

CHANCERY & COMMERCIAL GROUP

NEWSLETTER

Autumn 2007

1. *Stack v Dowden*: Hugh Derbyshire reflects

The decision of the House of Lords in *Stack v Dowden* [2007] UKHL 17 marks a fundamental shift in the approach of the courts to determining the beneficial interests of co-owners of land.

Baroness Hale and the majority of the House held that, where there is joint legal ownership, the starting point is that there is also joint beneficial ownership (para.56). The majority's approach is that equity follows the law and that therefore the beneficial interests should reflect the legal interests in the property (paras.54, 56, 5 and 33). In effect the majority applies the evidential presumption that equity is equality in circumstances where this presumption would previously have been expected to be rebutted by evidence of contribution to the purchase price (paras.109-110).

What must a legal joint owner do to move from the starting point of equality? The onus will lie on the person seeking to show that beneficial ownership is different from legal ownership. It is not a task to be lightly embarked upon (para.68); the burden is said to be considerable and heavy (paras. 14 and 33). The court must ascertain the parties' shared intentions, actual, inferred or imputed in light of their whole course of conduct in relation to the property (para.60). Baroness Hale lists a wide range of factors to be considered (para.69) in deducing the parties' intentions. It is not a question of what result the court considers 'fair' (para.61).

On the facts of *Stack*, Baroness Hale thought it an unusual case (para.92). There were many factors to which Ms Dowden could point to indicate that the parties intended to hold the property

otherwise than as beneficial joint tenants. It is questionable how unusual a case *Stack* really was. Given the breadth of the factors to be considered (see para.69) there is much scope for a judicial finding of fact that warrants a departure from the majority approach (see now: *Adekunle v Ritchie* LTL 24/08/2007).

Although a fundamental shift in the law, the practical consequences should not be so dramatic, thanks to the H.M. Land Registry form TR1 which permits an express declaration of trust. Solicitors need to be mindful of ensuring appropriate advice is given about making such a declaration.



2. *Stack v Dowden*: Nick Orr co-authors book

Head of the Practice Group, Nick Orr, is a co-author of *Stack v Dowden: Co-ownership of Property by Unmarried Parties: A Special Bulletin*, published in July 2007 by Jordans and intended to keep the practitioner fully up to speed in this area.

3. Calm down: its just a commercial

In *Esure Insurance Ltd. v Direct Line Insurance Plc.* [2007] EWHC 1557 (Ch), Lindsay J. allowed Esure's appeal against a decision that its wheeled (computer) mouse could be confused with Direct Line's famous wheeled telephone.

Though the threshold test for similarity was met, there was insufficient evidence on which to find in favour of likely confusion. Direct Line fell into serious difficulties with its public survey evidence because, before the taking of the surveys, it launched *its own* red wheeled mouse in advertisements, alongside its telephone.

Yet on the second limb of the appeal Lindsay J. was satisfied that, under the Trade Marks Act 1994 s.5(3), Esure's wheeled mouse was detrimental to the distinctive character of Direct Line's telephone (Esure's device was described as “..parasitic..”, taking a benefit from the reputation which the wheeled telephone had developed). Esure could not register their wheeled mouse as a trademark.

Esure now uses a (mammalian, and unwheeled) mouse character in advertisements; Direct Line keeps both its red telephone *and* its red (computer) mouse!

4. Law Commission: housing law consultation paper

Law Commission Consultation Paper No.180, 'Housing: Proportionate Dispute Resolution – The Role of Tribunals' was published on 29th June 2007.

This paper makes a provisional proposal (Para. 1.4) that the County Court's jurisdiction over claims for possession and disrepair in respect of rented dwellings should be *transferred* to the Residential Property Tribunal Service (with the RPTS

becoming part of the two-tier Tribunals structure expected to be established by the Tribunals, Courts and Enforcement Bill, which had its 3rd Commons reading on 27th June 2007).

The Law Commission notes (Para. 2.54) that implementing the proposal would require the RPTS “..to move from a case load of around 8,000 cases a year, to something around 150,000 cases a year.” It appears, to the writer at least, that the administrative difficulties alone could be substantial.

5. Inheritance Tax: Nigel Ginniff reports

A report of *Phizackerley v IRC* can be found at www.financeandtaxtribunals.gov.uk/judgmentfiles/j3038/spc0091.doc.

The decision has caused concern that spousal ‘mirror image’ wills incorporating nil-rate band discretionary trusts, with provisions for a ‘debt or charge’ scheme, can fail to achieve the intended inheritance tax saving where the debt incurred by the surviving spouse falls foul of s.103 Finance Act 1986.

