SELBORNE CHAMBERS

CHANCERY - COMMERCIAL NEWSLETTER

This summer, Chambers marked its fifth birthday. From our startup in June 2002 we have grown to 19 tenants. 4 established practitioners joined us and we have taken on 3 of our own pupils. We are pleased now to announce that Nick Trompeter joins us as our new junior tenant. Our position has gained further recognition in the new edition of the "Legal 500" – we are placed snapping at the heels of the top three property sets, and are pleased to see that we have been described as *"first port of call in a storm"*. I hope that this reflects your experience with all our members and clerks, and we look forward to continuing to work with you in the future.

In this edition we have included a few of the many photographs from our birthday celebrations (when we were addressed by our guest of honour, Lord Neuberger) – our apologies for not including them all. On a more serious note, we have some articles on the enforceability of side agreements (by Mark Warwick), the key points in the important House of Lords decision in *Stack* (by Stephen Boyd) and a review of some recent judicial applications of *Stack* (by Neil Mendoza). I trust that you find these both interesting and useful.

Romie Tager QC

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5 Successful Years
Selborne Chambers Celebrates

COLLATERAL DAMAGE:
SIDE LETTERS AND THEIR ENFORCEABILITY

There is often a tension in the law between the need for certainty (which some lawyers see as creating "hard cases") and the need to do "justice" in the individual case (which other lawyers see as creating unpredictability). The weight to be given to these two features may vary depending upon the nature of the dispute.

At one end of the spectrum may be the personal injury claim, where the court will often strive to award damages to a wrongly injured party. An example of this occurred when claimants suffered injuries from exposure to asbestos. In *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32, the House of Lords created an exception to the law of causation in order to permit an individual harmed by asbestos to recover damages although that individual could not prove on the balance of probability which particular defendant caused the damage. (The *Fairchild* decision has recently required further judicial creativity in the case of *Barker v Corus UK Limited* [2006] 2 AC 572, where the House of Lords decided that the defendant could be liable for only a percentage of damages, the percentage depending upon the defendant's relative degree of contribution to the risk).

At the other end of spectrum are property cases, where the court is likely to be more impressed by the need for certainty. An example of the triumph of the need for certainty over perceived unfairness to a tenant arose in the Court of Appeal's decision in *Business Environment Bow Lane Limited v Deanwater Estates Limited* [2007] EWCA Civ 622, decided on 27 June 2007. In this important case the Chancellor, delivering the principal judgment, went out of his way to emphasise the need for certainty in a property case and to limit the scope of the doctrine of collateral contract.

It is illuminating to examine the decision in *Business Environment* against the backdrop of two earlier collateral contract cases, both well known to law students. These are *City & Westminster Properties (1934) Limited v Mudd* [1959] 1 Ch 129 and *Brikom Investments v Carr* [1979] 1 QB 467. *Mudd, Brikom* and *Business Environment* all concerned a tenant seeking to set up a collateral contract in order to qualify the tenant's express covenants in a lease. In the *Mudd* case, Mr Mudd was an antique dealer who had a lease of shop premises. In his lease there was a covenant not to use the premises except as a shop for his business as an antique dealer. However, as the landlord well knew, Mr Mudd slept behind his shop and had fitted out certain basement rooms for residential purposes. When solicitors for landlord and tenant were negotiating the terms of a draft new lease, that draft incorporated a covenant prohibiting residential user. Mr Mudd however wished to continue to live in his shop premises. He spoke directly to the landlord's agent, who gave him a personal assurance that he could continue to live behind his shop.

After the grant of the new lease and the passage of time, the landlord then sought to forfeit Mr Mudd's new lease, relying upon the prohibition on residential user. Mr

Mudd's attempt to use acquiescence, rectification and construction as defences all failed. Harman J however held that the tenant's signature to the lease was a reliance on an assurance made to him, which constituted a defence because:

> *"there was a clear contract acted upon by the defendant to his detriment and for which the plaintiffs cannot be allowed to resile"*.

