

legal update

Your digest of recent chancery and commercial cases

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Dividing up the family home

Stack v Dowden [2007] 2 WLR 831



Introduction

Does a conveyance into joint names, without an express declaration of trust, indicate only that each party is intended to have some beneficial interest or does it establish “a prima facie case of joint and equal beneficial interests until the contrary is shown” (para 58)? The House of Lords has recently considered the issue in *Stack v Dowden*. Though a common problem, it seems to be the first time that the point had reached the House: earlier cases concerned claims against a sole title-holder.

The House also had to consider two further questions:

- Whether a statement in the transfer to the effect that a survivor could give a valid receipt for capital moneys amounts to a declaration of a joint beneficial tenancy, a contention rejected by the Court of Appeal in *Huntingford v Hobbs* [1993] 1 FLR 736;

and

- Whether the occupying beneficial owner should compensate the excluded or non-occupying owner by making a payment to him.

Beneficial interests

On the first issue, the most important, the House held, by a majority, that the general rule is that beneficial ownership does follow legal title, so joint legal title-holders will also be joint beneficial tenants (subject to any severance of the beneficial interest), save in exceptional circumstances. The onus of establishing exceptional circumstances, and thus proving that beneficial ownership is different from legal ownership, is a heavy one. The decision applies only to cases of

joint title-holders in a “domestic, consumer context” and is not intended to apply to cases where there is a commercial or arms-length relationship between the parties or where there is a sole title-holder. So it does not apply to joint venture agreements or joint tenancies of business premises.

Lady Hale gave the leading majority opinion, with which three other law lords agreed. The reasoning was that one starts with the presumption that equity follows the law and it is a strong presumption, difficult to rebut in a domestic consumer case like the present. Lady Hale supported this by stating that intention, “whether actual, inferred or imputed”, is crucial. One would expect joint owners to spell out their beneficial interests only if they intended them to be different from their legal interests: no declaration means that one assumes the beneficial interests were intended to reflect the legal interests. Putting the title into joint names is assumed to be a conscious decision not done without thought, requiring, as it does, signatures on a contract, if not on the transfer.

Lady Hale expressly accepted that cases of joint title-holders should be treated differently from cases where there is a sole title-holder. She mentioned that courts might well find a joint beneficial tenancy in cases of joint legal title-holders but there was no instance of a sole title-holder being found to hold the title on a beneficial joint tenancy. With a sole title-holder, a contribution to the purchase price of the property by the claimant would easily rebut a presumption that the legal title-holder was also entitled to the whole of the beneficial interest. The starting point for determining the extent of the beneficial interest was a presumption of a resulting trust (agreeing with Chadwick LJ in *Oxley v Hiscock* [2004] EWCA 546; [2005] Fam 211), which would have no application in cases of joint title-holders.

■ Exceptional circumstances

Given the statement of the applicable principles, the issue then became how, if at all, the presumption of a beneficial joint tenancy could be rebutted. Lady Hale made it clear that unequal contributions to the purchase price would not alone be enough to rebut the presumption: clear evidence was required of a common intention that the beneficial interests were not to be joint. What did the facts of the case show?

Ms Dowden and Mr Stack had begun their relationship in 1975 in their teens. They started cohabiting in about 1983 when a property was bought in Ms Dowden's sole name at what seems to be less than market price, as it was acquired from the executors of her "Uncle Sidney" who wanted her to have the opportunity to buy it. The property was bought with a mortgage loan of £22,000, all repayments of which Ms Dowden made, together with all other outgoings on the property. There was some question whether the deposit monies had included money contributed by Mr Stack. The couple then had four children together, although Ms Dowden remained in full-time employment throughout the relationship and her earnings were significantly greater than Mr Stack's. Substantial improvements were made to the property, to which Mr Stack made a significant contribution. An oddity was that Mr Stack continued to use his father's address for some years, even putting it on their first child's birth certificate. A further oddity, given four children and a relationship of 25 years or so, is that the couple kept their finances completely separate, maintaining their own individual current and savings accounts and investments: there was no joint account.

