Has Supreme Court affected beneficial ownership of property in single legal ownership?

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1. A writer recently described, aptly in my view, following this area of the law as like watching a snow globe of a wintry landscape which every time the snow begins to settle is given another shake. Inevitably there are more shakes to come.

2. The focus of the Supreme Court decisions in both Stack v Dowden[1] and Jones v Kernott[2] is on co-habitants jointly acquiring the legal title of a property to be their home. The growing need for such focus both due to the increase of co-habitation outside marriage and the confusing plethora of decisions needs no amplification. Peter Gibson LJ said back in 1995 in Drake v Whipp[3] "as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of the law." As the Supreme Court has learnt that is even truer today than it was in 1995.

3. Notwithstanding the focus on joint legal ownership those two decisions are intended to have a wider application and are also intended to have an impact on the beneficial ownership of properties in single legal ownership. Until Stack v Dowden nearly all the cases in the House of Lords (including the original big three in this field of Pettit, Gissing and Lloyds Bank v Rossett) involved properties in single legal ownership. In a survey carried out in 2001 it was found that only 30% of cohabitants then lived in a property held in their joint names. No doubt this percentage has increased in the last decade but it means that there are a large number of properties jointly occupied but with the legal title held by one only.

4. It is acknowledged in those decisions that the application of the law cannot be identical because there is a crucial factual difference between properties where the legal title is jointly owned and those in single legal ownership. Joint legal ownership is a strong indicator that the joint owners have a common intention to share the beneficial ownership of the property. Inevitably that has a strong influence with regard to any disputes between the owners. As stated by Lord Walker and Baroness Hale in Jones v Kernott[4]

"the starting point is different because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed as a "common intention" constructive trust. The claimant whose name is on the register starts (in the absence of an express declaration of trust in different terms, and subject to what is said below about resulting trusts) with the presumption (or

[1] [2007] UKHL 17
[2] [2011] UKSC 53
[3] [1995] EWCA Civ 25 at page 2
[4] Supra at paragraphs 16 and 17

assumption) of a beneficial joint tenancy." This is because joint legal ownership is "a strong indication of emotional and economic commitment to a joint enterprise."[5]

The point is also made by Baroness Hale in Stack v Dowden[6] that another difference between single and joint legal ownership is "that it will almost always have been a conscious decision to put the house into joint names. Even if the parties have not executed the transfer, they will usually, if not invariably, have executed the contract which precedes it. Committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it a moment's thought".

With disputes over properties in joint legal ownership the first hurdle as to whether the beneficial ownership is to be shared will normally not be a major issue and the real issue will be the size of the share. In contrast with properties in single legal ownership the first battle will be over whether the beneficial ownership is shared which is why many of the cases before Stack v Dowden concerned such properties.

5. Single regime – In Jones v Kernott Baroness Hale and Lord Walker referred to an article which following Stack v Dowden expressed the hope that constructive trusts of family homes would be governed by a single regime and that there is dispelled the impression that different rules apply to joint and single.[7] This hope raises at least three separate issues – (i) what is the single regime; (ii) does it apply to both single and joint legal ownership cases; (iii) if it does in what type of cases does it operate. This then leads on to the need to consider what differences there are between the two forms of legal ownership as regards the operation of the single regime.

5.1 What is the single regime – my understanding of the regime enunciated by Stack v Dowden as explained in Jones v Kernott is

5.1.1 There is a presumption that the beneficial ownership follows the legal ownership and this displaces the presumption of resulting trust based on contributions;

5.1.2 This presumption may be rebutted by a common intention constructive trust subjecting the property to a different shared beneficial ownership. This will require the following stages to be considered:-

(1) the establishment of such a trust which requires

(a) an actual or inferred agreement or common understanding that the beneficial ownership shall be shared; and

(b) writing complying with s.53(1)(c) LPA 1925 or the incurring of detriment by the claimant referable to that agreement or common understanding.

[5] Para. 19
[6] Para. 66
[7] Para. 16

(2) actual or inferred common intention as to the size of the claimant's beneficial share

(3) in the event that there is no common intention as to size consideration of the course of dealing between the parties in relation to the property to arrive at what is a fair share.

5.1.3 In the case of joint legal ownership the onus on the party seeking to rebut the presumption is a heavy one.

5.1.4 the original presumed or common intention may be subsequently varied but this will require clear evidence.