In *Brikom* the landlord of a block of flats offered its existing tenants long leases of their respective flats. The landlord promised to repair the roofs at his expense. He duly repaired the roofs but then sought to recover from the lessees, their assignees or the assignees of their assignees, their share of the expenditure on the footing that it was recoverable under a covenant in the long leases. The County Court judge decided that the landlord could not recover, relying upon the doctrine of promissory estoppel.

In the Court of Appeal, Lord Denning MR agreed. He rejected the landlord's submission that if assignees of a tenant could rely on some oral representation not contained in the deed this "would cause chaos and confusion amongst conveyancers". He said:

> *"I prefer to see that justice is done: and let the conveyancers look after themselves"*.

The two other judges in *Brikom*, whilst agreeing with the result, did not agree that the landlord could be prevented from pursuing his claim because of promissory estoppel. They concluded that it was a case of a collateral contract that qualified the landlord's ability to recover the costs of particular repairs.

In *Business Environment*, the landlord and tenant of an office building agreed heads of terms. These heads of terms included the surrender of an existing lease, with the landlord abandoning all existing dilapidations liability, and then the grant of a new lease, with a limited repairing obligation, but with the tenant being free of all dilapidations liability at its termination. After considerable negotiation between the parties' solicitors, a draft lease was produced that included a repairing covenant. There was no exclusion of the tenant's terminal dilapidations liability in the draft lease. The tenant's solicitor sought to address this omission by reason of a side letter. However the landlord's solicitor rejected this. In an important letter, the landlord's solicitor wrote:

> *"The nature of this transaction is to be one of flexibility and cooperation"*.

She added:

> *"My client has already indicated to your client that a terminal schedule of dilapidations will not be served and this should be satisfactory comfort for your client"*.

The tenant's solicitor wrote back reiterating that he wished to have a side letter. However this proposal was again rejected. In its place the landlord's solicitor proposed an amendment to the landlord's re-entry clause so that if the landlord gained access to the premises during the term of the lease, this access could not be used to prepare a terminal schedule of dilapidations. The tenant's solicitor opted to accept this amendment.

The result was that there was nothing in the lease that prevented the landlord serving a terminal schedule of dilapidation as a result of accessing the premises after the lease had ended. This is indeed what happened, albeit that the party serving the schedule was a successor to the landlord. The successor was ignorant of the detail of the pre-lease negotiations. When sued for dilapidations, the tenant claimed that it had a complete defence, relying upon promissory estoppel and collateral contract. These defences were ordered to be tried as preliminary issues. The trial came on before Briggs J. After a careful review of the facts and the law, he said:

> *"In the end, I have on the narrowest of balances, come to the conclusion that the assurance given (in the landlord's solicitor's letter) was not (and was not intended to be) overridden by the amendment to the draft lease".*

The Court of Appeal comprehensively reviewed both the law and the facts. They unanimously arrived at the opposite conclusion to the trial judge. In his judgment, the Chancellor accepted the submission by the landlord's counsel of:

> *"the need for certainty in conveyancing transactions generally"*.

He continued as follows:

> *'In a normal conveyancing transaction in a commercial context with both parties represented by experienced solicitors the usual course of dealing is to ensure that all agreed terms are put into the contract and conveyance, transfer or lease. Accordingly those who assert a collateral contract in relation to a term not so contained must show that it was intended to have contractual effect separate from the normal conveyancing documents. Otherwise it will be invalidated by s.2 Law of Property (Miscellaneous Provisions) Act 1989 even if evidence as to its existence is admitted'.*

The judge also referred to Lord Denning's remarks in *Brikom*. He said:

> *"Lord Denning considered ... that conveyancers could look after themselves but he gave no indication of how they could protect their clients from variations to the terms of a document forming part of their title to land of which they did not and could not know"*.