Where the surviving spouse incurs a debt to the trustees of the NRB trust created by the deceased's will, that debt may fail to be deductible from the survivor's estate on his death if it is found that consideration given for the debt consisted of *property derived from the deceased*. So, if the survivor had made substantial transfers of value to the deceased (however long ago) there is potential for s.103 to bite and the ‘debt or charge’ scheme to fail, in whole or in part.

There is a real need for the taking of a thorough client history to establish what inter-spouse transfers have occurred and who funded the assets. Where potential problems are identified, the wills might be changed, pre or post-death, leaving the estate of the deceased (other than the NRB trust) on life interest trusts for the survivor.

The original principles of Inheritance Tax have been undermined by failure of the government to increase the NRB in line with increases in property values (since 2002 the NRB has been less than twice the average house price) and piecemeal amendments. Couples with relatively modest estates now need to seek out, understand and pay for complicated wills to avoid Inheritance Tax arising on the jointly owned matrimonial home.

6. Nick Riddle: damages and debt

On 8 May 1829 Lord Tenterden C.J. held: “It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest” – *Page v Newman* (1829) 9 B. & C. 378 at p.380. In the 1890s a gallant attempt was made to persuade the Courts that interest on a debt could be awarded by way of damages for non-payment of that debt. On 28 July 1893, 64 years and 61 days after the decision in *Page v Newman*, the House of Lords held that the law as described by Lord Tenterden had “been too long settled to be now departed from”: *London, Chatham and Dover Railway Co. v South Eastern Railway Co.* [1893] A.C. 429. This decision was followed in *President of India v La Pintada Compania Navigacion S.A.* [1985] A.C. 104. Ten days short of the one hundred and fourteenth anniversary of the earlier of these displays of judicial conservatism the House of Lords, unmoved by the fact that the rule had by then been settled for two centuries, expressed the opinion (unasked, too!) (n.1) that it was anomalous and unprincipled and should no longer be sanctioned: *Sempre Metals Ltd. v Inland Revenue Commissioners* [2007] UKHL 34; [2007] 3 W.L.R. 354. The headnote tactfully describes the earlier House of Lords cases as having been “not followed”; but for one point, touched on below, “overruled” would be a better description.

The self-conferred power of the Lords to depart from their previous decisions was created by the *Practice Statement* [1966] 1

W.L.R. 1234. The House seems increasingly willing to abrogate well-established rules of law and, where necessary, to depart from its own previous decisions. Comparatively recent examples of this are the abolition of the advocate’s immunity from negligence claims (*Arthur J.S. Hall & Co. v Simons* [2002] 1 A.C. 615, overruling *Rondel v Worsley* [1969] 1 A.C. 191) and of the centuries-old rule that a restitutionary claim does not lie for the recovery of money paid under a mistake of law (*Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 349, although this rule had never before been considered by the Lords).

These departures from precedent may be regarded as a realistic and welcome acknowledgment of the fact that the legislature has no time to legislate to correct all the old-established anomalies of the law [or perhaps it is more fashionable to spend time enacting new difficulties, Ed.] and the constitutional questions that it raises are outside the ambit of this article. However, these changes of the law can have startling consequences, as in *Awoyomi v Radford and Postill* [2007] EWHC 1671 (QB), in which it was held that a cause of action in negligence against barristers for the conduct of advocacy had accrued in November 1995, although *Arthur J.S. Hall & Co. v Simons* [2002] 1 A.C. 615 was not decided until 20th July 2000.

The curious thing about the *Sempre* case is that the overruling of the old law was not essential for the decision in the case, and does not appear to be something that the Claimants asked for. The majority of the House (Lord Scott and Lord Mance dissented) appear to have intervened disinterestedly in the development of the law, “in view of the wide-ranging arguments presented”: see para. 92. On the face of things, therefore, its decision on this point is *obiter*, though it would take a brave advocate to suggest that it should therefore be discounted.



As to its practical effect, the decision is to the effect that “in principle it would always be open to a claimant to plead and prove his actual interest losses caused by late payment of a debt; that those losses might include an element of compound interest; that such losses would be subject to the principles governing all claims for damages for breach of contract, such as remoteness and failure to mitigate”: see the headnote. Lord Hope, at least, thought that in the majority of cases simple interest under s.35A Supreme Court Act 1981 (n.2) would afford a more

convenient remedy: para. 17. Yet a claimant who, by reason of non-payment of a debt, has been compelled to borrow money at compound interest (as is the case with most bank borrowing) may well regard it as a useful remedy.

(1) Jane Austen, *Pride and Prejudice*, Ch. 19.

(2) S.69 County Courts Act 1984 presumably being too lowly for the House of Lords.

Department for circular thought

A Member of the Practice Group recently encountered contractual provisions similar to the following:

1. *During the Term Party A will install an X...*
- ...
4. *The agreement will run for a period of two years from the date of installation (the Term)...*

When does Party A have to install?

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