A principal difference in Stack v Dowden was between the majority who considered that the presumption of resulting trust has no role to play when determining the beneficial ownership of a matrimonial or quasi-matrimonial home and Lord Neuberger who considered that resulting trust still had a role to play when (a) there was no evidence other than the title and the financial contributions or (b) there was an actual or inferred agreement to share beneficial ownership but no such agreement as to the quantum of the shares.

As there is general agreement that an agreement to share the beneficial interest can be inferred from the making of financial contributions it seems to me that the real difference is over (b) when there is no actual or inferred agreement as to the size of the beneficial shares. Even then this difference appears to come down to a debate over what is the difference between inferred and imputed intention and how imputation operates with a real doubt as to whether in practice this will result in different conclusions. In both Stack v Dowden and Jones v Kernott notwithstanding the differences in the judgments all the judges were agreed as to the size of shares regardless of the regime that they applied.

5.2 <u>Does this regime apply to single as well as joint legal ownership</u> - The answer to the aspiration in the article was a qualified answer by Baroness Hale and Lord Walker. They stated that to "the extent that we recognise that a "common intention" trust is of central importance to "joint names" as well as "single names" case we are going some way to meet that hope. Nevertheless it is important to point out that the starting point for analysis is different in the two situations." It is not readily apparent whether this means that the regime may not be identical for both sets of case or alternatively that it is only the manner of application of the regime that may be different. The latter is inevitable for the reason set out in paragraph 4 above. There is a crucial difference between a property in single legal ownership and one in joint legal ownership. As was pointed out the starting point for the analysis is different in the two sets of cases.

However, that in my view does not mean that the overall regime has to be different. In their judgment they went on to say that the starting point is different "even though it may be necessary to enquire into the varied circumstances and reasons why a house or flat has

been acquired in a single name or joint names".[8] These are factors which are particularly of relevance in the context of common intention constructive trusts but not so much with regard to a resulting trust.

It was made clear by Lord Walker in Stack v Dowden that in "a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties' common intention."[9] I understand this to be treating the issue of contributions as being material in the context of ascertaining whether the parties had a common intention and if they did what it was. It is denying the ability to use contributions to presume an intention which is not an actual intention (whether express or inferred). It is also indicating that the rigid approach of Lord Bridge in Lloyds Bank v Rosset taking account only of direct financial contributions should be relaxed. There is no good reason in my judgment to limit either the denial or the indication to jointly held properties.

Baroness Hale in her judgment in Stack v Dowden discussed whether displacing the beneficial ownership presumed from the legal ownership was to be achieved by applying the presumption of resulting trust. She made it clear that it was not but rather 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."[10]

This was built on in their joint judgment in Jones v Kernot[11] when they made it clear that a resulting trust analysis is inconsistent with a presumption or starting point of joint beneficial interests. In their judgment a resulting trust is no longer suitable for modern times and is even less so with the effective abandonment of the presumption of advancement. In consequence it has been replaced by the common intention constructive trust. Both the logic and the changes applied to property in joint legal ownership should apply equally to a presumption of single ownership notwithstanding that the emphatic rejection of the presumption of resulting trust in paragraph 25 is expressed in terms of purchases in joint names.

In paragraph 52 of their judgment it is made clear that in the case of a family home in the name of one party only common intention is still the overriding consideration and they then went on in paragraph 53 to state that the "assumption as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case." This comment is not in my view

[8] Para 16
[9] Para. 31
[10] Para. 60.
[11] Para. 23

restricted to joint properties. On the contrary this statement appears to be foreshadowing a reconsideration in the future of the application of the presumption of resulting trusts in cases not involving a family home.

By insisting that the starting point for the analysis in each case is the legal ownership it excludes the possibility of applying the presumption of resulting trust. This is so whether the legal ownership is joint or single. The decision in Stack v Dowden is obiter as regards the presumption regarding single legal ownership but if the presumption of resulting trust were still to be applicable in single legal ownership cases it would make that obiter meaningless because it could only operate when there was no evidence as to contributions. This would not be saying more than that if there is no evidence other than as to title the sole legal owner is also the sole beneficial owner. Protracted debate in the Supreme Court is not required to arrive at that conclusion.

When Lord Walker suggests that the most that can be said as regards the single regime applicable to both sets of ownership is the general statement that both are subject to the law of trusts that does not go far enough at least in the context of family homes. It seems to me that it is possible to go further and say that the overall regime outlined in section 5.1 applies to both but the manner of its application will be different. In particular with both sets of legal ownership the common intention constructive trust will play a core role.