They sold the first property in 1993 and bought a second one in Chatsworth Road (the subject of the claim). This was conveyed into their joint names and was paid for using the proceeds of sale of the first property plus savings in Ms Dowden's sole name (£128,000-odd), with the balance being funded by secured borrowings of £65,000-odd. Mr Stack paid all the interest on the mortgage loan and the endowment policy instalments. He also paid off £27,000 of the capital from his personal moneys, while Ms Dowden paid off £38,000-odd. At all times they appear to have expressly agreed who would pay which household expense

and then made the payments from their separate, personal accounts. They separated in October 2002 and Mr Stack moved out, leaving Ms Dowden and the children in residence until Chatsworth Road was sold in November 2005.

The presumption was held to be rebutted. The factors that established the common intention that the parties should hold Chatsworth Road in unequal shares in proportion to their contributions were the unequal contributions to the purchase price, together with the agreement to reduce the capital loan quickly from their separate accounts in a context where there was no pooling of resources whatsoever (except for Chatsworth Road itself and the associated endowment policy). There was no joint responsibility for covering household expenses but separate responsibilities for different items of expenditure. Except for the mortgage interest and endowment policy payments, Mr Stack made no other regular payments, not even towards childcare. All of these factors were held to be sufficient evidence of a common intention displacing the presumption of a joint beneficial tenancy. Ms Dowden had restricted her claim to 65% of the equity in both the Court of Appeal and the House of Lords. The evidence easily supported that share of the contributions, so no real attempt was made to calculate accurately the actual contributions they had each made.

■ The remaining issues

On the other two issues there was a consensus that *Huntingford v Hobbs* was rightly decided – the fact that a survivor could give a valid receipt for capital monies did not amount to a declaration of joint beneficial ownership. But there was dissent on the issue of the occupation rent payable by Ms Dowden to Mr Stack. The Court of Appeal had said that a primary purpose of the trust had been to provide a home for the parties' children. Mr Stack had an obligation to house his children, who required their mother to live with them, so it was not appropriate to require Ms Dowden to pay him any compensation for his exclusion. Lady Hale agreed with the Court of Appeal, although those concurring with her did not address the issue. While agreeing that compensation for exclusion from property is entirely governed by

sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996 and not the principles of equitable accounting, Lord Neuberger dissented on the ground that the children's needs were not in point when considering Mr Stack's loss of occupation of the property.

■ Where are we now?

The position now appears to be that in a domestic context, where a property is held by one person, the presumption that he is entitled to the whole of the beneficial interest is easily rebutted by evidence that the claimant contributed to the purchase price of the property. Absent evidence of agreement as to beneficial shares, the task of quantifying beneficial interests is governed by the law of resulting trusts, unless it can be shown that there was a common intention that the beneficial interests should be held in some other proportions. That calculation is carried out by reference to the whole course of dealing between the parties to do with the property, including the arrangements they make to meet the outgoings on the property if they live in it as their home, which, it is assumed, reflects their intentions as to their ownership of the property. This is the statement of the law made by Chadwick LJ in *Oxley v Hiscock*, as qualified by Lady Hale and Lord Walker. Where the property is held in joint names, absent evidence of an express agreement as to beneficial interests, it will be very difficult to rebut the presumption that the beneficial interests follow the legal title. Circumstances as unusual as those in *Stack v Dowden* will be required but if established the calculation of beneficial shares will be as for cases of single title-holders. Where such exceptional circumstances are established the whole of the parties' dealings in relation to the property will again be relevant in determining their intention and thus their interests in the property.

There are unsatisfactory aspects to this decision, set out by Lord Neuberger in his dissent. Courts should be wary of altering long-established principles in particular types of relationships. It is unsatisfactory that the law is now different in the context of domestic relationships – and different again within that context depending on the state of the legal title. The majority seem to have been concerned to bring an end to litigation and the waste of assets in costs by providing greater

Dividing up the family home (continued)

certainty of outcome. But it may be, as Lord Neuberger states, that this change will produce its own unforeseen uncertainties and unfairness. He preferred the presumption of a resulting trust as a starting point, which presumption could be rebutted by clear evidence of a different intention, either actual or inferred. There are many that agree with him.

