s promotion of the view that s17 of the MWPAA gave the Court a discretion to vary BI’s to accord with the Court’s view of what was fair (see Baroness Hale) : Pettitt and Gissing give us the proposition that the most crucial point is whether the court can find that a real bargain exists between the parties (in the absence of express intention) by looking at whether there is sufficient evidence to infer or impute a bargain (see Neuberger L on the difference between inference and imputation).

Diplock L in Pettitt saw the Courts task as examining the facts and imputing the common intention of the parties, which he saw as comparable to implying a term in contract.

Diplock L thus dismissed the resulting trust in Pettitt but in Gissing gave it equivalence to a constructive or implied trust. A trustee should not be permitted to get away with inequitable conduct where a potential beneficiary has acted to his detriment in the belief that he/she was gaining a BI by so acting.

Bridge L in *Lloyds Bank v Rossett* found that the wife's argument that she would not have embarked upon work to the property unless she had a BI was untenable. There had to be an actual agreement, arrangement or understanding between the parties based on express discussions between the parties "however imperfectly remembered and however imprecise". In the absence of such express agreement the court could rely on the conduct of the parties to infer a common intention to share BIs: cogent evidence would be direct contribution initially or by mortgage contribution: anything less would not do.

That statement is incorrect: the law has moved on and it is likely that the Law Commission recommendations will reflect this.

Academic basis, unjust enrichment, proprietary estoppel, resulting or constructive trust is immaterial: but important in looking at significance or direct and indirect contributions to acquisition of the trust property. He cites Gibson LJ in *Drake v Whipp* in this regard where it was found that the common intention was to purchase the property and renovate it, so that the approach of a resulting trust in relation to the purchase price was flawed.

Lord Walker does not dismiss RTs as being applicable to two people living together in an "emotional and commercial relationship" with a quasi-contractual flavour.

In an ordinary domestic relationship there will be a heavy evidential burden to establish that there should be imputed an intention to keep a balance sheet in relation to all expenditure. In cases where such an examination is pertinent, the Court should take a wide view of what contributions are to be taken into account that are referable to a property's acquisition (see *Neuberger L* on this).

Walker J cites a line of cases that support this proposition up to Chadwick LJ in *Oxley v Hiscock* who refers to (in the absence of evidence of express intention) the Court looking at 'the whole course of dealing between them in relation to the property' and gives the examples of mortgage contributions, council tax and utilities, repairs, insurance and housekeeping (*Baroness Hale* and *Neuberger L* qualify this). *Walker L* views significant manual labour as also capable of inclusion in this regard.

Ends by making a distinction between proprietary estoppel as "mere equity" and "common intention" constructive trust which identifies beneficiaries and the BI.

3. BARONESS HALE

To view a domestic relationship as having equivalence with a commercial transaction may result in injustice.

Increasingly couples co-habit before marriage or do not marry at all.

The Law Commission currently looking at this problem does not contain a draft bill. If the Government does not like its proposals it is unlikely to be legislated for, nor will any such provide an answer to the effect of a conveyance in joint names without a declaration of BIs.

An express declaration of trust is conclusive unless vitiated by fraud or mistake and severance of a joint tenancy results in a tenancy in common in equal shares: *Goodman v Gallant*.

But Land Registry not interested in declarations of BIs, it is concerned with establishing good title to bona fide purchasers for value. In *S v D* in 1993 when the TP was bought all that the transfer form asked was whether the survivor could give a valid receipt for capital monies received on sale: this was rejected as evidence of an express declaration of beneficial joint tenancy by inter alia the CA in *Huntingford v Hobbs*. This form was replaced by the TRI from 1998 with its three options (JT, TiC in equal shares & some other trusts) :“if this is invariably complied with, the problem confronting us here will eventually disappear” (but see *Neuberger L*). Baroness Hale suggests an additional box: not prepared to commit as to size of BIs at present time.

The onus is upon the person seeking to show that the BI is different from the legal interest to provide cogent evidence to that assertion. This is whether the property is owned solely or jointly. She refers to *Brightman L* in *Malayan Credit Ltd v Jack Chia*: joint lessees at the commencement of a lease hold commercial premises for their separate business purposes: parties may not intend survivorship even if they hold equal shares in TP. Further TP is often acquired over time so that mortgage or rent payments may be a contribution to the purchase price: in *Jack Chia* these factors pointed to a tenancy in common in unequal shares (they had made unequal contributions and occupied different square footage).

JT prima facie means equal BIs unless the contrary can be shown.

