breach of fiduciary duty, even though the director did not hold the company's property on trust: the property is treated *as if* it were held on trust: *Ultraframe (UK) Ltd.* v. *Fielding* [2005] EWHC 1638 (Ch) at [1487]–[1488]. Also, receipt will occur where a fiduciary takes property from a third party in breach of trust (*e.g.*, a bribe) and then transfers it to X.

The question that arises is whether recipient liability should attach where a fiduciary acts in breach of fiduciary duty and diverts the property in question to X without ever taking title to it at some intermediate stage. Morritt J. considered this arguable in *Carlton* v. *Halestrap* (1988) 4 B.C.C. 538 at p.540, although only in interlocutory proceedings regarding the removal of cautions from a registered title. The difficulty with extrapolating from the previous situations to this one is that here X has received property as a result of a breach of fiduciary duty, but X did not receive property impressed with a trust: no such trust ever arose. The policy concern is that this reasoning would allow fiduciaries to engineer situations that avoid the imposition of recipient liability on X. However, to extend recipient liability to this situation would blur the distinction between it and accessory liability: *Ultraframe*, at [1599]. The High Court's view is more doctrinally sound and, it bears repeating, X remains vulnerable to a claim for assistance in the breach of fiduciary duty. (In this regard, it is noteworthy that, in Australia, the assistant need not be dishonest but must assist in a dishonest transaction, whereas, in England, the assistance must be dishonest but the transaction need not be: compare *Farah* v. *Say-Dee* at [163] with *Twinsectra Ltd.* v. *Yardley* [2002] 2 A.C. 164.)

Thirdly, the High Court held that even if the defendants had received property following a breach of fiduciary duty, that property was protected from any proprietary claim by the defendants' indefeasible registered title: at [197]–[198]. The slight differences between the English and the Australasian (Torrens) systems of registration should not affect the applicability of this conclusion in England. The implication is that indefeasible title would also protect the defendants from any *personal* liability for receipt, so as to ensure that the indefeasibility conferred by registration is not undermined surreptitiously.

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PROVING A TRUST OF A SHARED HOME

THE trust that commonly arises when cohabiting couples buy a house together sits uneasily between different legal regimes and their

https://doi.org/10.1017/S000819730700089X Published online by Cambridge University Press

competing rationales. Identifying the applicable regime is obviously important: if the parties separate it determines what share, if any, each party has in the equity in the house. Once identified, it is equally important to know the starting point for that regime's application to a particular case. In principle, it should give a structure to the parties' negotiations, and, in the heat of post-separation animosity, help to distinguish relevant from irrelevant evidence. Ideally, a clear view of that starting point should prevent litigation, which is often publicly funded or paid for out of the shrinking sale proceeds of the parties' former home.

The House of Lords' decision in *Stack* v. *Dowden* [2007] UKHL 17, [2007] 2 W.L.R. 831 wipes the slate of earlier authorities almost clean. Its main value lies in the authoritative restatement of the proper starting point in shared home cases: the parties' real intentions (expressed or implied) should be definitive. If there is an express declaration of trust, evidenced in proper form, then it should almost invariably determine the parties' beneficial shares in the property: Law of Property Act 1925, s. 53(1)(b). Failing that, any beneficial interest will arise under a common intention constructive trust.

The advance made by *Stack* relates to the starting point in applying the constructive trust regime. It formulates a strong inference that the state of the registered legal estate was intended by the parties to reflect their beneficial interests in the property. The sole registered proprietor is inferred to be the sole beneficial owner. If the parties are joint registered proprietors, it is inferred that they intended to hold for themselves as beneficial joint tenants. A party wishing to argue for a different beneficial share would bear a heavy evidential burden to displace those primary inferences.

The House of Lords accepted that Ms Dowden had successfully discharged that burden. She and her partner, Mr Stack, were the joint registered proprietors of their house. Ms Dowden made the bigger financial contribution to buying it and consistently earned more than her partner. They kept separate finances. When the couple separated, Mr Stack claimed a half-share in the sale proceeds. He argued for an express or constructive trust under which they were equitable joint tenants. The House held that there was no express trust. It accepted that the property was held on a constructive trust but, despite the legal joint tenancy, found no reason to vary the Court of Appeal's conclusion that the parties took 35:65 shares under it.

Mr Stack's unsuccessful argument that he and Ms Dowden had made an express declaration of trust rested on the inclusion in the transfer to them as joint registered proprietors of a power for the survivor to give a valid receipt for capital moneys arising from a disposition of the property (see Cloherty and Fox [2006] C.L.J. 558).