Arguably, uncertainty has already arisen. In *Adekunle v Ritchie* LTL 24/8/2007, Judge Behrens has held that *Stack v Dowden* applies to all domestic cases and not just to cohabiting couples, so that where a mother and her youngest son bought a property in their joint names, in which

they lived for some, but not all of the time, the starting-point was that they were joint beneficial tenants. But the judge expressed the view that the presumption was not so strong in such cases and that it would be easier to establish exceptional circumstances, as he found in that case. If that is correct, there are three potential approaches to determining beneficial interests in domestic contexts. It can fairly be said that applying the *Stack v Dowden* presumption to cases where the owners are not a couple is more likely to result in unfairness vis-à-vis other family members (e.g. other children as in *Adekunle*). Of course, the effect of *Stack v Dowden* may be very limited. If the Government implements the Law Commission's

recommendations on providing financial relief on the breakdown of relationships between cohabitants, only short-term childless relationships will be left to the current law (subject to the correctness of *Adekunle*). If the Land Registrar takes Lady Hale's advice that a statement of the beneficial interests on the transfer should be mandatory, the scope for dispute will be further reduced. In the meantime, we have *Stack v Dowden*.

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Landowners lament rights of way ruling

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] 3 WLR 85

The House of Lords' recent decision in the *Godmanchester* case combined history, a short point of statutory construction and lots of scope to demonstrate judicial virtuosity in finding reasons to disagree with five judges in the courts below. The outcome greatly assists all those concerned to establish public rights of way by long user. The result is a blow for landowners.

■ The issue

You have a track over someone's land. For more than 20 years the public use it on foot or on horseback without interruption and "as of right", i.e. peaceably, openly and without permission. One day the landowner challenges the public right by erecting across the track a locked gate. The user stops. The aggrieved public turn to section 31 of the Highways Act 1980:

Dedication of way as highway presumed after public use of 20 years

(1) Where a way over any land ... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

As Lord Denning explained in the leading case, *Fairey v Southampton County Council* [1956] 2 QB 439, at 456, fifty years ago,

The new statutory period of 20 years has no fixed starting point, but only a finishing point. The public must have used the way as of right for the period of 20 years next before their right to use it was "brought into question".

So what counts as a bringing into question which will stop time running? Answer, according to Lord Denning (at 457):

[The public] right is brought into question as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way.

Once an event such as the owner's putting up a notice or locking a gate across the track has occurred, you count back 20 years to see whether the public can prove the requisite 20 years' uninterrupted user as of right over the

track. If they can, "the way is to be deemed to have been dedicated as a highway". End of story? Not quite.

The deemed dedication is subject to a very important proviso, viz. "unless there is sufficient evidence that there was no intention during that period to dedicate it". The meaning of those 16 words was under scrutiny in the *Godmanchester* case.

Lord Denning had explained what would count as evidence of lack of intention to dedicate sufficient to satisfy the proviso in these words (at 458):

... [A] landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate. In order for there to be "sufficient evidence that there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large ... that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right ...

■ The problem with Lord Denning's test

In two earlier first-instance decisions, *ex p Billson* [1999] QB 37 and *ex p Dorset CC* [2000] JPL 396, the courts



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Landowners lament rights of way ruling (continued)

had pointed out that Lord Denning's own formulation of what evidence would count as bringing the public right into question was more or less the same evidence as would satisfy the proviso. In *Jacques v Secretary of State for the Environment* [1995] JPL 1031, at 1037, Laws J had foreshadowed that sentiment in these words:

The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to have made it clear to the public that they had no right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part.