5.3 Situations in which regime operates – the judgments apply the regime to what is loosely described as family homes. Guidance was not given as to how far this regime extends beyond that type of case. This will need to be explored on a case by case basis. There has been no discussion as yet as to whether there may be differences between the two sets of legal ownership in cases other than "family homes".

5.3.1 Platonic friends – shared occupation need not only occur in the context of a loving relationship. In Gallarotti v Sebastianelli[12] two friends had purchased a flat with the help of a mortgage and unequal contributions but with the legal title being vested in the larger contributor. It was held by the trial judge that there was an express agreement that they would share equally notwithstanding the difference in contributions. However, the claimant paid significantly less by way of contributions than had been expected. The contest was over the size of their respective shares. At first instance it was held that they remained entitled in equal shares on the basis of a common intention constructive trust. In the Court of Appeal Arden LJ stated that as against the argument for a resulting trust such a constructive trust "is also more appropriate where the parties have incurred expenditure on the strength of their personal relationship and without expectation of having to account, or call for an account, of every item as they would do in the case of a true legal partnership." It was not disputed that the beneficial ownership was shared but it was accepted that the size of those

[12] [2012] EWCA Civ 865

shares was to be determined by the principles applicable to a constructive trust rather than a resulting trust.

The contributions were 25%:75% as between claimant and defendant or if the mortgage was treated as solely paid by the defendant this changed to 14%:84%. The Court of Appeal rejected the trial judge's finding that the express agreement of an equal division based on a slight imbalance of contributions continued to operate when the claimant had not performed his part. He had failed to make up the proportion of his contributions by paying more towards the mortgage. In consequence the agreement ceased to apply and "the only inference that could be drawn was that the parties intended the beneficial ownership should, in substance, reflect their financial contributions."[13] The division was changed to 75%:25%. Although the language used is the language of constructive trust it is equally consistent with the application of a resulting trust when an earlier trust has failed. This feeling is strengthen by the reason given for this outcome which was that it was "wholly implausible" that the larger contributor should make a substantial gift to the smaller contributor. Traditionally that has been the justification for resulting trusts.

5.3.2 Emotional and commercial partnership – Lord Walker in Stack v Dowden[14] indicated that the resulting trust presumption "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 partnership".

By way of example he cited the Australian authority Muschinski v Dodds[15]. This concerned the purchase of land with an old cottage in a bad state of repair which was to be restored to be used in a crafts business and a prefabricated house was to be erected on the land for them to live in. The purchase was by an unmarried couple living together. The female appellant had contributed ten times more than the respondent on the basis that he would in due course contribute more in money and labour to the subsequent development. The project and their relationship had failed in less than four years. It was held that their shared intention at the time of the purchase was that each should have a full one half share. It was not accepted that this division should change due to the failure of both their project and relationship which the parties had not anticipated or provided for.

However, it was recognised to be unconscionable for the respondent to take the benefit of the appellant's contributions without having made his intended contribution. In consequence principles of equitable accounting were triggered so that the appellant recovered the excess of contributions made by her before the surplus was divided between them. This achieved a similar but not identical result as in Gallarotti v Sebastianelli supra but by a different route.

[13] Para. 26
[14] Para. 32
[15] (1985) 160 CLR 583

The three judgments all start on the basis that although purchased in joint names as the whole purchase price was paid by the appellant the presumption of resulting trust meant that the beneficial interest was vested wholly in the appellant unless that presumption was rebutted, which it was held to be, by the common intention of the parties creating a constructive trust. The legal analysis by which the judges reached their decision does not correspond with the Stack v Dowden analysis. The order made did not reflect a true resulting trust.

This is not the approach that has been adopted in this country following Stack v Dowden in such cases. The Court of Appeal in the recent case of Geary v Rankine[16] had no problems in applying the Stack v Dowden analysis to a guest house in single legal ownership where the parties both lived and ran the business. It was stated by Lewison LJ at paragraph 18 that the starting point was the legal title vested in the defendant alone which placed the burden on the claimant to establish a common intention constructive trust. In his judgment "the burden is all the more difficult to discharge where, as here, the property was bought as an investment rather than a home." A common intention that they would run the business together does not mean that they had a common intention to share the property from which it is run. In this respect it is an important part of the decision that it was found that there was no partnership between them but in any event that would not have changed the outcome as it would have led to the application of the presumption of resulting trust and the defendant had provided all the money. It was held that there was no common intention to share either at the date of acquisition or subsequently. On the basis of this case in the absence of a partnership the Stack v Dowden analysis will be applied to a property in single legal ownership which is both the parties' home and used for commercial purposes.