Thus it can be seen that the Court of Appeal in *Business Environment* has delivered a clear warning to all those concerned with drafting contracts, conveyances, transfers and leases that they should put the whole bargain in the primary document. If they

do not do this, then they may find that the rigours of the law of collateral contract and/or section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 will deprive any "side agreement" of legal effect.

Mark Warwick

CO-OWNERSHIP REVISITED: STACK v DOWDEN

Establishing the legal title to a property is simple: it is held by those persons (up to four) into whose names the property is conveyed.

Establishing the beneficial interests is often far more difficult[1].

If two (or more) persons wish to own property jointly, they may do so by creating an express trust of land. Such an express declaration of trust is conclusive (except in cases of fraud or mistake) unless varied by subsequent agreement or affected by proprietary estoppel[2]

In the absence of an express trust, it is necessary to decide two questions:

(i) whether each of the parties has an interest in equity; if so

(ii) what is the quantum of their respective interests.

On 25 April 2007 the House of Lords handed down its judgment in Stack v Dowden, throwing light on the resolution of these questions.

Issue

The issue was the effect of a conveyance into the joint names of an unmarried cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house, which was to become their home.

Facts

In 1983, a house ("the First Property") was bought for £30,000 and conveyed into Ms Dowden's name. £22,000 was raised by way of mortgage in her name.

[1] However, Land Registry Form TR1, introduced with effect from 1 April 1998, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is complied with, the problem will eventually disappear.
[2] See Goodman v Gallant [1986] Fam 106

She made all the payments due under the mortgage and paid all the bills for utilities, council tax etc. The down payment of £8,000 came from a building society account, also in Ms Dowden's name. The judge at first instance, however, found that this was joint savings, although there was little if any evidence to support this finding[3]

The parties did a great deal of work to the First Property. The first instance judge concluded that Mr Stack had been responsible for most of them, but he could not put a figure on their value to the sale price.

Four children were born to the parties there.

The First Property was sold in 1993 for £90,000.

In 1993, another house ("the Second Property") was bought as the family home for £190,000. This time it was conveyed into the joint names of the parties, using the then current land registry form. This contained no declaration of trust, but did contain a declaration that the survivor could give a good receipt for capital monies arising from a disposition of all or part of the property.

£128,813 (the balance of the price after deduction of the mortgage loan plus stamp duty and legal fees) came from Ms Dowden's building society account. This already contained £57,179 to which were added the proceeds of sale of the First Property. £65,025 was provided by a loan to both parties from a bank, secured by a mortgage and two endowment policies, one in their joint names and the other in Ms Dowden's sole name. The mortgage interest and joint endowment policy premiums (eventually totalling £33,747) were paid by Mr Stack. As contemplated by the parties, the mortgage loan was repaid by a series of lump sum payments, beginning in 1994. It was agreed that Mr Stack contributed £27,000 and Ms Dowden £38,435 towards these capital payments. The utilities bills were all in Ms Dowden's name although Mr Stack claimed to have paid some of these. Improvements were also made. Throughout this time, they kept separate bank accounts and made a series of separate investments and savings.

The parties separated in 2002.

At the trial at Central London County Court, the judge ordered that the property be sold and the net proceeds of sale divided equally between the parties, based on the long association between the parties.

Ms Dowden appealed. The Court of Appeal allowed her appeal and ordered that the net proceeds of sale be divided 65% to 35% in her favour.

A major issue had been the effect of the declaration as to the receipt for capital monies in the transfer document. Following Huntingford v Hobbs [1993] 1 FLR 736, this could not be taken as an express declaration of trust. Nor could it be relied upon

[3] Paragraph 75

for the purpose of drawing an inference as to their intentions, unless the parties had understood its significance. If they had done, the inference that they intended a beneficial joint tenancy would have been irresistible. But in the court's view there was no evidence that they did.

Mr Stack appealed.

The Opinions

Baroness Hale (with whom Lord Hoffman agreed) gave the leading opinion.

Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. At least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved[4].

> *"The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon*[5] *....In joint names cases [a full examination of the facts] is ...unlikely to lead to a different result unless the facts are very unusual"*[6]

How is the contrary to be proved?

(a) Is the starting point the presumption of a resulting trust, under which shares are held in proportion to the parties' financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have had a contrary intention?[7] Or

(b) By looking at all the relevant circumstances in order to discern the parties' common intention.

[4] paragraphs 58, 63
[5] Lord Walker described it as "a considerable burden": paragraph 14; Lord Walker said there would be "a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance sheet of contributions actually existed, or should be inferred, or imputed to the parties" Paragraph 33
[6] Paragraph 68
[7] Lord Hope considered this to be the correct starting point where the parties have dealt with each other at arms length, but that the position was different for cohabiting couples: "Who pays for what in regard to the home has to be seen in the wider context of their overall relationship. A more practical, down-to-earth, fact-based approach is called for in their case": paragraph 3 Similarly, Lord Walker considered that the doctrine of a resulting trust may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial relationship: paragraph 32

Baroness Hale considered that the importance to be attached to who paid for what in a domestic context was not as important as it used to be, and that the law had moved on 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[8]"*

She went on to explain that:

> *"In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital monies; 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 subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses."*[9]

However, whatever the parties' intentions at the outset, these may change later. For example, where one party has financed (or constructed himself) an extension or substantial improvement to the property.[10]

Lord Hope

Although Lord Hope agreed with the opinion of Baroness Hale, he said this:

> *"In a case such as this, where the parties had already been living together for about 18 years and had four children when [the Second Property] was purchased in joint names and payments on the mortgage secured on that property were in effect contributed to by each of them equally, there would have been much to be said for adhering to the presumption of English law that the beneficial interests were divided between them equally. But I do not think that it is possible to ignore the fact that the contributions which they made to the purchase were not equal. The relative extent of those contributions provides the best guide as to where their beneficial interests lay, in the absence of compelling evidence that by the end of their relationship they did indeed intend to share the beneficial interests equally.*

[8] Paragraph 60
[9] Paragraph 69
[10] Paragraph 70

> *The evidence does not go that far. On the contrary, while they pooled their resources in the running of the household, in larger matters they maintained their financial independence from each other throughout their relationship"*[11]

Lord Walker

Lord Walker also agreed with Baroness Hale. He said that, in cases where a detailed examination of the parties' relationship and finances is required, the court should take a broad view of what contributions are to be taken into account[12], that is to say a broader view[13] than that taken by Lord Bridge in Lloyds Bank plc v Rosset[14] that, in the absence of any evidence of an agreement to share: "direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do"[15]

Lord Neuberger

While agreeing in the result, Lord Neuberger considered that, in the absence of statutory provisions to the contrary, the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners "whether in a sexual, platonic, familial, amicable or commercial relationship"[16]

He considered that, where a property is held jointly, and the only additional relevant evidence is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held in the same proportions as the contributions to the purchase price – the resulting trust solution[17]

Lord Neuberger was *"unimpressed…by the argument that, merely because they have already lived together for a long time sharing all regular outgoings, including those in respect of the previous property they occupied, the parties must intend that the beneficial interest in the home they are acquiring, with differently sized contributions, should be held in equal shares. Particularly where parties have chosen not to marry, their close and loving relationship does not by any means necessarily imply an intention to share all their assets equally. There is a large difference between sharing outgoings and making a gift of a valuable share in property; outgoings are relatively small regular sums arising out of day-to-day living, but an interest in a home is a capital asset, with a substantial value"*[18]

[11] Paragraph 11
[12] Paragraph 34
[13] see paragraph 26 and Baroness Hale at paragraph 63
[14] [1991] 1 AC 107
[15] at 132H-133B
[16] paragraph 107
[17] paragraph 110
[18] paragraphs 132 and 133

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Applying the law to the facts

Baroness Hale criticised the first instance judge because, instead of focussing on the matters that were particularly relevant to the parties' intentions about the Second Property, he looked at the parties' entire course of conduct together. She felt that this boiled down to saying little more than that the parties were in a relationship for 27 years and had four children together.