Is the starting point RT or can the Courts look at all relevant circumstances to ascertain common intention. Presumption of RT not a rule of law: she cites *Gray & Gray*: emphasis of law of trusts switched away from “crude factors of money contribution ...(to)...the more subtle factors of intentional bargain (which are the foundational premise of the constructive trust)”.

Echoing *Chadwick LJ* in *Oxley*, the law is now a search to find the parties’ shared intentions, actual, inferred or imputed in the light of the whole course of conduct in relation to the TP.

First issue in *Oxley* was whether BI at all. This readily inferred from contribution to purchase price. As to the size of the BI, she cites *Chadwick LJ*: that the answer will be found in what the parties said and did at the time of acquisition, but if no discussion then each is entitled to a share that the Court considers fair in the light of their whole course of dealing with the TP, including arrangements to meet the outgoings (e.g. mortgage, council tax, utilities, repairs, insurance and housekeeping). Common Intention is to be ascertained from conduct but fairness is arrived at from that conduct, it is not for the Court to impose what it thinks is fair. Common intention may change over time, *Walker L*’s “ambulatory trust”: they cannot at the same time intend survivorship if they stay together, a TiC in equal shares if they separate on amicable terms and an unequal one if not on friendly terms.

Baroness Hale disapproves of the RT solution in, inter alia, *Walker v Hall*, *Springette v Defoe*, *Huntingford v Hobbs*, and *Crossley v Crossley*, in favour of *Chadwick LJ*’s

Oxley formulation about common intention by inference from conduct (both as to whether BI and extent of BI). She agrees that an RT does not come into operation simply because of an absence of discussion as to extent of BI at the time of purchase. To the extent that these cases adopted that course, they should not be followed.

Joint names cases the starting point is whether the parties intended their BIs to be other than their legal interests. There will be a strong inference that they do, but this is not to say that parties always have a full understanding of the legal effects of their choice: this is so where there is an express declaration of trust and “no-one thinks that such a declaration can be overturned except in the case of fraud or mistake”. The parties may not have a free choice as to how property is held (mortgagees may insist on forms of holding for their security). In joint names cases it will be difficult to show that the parties did not intend their BIs to be different from their legal interests but context is everything and each case will turn on its own facts.

Factors to divining true intention: advice or discussions at the time of transfer; reasons why TP in joint names; reasons why survivorship was included; purpose home acquired; nature of the parties relationship; whether they have children for whom they are both responsible to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged their outgoings on the property and other household expenses. Not intended as an exhaustive list. Initial intention may change, say in relation to sole financed extension to the property.

Baroness Hale sets out that the trial Judge in *S v D* looked at the relationship between the parties rather than identifying and examining “matters that were particularly relevant to their intentions about this property”. He repeatedly referred to *S & D* as being in a partnership notwithstanding they had maintained separate finances. This was not a case where the parties pooled their separate resources for the common good. The fact that the TP was put into joint names was because it was intended that *S* would have some BI in the property: the issue was the size of his share in the light of the parties’ conduct. They also undertook separate responsibility for that part of their expenditure that each had undertaken to pay.

4. LORD NEUBERGER OF ABBOTSBURY

Ownership of BI in TP engages law of contract, land and equity. Domestic context gives different facts to commercial context but should be same approach to BI in joint names, people who have contributed to its acquisition, retention or value.

Cases are fact sensitive: what transpired before, at time of purchase and at time of trial to decide how BI held.

Prima facie JT equals joint BI: equity follows the law.

Where only evidence in JT is extent of parties’ contribution, BI held in proportion to that. RT best solution.

There is no presumption of advancement between unmarried co-habitants:

“The property may be bought in joint names for reasons that 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 happenstance of how the initial contact with the solicitor was made”. Parties in a loving relationship are not often anxious to discuss how they should divide the BI in the home they are about to buy. If they are happy with an equal share of BI at the outset they might be expected to say so.

In the absence of any express declaration as to trust the RT arises because it is assumed that neither party intended to gift the other his own contribution. Joint ownership is not identical to equal BI: why must the parties intended equal BIs; the only way property can be held by two or more is as joint owners; absence from the title with contribution is not conclusive as to BI; JT may have resulted from the above practical considerations.

JT suggests some BI, but a lesser contribution on its own does not indicate equal BIs.

Neuberger L suggests RT plus CT. Or RT modified by CT, e.g. by capital mortgage payments that increase the equity of redemption. Although there are arguments against taking on mortgage liability alone should be seen as a contribution (e.g. where one party makes initial payment and property price falls).

Intention cannot be imputed it has to be inferred i.e. objectively deduced to be the subjective intention of the parties. An inference that flows from cogent evidence.

CT arises from express or implied intention and may arise from proprietary estoppel.

Evidence of intention: paras 130-146