5.3.3 Exclusively commercial properties – Neuberger LJ in Laskar v Laskar[17] made clear the Stack v Dowden principle had no application to "investment" cases where the property had been purchase "for rental income and capital appreciation, even where their relationship is a familial one".[18] In such circumstances the presumption of resulting trust still applies and added emphasis is placed on this when the property is held in sole ownership. This is subject to the hint in the joint judgment of Lord Robert Walker and Baroness Hale in Jones v Kernott that this may be reconsidered.

6. Similarities between single and joint legal ownership – there are important differences which will be considered in section 7 below but it is important to appreciate where there are no differences in the manner that the Stack v Dowden analysis is applied between single legal ownership and joint legal ownership.

[16] [2012] EWCA Civ 555
[17] [2008] EWCA Civ 347
[18] Para. 17

6.1 Presumption of resulting trust – as discussed above as a starting point this presumption will not have a place in the analysis as the Stack v Dowden presumption has displaced it regardless of whether the property is held in single or joint legal ownership.

6.2 Common Intention to share – when determining whether the property is to be held on trust for the parties beneficially the Court is required to ascertain the actual intention of the parties. Whether it is possible to impute such a common intention rather than infer one has not been conclusively settled. Lord Wilson left the issue open in Jones v Kernott[19] stating that the question "will merit careful thought".

It is a question which greatly vexed Lord Neuberger in Stack v Dowden. He set out the difference between inference and imputation[20] when he stated that an "inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did." Lord Neuberger set his face against imputation because it was wrong in principle and would cause the Court to embark on an exercise which is difficult, subjective and uncertain. He considered that the advantage of the resulting trust presumption is that such an exercise is avoided.

Notwithstanding this it is an approach which is adopted by the Courts with regard to the second stage of establishing the size of any beneficial share. The question is whether imputed intention is also possible when considering in the first stage whether there is a common intention constructive trust.

Notwithstanding Lord Wilson in Jones v Kernott highlighting the issue Lewison LJ (with whom the two other Lord Justices agreed) had no doubt in Geary v Rakine supra which concerned a guest house in sole ownership. Lewison LJ was clear that for the purpose of the first stage investigation (whether a common intention constructive trust is established) the actual intention had to be agreed or inferred and could not be imputed[21]. He went on to state that an "imputed intention only arises where the court is satisfied that the parties' actual common intention, express or inferred, was that the beneficial interest would be shared, but cannot make a finding about the proportions in which they were to be shared."[22] There would seem to be no justification for the two sets of ownership being treated differently. What applies to a sole ownership property should equally apply to a property in joint ownership when the first hurdle of establishing shared beneficial ownership is not a real issue.

[19] Para 84
[20] Para. 126
[21] Para. 18
[22] Para. 19

This accords with the statement of Baroness Hale in Stack that it is not for the court to impose what it considers to be fair on the parties,

6.3 Contributions – related to the last point is the question as to the extent to which there has been a relaxation of the requirement that if a common intention to share the beneficial ownership is to be inferred there must be a direct financial contribution. This is an issue which is much more likely to be a substantial live issue in the context of properties in sole ownership. There had been general acceptance of the statement by Lord Bridge in Lloyds Bank v Rosset[23] that "where the court must rely entirely on the conduct of the parties both as to the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation 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." On that basis the Lords rejected the contention that when arranging extensive renovation works and carrying out re-decoration that could only be explained on the basis that the parties believed that the claimant would have an interest.

Lord Walker in Stack v Dowden made it clear that he considered that the law had moved on[24] and that the Court should take a "broad view of what contributions are to be taken into account."[25] He seems in his judgment to be extending the required examination to any adjustments referable to the acquisition or improvement of the property including significant contributions in kind by way of manual labour[26] disregarding insignificant improvements and "elaborate arguments (suggestive of creative accounting) as to how the family finances were arranged". Baroness Hale stated that this issue did not arise in Stack but that there was undoubtedly an argument for stating that the hurdle was set by Lord Bridge rather too high.[27] She then confirmed in Abbott v Abbott[28], echoing Lord Walker's words, that the law had moved on.