The House's rejection makes good practical sense, however appealing it might have been to infer a declaration from the presence of the power. The flaw in the argument was its unreality ([2007] UKHL 17, [2007] 2 W.L.R. 831, at [130] *per* Lord Neuberger). It assumed that the parties actually knew that the power existed, and that they had the necessary conveyancing expertise to realise that it was consistent with a beneficial joint tenancy.

As to common intention constructive trusts, the new weight attached to inferences drawn from the state of the registered legal title will make the distinction between sole and joint legal proprietorship more important. A joint registered proprietor who claims a beneficial interest need only rely on the force of the inference to establish his or her claim. He or she need not prove some direct financial contribution to the purchase price or mortgage instalments to establish that he or she had any beneficial interest. Conversely, a person claiming a beneficial interest in a house which is registered in his or her partner's sole name should, according to *Stack*, bear a heavy evidential burden. However, in discharging that burden many more factors than financial contributions are now apparently relevant (*cf. Lloyd's Bank Ltd.* v. *Rosset* [1991] 1 A.C. 107, 132–133 *per* Lord Bridge): "each case will turn on its own facts" ([2007] UKHL 17, [2007] 2 W.L.R. 831 at [69] *per* Baroness Hale).

It is surprising that, if the primary inference that the sole registered proprietor is also the sole beneficial owner is as strong as their Lordships held, it can now be displaced by evidence which may not point so compellingly to an intention to acquire a beneficial share in the property as a direct financial contribution does. There is also a disconnection between the stated strong inference and the outcome, which in *Stack* was the same as would be dictated by a resulting trust solution (as Lord Neuberger observed at [106]). In fact, when deciding particular cases judges tend to focus exclusively on financial contributions (for a very recent example applying *Stack,* see *Adekunle* v. *Ritchie*, Leeds County Court (H.H.J. John Behrens Q.C.) 17 August 2007).

These possible inconsistencies highlight the tension underlying cohabitation disputes. Strictly, it is not the function of an express or constructive trust to impose on the parties some just re-distribution of their assets, which takes into account their various contributions to the entire relationship or the future needs of themselves and any dependant children. It does not aim to achieve for cohabitants what the Matrimonial Causes Act 1973 does for married couples or civil partners who separate. The trust depends narrowly on what the parties intended about the beneficial ownership of the house. But the test for inferring their intentions is unavoidably open-textured, which allows

re-distributive concerns to enter the inquiry. As a basis for negotiation or litigation, such a nebulous test replaces the apparent certainty of the correct starting point with actual uncertainty about which of the myriad relevant factors the judge may find conclusive. And as Baroness Hale herself observed earlier in her speech, "a full examination of the facts is likely to involve disproportionate costs" ([2007] UKHL 17, [2007] 2 W.L.R. 831, at [68]). Despite the protestations of the majority, therefore, *Stack* may make only a marginal difference to the efficiency of the dispute-resolution process.

Since the decision, the Law Commission has proposed a new regime to resolve the financial consequences of the termination of relationships by certain cohabiting couples in specified circumstances (see Law Com No. 307). Unlike the current trust regime, it would be explicitly re-distributive in its approach. It would not be narrowly confined to ascertaining the parties' beneficial rights in their former home. It would ensure that all the "pluses and minuses of the relationship" were fairly shared between them.

The merit of the proposal is its explicit rationale. If the government adopted it, just re-distribution of assets would become an end in itself, not something to be achieved through an awkward search for the parties' "intentions".

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PERMANENCE FOR CHILDREN: SPECIAL GUARDIANSHIP OR ADOPTION?

WHERE a child is in long-term substitute care, a decision must be taken about the legal status of those carers. Adoption will often be inappropriate because of its drastic effects in terminating completely the legal relationship of parent and child and transplanting parentage to the adopters (Adoption and Children Act 2002 ("ACA"), s. 67 (1)). The issue may be yet more contentious where those carers are members of the child's own family. An attempt to meet these concerns by the creation of a superior legal status for foster parents and other long term carers was made in the ill-fated custodianship regime of the Children Act 1975 which was abolished by the end of the 1980s. Special guardianship, introduced by the Adoption and Children Act 2002, is the latest attempt. Where someone is appointed special guardian, he or she will importantly have the right to exercise parental responsibility *exclusively* (Children Act 1989 ("CA"), s.14C (1) (b)) and variation of the order will require leave of the court. This will be