Lord Hoffmann said in *Godmanchester* (para. 24) that he did not follow this and gave as an example a notice prohibiting public user which was ignored for 20 years: see section 31(3). But Laws J knew perfectly well about section 31(3). What he had in mind was the different point that *other* methods of proving lack of intention to dedicate (such as locking a gate once a year) would also be such as to bring into question the public right, and so stop time running. If time stops, then to say that at that moment the owner had no intention to dedicate is true but irrelevant. It is true because the classic case in which time stops is when the owner does something unequivocal to show that he challenges the public right. Any action which has that effect will also clearly

show lack of intention to dedicate. But it is irrelevant, because Parliament did not introduce the proviso to help landowners at the *end* of the 20 year period: it introduced the proviso to help them "during" that period to defeat what would otherwise be a successful claim. So Laws J had a good point. What evidence satisfies the proviso?

■ The law tilts to favour landowners

The proviso is not worded so as expressly to permit other methods of satisfying it than are set forth in the section itself. (See the notice provisions in subsections (3), (5) and the provision for depositing a map in subsection (6)). But it had never been suggested in any case (except in argument in the House of Lords itself) that section 31(3), (5) and (6) prescribed the only methods of satisfying the proviso. And so, in the post-*Fairey* cases, the courts understandably tried to make sense of the proviso by looking for methods of satisfying it which would not automatically self-destruct by satisfying subsection (2) instead. The actual facts in the *Godmanchester* case illustrated the kind of thing they came up with, i.e. instances of landowners having *privately* said or done things which showed that they had no intention to dedicate, albeit *not* in a way which could have come to the attention of users. On this view, all the landowner had to do, at some time during the 20-year period, would be to say or do something (such as writing a private letter to his solicitor) on which he could later rely to show that he had no intention to dedicate. He might even deliberately *delay* challenging the public right until he had set things

up in this way, and so defeat claims that would otherwise have succeeded. Moreover, as Dyson J had held in the *Dorset* case, there was nothing in the wording of the proviso to prevent a landowner from satisfying it by coming into the witness box and truthfully saying, "I never had any intention to dedicate."

■ The playing field levels

The House of Lords took the view that most landowners would be able to say that: who, after all, does *intend* to dedicate? See Lord Hoffmann's speech (para. 29). That was the turning-point of the case. Once you concede that the proviso can be so easily satisfied, it is destructive of everything section 31 was enacted to achieve (namely to put the common law on a statutory footing, and to make proof of public rights of way based on long user easier and more predictable). To avoid that result, some restriction on the evidence capable of satisfying the proviso had to be read in. The logical answer, adopted by the House of Lords in allowing the appeal, was to exclude all evidence which did not come to public attention. The result is to make it much more difficult to use the proviso to defeat claims based on long user.

George Laurence, Q.C. practises in the areas of property and public law. He is recommended by *Chambers & Partners 2007* as a leading traditional chancery silk, being described as "meticulous and clever". George Laurence, Q.C. and Ross Crail (also of *New Square Chambers*) appeared for the successful appellants in the *Godmanchester* case.

Avoiding compromising positions

- the changes to CPR Part 36



Nicola Allsop

■ Introduction

A shrewd party to litigation will put forward an offer at the right level in order to protect his position on costs if ultimately unsuccessful. Part 36 of the CPR is about offers to settle made in accordance with that Part and the consequences once such an offer is made.

Of course, a party may choose to put forward a 'non-Part 36 offer', i.e. an offer which does not comply with Part 36. But if the offer is not made in accordance with rule 36.2, it will not have the consequences specified in rules 36.10, 36.11 and 36.14.

Significant amendments have been made to the Part 36 regime, which came into force on 6 April 2007. This article endeavours to analyse the key changes and highlight those which may cause problems in practice. References to the CPR below are to the rules as amended.