Abbott v Abbott was a case which concerned a property in the sole name of the husband. The Privy Council upheld the trial judge's decision that they were entitled equally to the matrimonial home on the basis that (i) the land was gifted by the mother to her son around the time of their marriage so was to be treated as a gift to both; (ii) they undertook joint liability for the mortgage; (iii) their finances until separation were organised entirely jointly; (iv) the wife paid her earnings into a joint bank account; and (v) the husband accepted that his wife had an interest. Baroness Hale stated that the "parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions

[23] [1990] UKHL 14
[24] Para 26
[25] Para 34
[26] Para. 36
[27] Para. 63
[28] [2007] UKPC 53 at para. 3

as to its ownership." This dicta is not restricted in scope to the second stage investigation (size of beneficial interest) but extends to the first stage (is there shared beneficial ownership). In consequence it was held that the wife was entitled to 50% and not as the Court of Appeal held 8.31%.

Whilst generally accepted that the law has moved on and that the strict requirement regarding direct financial contributions has been relaxed it remains unclear where the line is drawn between what is and what is not sufficient for the purpose of inferring a common intention to share a property's beneficial ownership. This issue will arise more often in the context of disputes over properties which are not jointly owned. An illustration is the decision of Warren J in Thomson v Humphrey[29]. The defendant has paid for the purchase and alteration of a property to be the home for the parties and the claimant's children. The claimant claimed to be entitled to half the beneficial interest based on her giving up her job, working for the defendant part time, caring for his mother and running the home. However, not only was there no direct contribution to the purchase price or the costs of alteration there was no contribution to housekeeping expenses. The judge found there was no express agreement because he considered that it did not follow from an assurance to provide a home for another that a beneficial share will be given. The acts relied on were insufficient to infer a common intention to share the beneficial interest even after Stack v Dowden. This outcome was in line with the Court of Appeal decision in Morris v Morris[30] albeit that was concerned with a claim to a change in beneficial ownership after the acquisition of the farm.

6.4 Ascertainment of quantum of share – The flexible approach of Chadwick LJ in Oxley v Hiscock[31] in relation to a property in single legal ownership as regards the quantification of a beneficial share once it has been established that the Stack v Dowden presumption is displaced will apply to joint legal ownership cases as well.[32] The whole course of dealings between the parties will need to be investigated. This is limited to conduct which "relates to the property" but that still permits a wide ranging investigation. As indicated above if it is not possible to arrive at a common intention as to the size of the shares it will then be for the Court to impute an intention.

6.5 Declaration of trust –the role of a declaration of trust will on purchase be the same with regard to properties in sole ownership as with those jointly held. However, completion box 10 of the Land Registry TR1 transfer form will only be of practical significance in cases whether the transferees are to jointly hold the transferred property. There is now the possibility that any declaration of trust may subsequently be varied by a change in the parties' common intention and I suspect that such a point is more likely to be litigated when the property started as in sole ownership.

[29] [2009] EWHC 3576 (Ch)
[30] [2008] EWCA Civ 257
[31] [2004] EWCA Civ 546
[32] Paragraphs 64 and 65 Baroness Hale in Stack v Dowden and para. 52 Jones v Kernott

7. Differences in manner of application of regime to single and joint legal ownership –

7.1 Starting point - as has been emphasised in the judgments property held in joint legal ownership nearly always indicates that the beneficial ownership is also to be shared. The same is self-evidently not the case with property in single legal ownership. The first hurdle in such cases as to whether there is a subsisting common intention that the beneficial ownership is to be shared will be a much higher hurdle than in joint legal ownership cases. With jointly owned property it will be for a party claiming to be the sole beneficial owner to overcome a very high hurdle.

7.2 Strength of presumption – both Lord Walker and Baroness Hale have emphasised that in the case of jointly owned properties the onus of rebutting the presumption of equal beneficial ownership is a considerable or heavy burden.[33] It operates more in the context of the second stage (size and nature of beneficial share) than the first stage (is there a common intention constructive trust). In consequence it was anticipated that it will be an exceptional case which results in a rebuttal. The expectation was that this would reduce the number of cases in which an investigation would be carried out to ascertain whether there was a common intention different from equality.

There has been no similar discussion with regard to sole legal ownership cases and I doubt that the burden will be so great. The presumption means that only the person with the legal title is the beneficial owner unless and until a common intention constructive trust is proved. The likelihood in cases not involving a claim framed in proprietary estoppel is that the claimant will have made a contribution which will suggest a common intention to share the beneficial ownership. Once the first stage has been overcome there is no presumption limiting the Court's consideration of what is the share of the party not the legal owner. There is no reason to limit rebuttal of the presumption to exceptional cases.