Baroness Hale considered that there were many factors to which Ms Dowden could point to indicate that the parties did not intend a 50-50 split:

(i) She contributed far more to the acquisition of the Second Property than did Mr Stack;

(ii) The parties did not pool their separate resources for the common good: the only things they ever had in their joint names were the Second Property and the associated endowment policy. Their affairs were kept "rigidly separate"

(iii) They undertook separate responsibility for that part of the expenditure which each had agreed to pay.

The implications

(i) It will be an exceptional case where a joint legal owner will be able to establish that his co-owner has an interest of less than half in the property (or even more unusually, no interest at all).

(ii) Context is everything, and each case will turn on its own facts. Many more factors than financial contributions could be relevant to intention In the absence of evidence of an agreement as to the shares in the beneficial interest, the courts will consider more than just direct contributions to the purchase price

Stephen Boyd

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RAISING THE STACK

Following on from the House of Lords decision in *Stack* (see Stephen Boyd's article above), Baroness Hale, Lord Walker and Lord Neuberger again had the opportunity to consider the beneficial ownership of property in participating in the Privy Council's judgment in *Abbott –v- Abbott*, 26th July 2007. Not surprisingly, the Board used the occasion to reemphasise the principles of *Stack* and reassert that the law had developed since *Lloyd's Bank –v- Rosset*

Abbott concerned the unfortunately familiar tale of proceedings between a divorced husband and wife about the beneficial ownership of their former matrimonial home. A year after the marriage, the husband's mother had transferred into the husband's sole name a plot of land at the delightfully named "Paradise View" in Antigua. The matrimonial home was constructed with the use of borrowed funds as well gifts from the mother. The mortgage was in the husband's sole name although the wife made herself jointly and severally liable for the repayments. All the mortgage repayments came out of a joint bank account with the wife's contributions coming from her employment at the less delightful sounding branch of Kentucky Fried Chicken.

In the litigation, the husband contended that the mother's gifts had been to him alone; the wife, of course, contended that the plot and money for construction costs had been intended for them both. Baroness Hale referred to previous authority to confirm that *"it has been said more than once in the English courts that if a parent gives financial assistance to a newly married couple to acquire their matrimonial home, the usual inference is that it was intended as a gift to both of them, rather than to one alone"* – plainly a point of practical importance to parents seeking to assist an adult child who is about to embark on married life.

On the facts, that inference was supported by the behaviour of the parties who had organised their finances jointly and had undertaken joint liability for the repayment of the mortgage – a highly significant factor. In commenting that the court below had placed undue significance on *Rosset,* Baroness Hale said *"The law has indeed moved on since then. The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to ownership."*

At the coal face, *Stack* is now being applied in County Courts up and down the land. This is illustrated by the decision of HHJ Behrens QC at Leeds County Court in *Adekunle and Ritchie –v- Ritchie* on 21st August 2007. The dispute concerned a squabble between siblings over the estate of their deceased mother who held the title to a house with only 1 of her 10 children. In the course of argument, it was submitted that *Stack* only applied in domestic situations where there was some sexual relationship between the parties.

Judge Behrens agreed that when considering *Stack* it appeared that Baroness Hale primarily had in mind cohabiting couples living together in either a platonic or sexual relationship. However, the Judge was of the view that she did not limit her

approach to those cases and that the *Stack* principles were to be applied to the domestic relationship between mother and son and that the case was to be decided *"in accordance with the new approach".* It would therefore appear that those attempting to limit the impact and effect of *Stack* are likely to have something of an uphill struggle.

Neil Mendoza

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