■ Key changes

The key changes are:

- Payment into court is no longer a feature of Part 36; a defendant may now make a Part 36 offer.
- The Part 36 regime applies regardless of track allocation. The previous rule (that the consequences of making a Part 36 offer did not apply to a claim being dealt with on the small claims track unless the court ordered otherwise) has been removed.
- Part 36 offers can be made at any time, including before the commencement of proceedings: see rule 36.3(2).
- The fact that a Part 36 offer has been made must not be communicated to the trial judge or to the judge (if any) allocated in advance to conduct the trial until the case has been decided: see rule 36.13(2). Previously there was an exception to this rule in the case of a split trial. This exception has been removed from the new Part 36 regime.
- Where an offer includes payment of a single sum of money, that sum must now be paid within 14 days of the date of acceptance or any delayed date where court involvement is required. If the sum is not so paid, judgment may be entered for the unpaid sum: rule 36.11(6) and (7).
- Acceptance of a Part 36 offer can now (but subject in certain cases to the court's permission) be made at any time unless the offeror serves a notice of withdrawal on the offeree in accordance with rule 36.9.

■ Making an offer

A Party wishing to make a Part 36 offer should comply with the requirements of rule 36.2. The offer may be made using form N242A. The general rule is that Part 36 offers should be made not less than 21 days before the start of a trial. Such offers will trigger the costs consequences without court involvement or further agreement as to

the liability for costs set out in rule 36.10(1) - (3). If an offer is made less than 21 days before the start of a trial or if the offer is accepted after the expiry of the "relevant period", then unless the parties agree the liability for costs, the court will make an order as to costs.

There are further restrictions on an offer to settle made by a defendant to proceedings. Subject to two exceptions (in cases of personal injury claims for future pecuniary loss and an offer to settle a claim for provisional damages), a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.

■ Acceptance

A Part 36 offer is accepted by serving written notice of acceptance on the offeror. It is important to note that except where the court's permission is required to accept an offer, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree. This highlights the fact that a Part 36 offer is not contractual in nature but procedural and subject to the rules of court. This rule may take the unsuspecting practitioner by surprise; it is, therefore, important to serve formal notice of withdrawal where a party wishes to resile from a previous offer.

■ Costs consequences of accepting an offer

Where a Part 36 offer is accepted within the relevant period the claimant will be entitled to his costs of proceedings up to the date on which notice of acceptance was served on the offeror. The costs will be assessed on the standard basis if not agreed. Where a Part 36 offer that was made less than 21 days before the start of the trial is accepted or a Part 36 offer is accepted after the expiry of the relevant period, if the parties do not agree the liability for costs, the court will make an order as to costs.

■ Costs consequences of not accepting an offer

Previously, where a party failed to beat a Part 36 offer the general rule was that

the offeror would be entitled to his costs from the date on which the relevant period expired, in addition to interest on those costs.

The rules now provide, however, that the claimant will be entitled to enhanced interest and costs where "judgment against the defendant is *at least as advantageous* to the claimant as the proposals contained in a claimant's Part 36 offer" (rule 36.14(1)(b), emphasis added). In those circumstances, the claimant will be entitled (unless the court considers it unjust) to interest of up to 10% above base rate on the sum awarded (or part thereof), his costs on the indemnity basis from the date on which the relevant period expired, and interest on those costs at a rate not exceeding 10% above base rate.

This should be contrasted with the position where a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer. In that case, the court will order (unless it considers it unjust to do so) that the defendant is entitled to his costs from the date on which the relevant period expired and interest on those costs. There is no presumption in favour of indemnity costs or an enhanced interest rate.

■ Comments

On the whole, the amendments to the Part 36 regime have introduced a simpler and more certain route to achieve settlement. Bear in mind that the advantages to a claimant of making an appropriate Part 36 offer are significant and now the claimant will reap benefits if he does as well as his own previous Part 36 offer; he need not beat that offer. In turn, the disadvantage to a defendant of failing to obtain a more favourable judgment than a claimant's Part 36 offer are not to be under-estimated. A party must also be astute to serve a formal notice of withdrawal on an opposing party where he wishes to withdraw an offer previously made, notwithstanding that the previous offer may have been followed by other offers or negotiations.

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