7.3 Inferences – the inferences to be drawn from the facts of any particular case will differ dependent on whether the legal title is in a sole name or held jointly. This flows from the different starting point referred to above (para. 6 above). Contributions are more easily attributable to equal beneficial ownership when the property is in joint names thus allowing the Court to give effect to the presumption than if in single ownership. Baroness Hale stated in Stack v Dowden[34] that when "a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays what may be very different from the inferences to be drawn when only one is owner of the home. 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."

[33] Lord Walker in Stack v Dowden at paragraphs 14 and 33 and Baroness Hale at paragraphs 56 and 69.
[34] Para. 69

7.4 Beneficial joint tenancy – absent a declaration of trust it almost inevitable that when the presumption arising from a property being held in a sole name has been displaced the shared beneficial ownership will be found to be a tenancy in common and not a beneficial joint tenancy. Baroness Hale pointed out in Stack v Dowden[35] that there had not been to her knowledge any case involving sole legal ownership which had been found to be held on a beneficial joint tenancy.

7.5 Mortgages – the impact of mortgages will inevitably be different as between jointly held properties and properties held in a sole name. With a property held in a single name unless there is a personal guarantee given by the person claiming to be entitled to a beneficial share (as in Abbott v Abbott [2007] UKPC 53) the title owner will rely on the mortgage as a contribution probably by claiming the amount borrowed as a contribution as in Gallarotti v Sebestianelli supra. Lord Neuberger in Stack v Dowden left open the issue whether liability under a mortgage is to be treated as equivalent to a cash contribution. This is much more likely to be an issue with properties in single legal ownership. The mortgage issues will probably range wider than just this point. For example, in Gallarotti v Sebestianelli an important factor was the agreement between the parties as to the repayment of the mortgage and how this impacted on the beneficial ownership. With jointly held properties the mortgage is less likely to impact on the question of beneficial ownership but instead the focus will be on whether the payments made by the joint owners trigger as between them the operation of the equitable accounting principles.

7.6 Transfer – the manner of completing the transfer form will possibly impact on jointly held property but not property held in sole ownership.

7.7 Subsequent changes - Jones v Kernott supra makes it clear that it is possible for the original beneficial ownership as at the date of the purchase to be subsequently varied if the common intention changes. The general principles applicable should be the same whether the property is held in joint names or a single name. The Courts are cautious when considering such an argument and in the absence of an express agreement will be slow to infer one[36]. However, it may be that with properties originally in sole ownership this is an area in which there will be more litigation. In my view the onus on the claimant in such cases will not be so high as with jointly owned properties because with jointly owned property subsequent expenditure may more easily be attributed to the existing shared beneficial ownership.

The carrying out of works subsequent to acquisition is one of the most frequent triggers for such a claim. The cautionary words of Slade LJ in Thomas v Fuller-Brown [1987] EWCA Civ 10 still hold good when he stated that that case illustrated "as many cases have done, that a

[35] Para. 66

[36] Chadwick LJ in James v Thomas [2007] EWCA Civ 1212 at para. 24 approved by Sir Peter Gibson in Morris v Morris [2008] EWCA Civ 257 at para. 19.

man who does work by way of improvement to his co-habitee's property without a clear understanding as to the financial basis on which the work is done does so at his own risk."

However, the operation of this area in the context of property held in a sole name is exemplified by the slightly unusual facts of Aspden v Elvy [2012] EWHC 1387. Mr. Aspden purchased a farm with outbuildings in his sole name and subsequently cohabited with Ms Elvy. She did some work on the farm before starting a dog kennel and cattery there. Mr. Aspden suffered a heart attack which prevented him continuing in employment. He engaged in unsuccessful litigation and this forced him to sell the farmhouse. Before the sale they had separated and he then transferred the outbuildings to Ms Elvy. He lived in a static caravan on the land transferred and helped with a proposed conversion of the barn into a dwelling. It was found that he contributed financially a significant amount to these works which according to his claim comprised roughly half of the net proceeds of sale of the farmhouse after his debts were paid off. He claimed an interest in the building being converted and she said his efforts and contributions were a gift.

The structure of the judge's analysis was interesting

(i) Acquisition of farm – the judge applied Stack and found that Mr. Aspden was the sole owner as no contribution had been made by Ms. Elvy. His consideration of this aspect was really no different from what it would have been had he being considering the presumption of resulting trust;

(ii) Subsequent work by Ms Elvy – the judge did not reach a decision as to whether a beneficial interest was subsequently acquired by work carried out by Ms Elvy. He accepted that it was arguable that it gave rise to an inference that the common intention had changed. There was no suggestion that there was a legal objection because it involved no direct financial contribution. The need for caution as expressed by Chadwick LJ was noted.

(iii) Transfer of outbuildings – Mr. Aspden claimed that the transfer was with the intention of their marrying but this was rejected. The judge found that it was an outright transfer.

(iv) Subsequent change – in the light of Mr. Aspden's work and financial contribution it was held that he had acquired a beneficial interest. There were no express discussions but the judge took into account that Mr. Aspden expected to move back when the conversion was completed. Griffiths LJ had in Bernard v Joseph [1982] Ch. 391 indicated that a beneficial interest could be acquired after

acquisition by the construction of an additional floor on a house to provide extra accommodation. This dicta was applied by the judge. The share was fixed on a rough and ready basis at 25% with regard to a building valued at £400,000.

There is the further difference in this context of subsequent acts that an alternative way of formulating a claim may be easier to pursue if the property is held in a sole name. In Chapman v Jaume [2012] EWCA Civ 476 a property was held in the sole name of Mrs. Jaume following an earlier divorce. Mr Chapman moved in and claimed to have spent £130,000 on extensions and refurbishment. By applications to the Land Registry he sought to claim a beneficial interest in the property but in his proceedings he claimed the money spent was a loan. Mrs. Jaume case was that it was a contribution to household expenses. The claimant failed at first instance. The trial judge found that there could be no beneficial interest in the property whether by way of resulting trust or constructive trust because the claimant's case was that it was a loan. This is questionable logic in the context of such disputes. How a financial contribution is described is not conclusive as the Court will look to the substance. The trial judge then held that the claimant failed on his claim for repayment of a loan because he could not establish the terms.

On appeal he succeeded by reference to an authority not cited to the trial judge. In Seldon v Davidson[37] Willmer LJ stated that "Payment of the money having been admitted, prima facie that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement." As was emphatically stated by Lewison LJ in Chapman there "is no presumption of advancement between co-habitants"[38] applying dicta of Baroness Hale in Stack v Dowden[39]. In consequence Mr. Chapman was entitled to a loan which was repayable within a reasonable time after demand which period as the house had been sold had elapsed at the latest on the sale.

8. Left off the title for a reason – in a number of cases the legal ownership has ended up in the name of one only when the original intention had been that it would be held jointly or would have been but for an objection. One party may be too young[40] or pose a problem when seeking a mortgage or there may be a fear that it could cause the property purchased to become entangled in the current divorce proceedings of one[41]. How does this affect the outcome when there is a dispute over the ownership of the property? The principal effect is that it makes it far easier to establish that there was a sufficient common intention to be the basis of a constructive trust. The intention to acquire jointly will be a strong factor in the first stage investigation. It makes it almost impossible for the person with legal title to rebut the argument that a joint purchase was intended which in turn must mean shared beneficial ownership.

[37] [1968] 1 WLR 1083
[38] Para. 24
[39] Para 112
[40] Williamson v Sheikh [2008] EWCA Civ 990 and Eves v Eves [1975] EWCA Civ 3
[41] Oxley v Hiscock [2004] EWCA Civ 546

However, is it possible to go further and allow an argument that the case should in fact be treated as if the property was held jointly and in consequence subject to the Stack v Dowden presumption so that unless displaced there will be an equal division of the beneficial ownership? In Thompson v Hurst [2011] EWCA Civ 537 Rimer LJ gave permission to appeal so that such an argument could be made. In that case the original intention was to purchase jointly by means of a joint mortgage. This did not happen because the claimant was advised that he was an unsuitable mortgage applicant. The house was purchased for £15,000 by the defendant under the right to buy when it was worth £28,000. The claimant now wished to argue that because he was left off the title for that reason he should be treated as if jointly owning the property and thus entitled to 50% unless there were exceptional circumstances. The trial judge had limited his share to 10%. The appeal on this ground failed ([2012] EWCA Civ 1752. Etherton LJ held that the case was to be approached on the basis that the property was held in one name alone.