

I set out below the declarations sought by the Claimant which are the subject of this trial:-

1. A Declaration that the First Defendant and the Second Defendant have no interest in the property known as 70 Abberville Avenue, Patrick City, Kingston 20 in the Parish of Saint Andrew registered at Volume 999 Folio 639 of the Register Book of Titles.
2. A Declaration that the First Defendant and the Second Defendant holds no share in all that Lot of land known as 70 Abberville Avenue, Patrick City, Kingston 20 in the parish of Saint Andrew registered at volume 999 Folio 639 of the register Book of Titles.
3. An Order that the Joint Tenancy in the said property at 70 Abberville Avenue, Patrick City, Kingston 20 in the parish of Saint Andrew registered at volume 999 Folio 639 of the Register Book of Titles in the names KEITH O'CONNOR, IMOGENE SHEARER and SHERYL O'CONNOR be severed.
4. An Order that in the event of the First Defendant and the Second Defendant refusing to sign the transfer or any other documents necessary to give effect to these Orders, the Registrar of the Supreme Court be empowered to do so.
5. That there be all necessary consequential accounts and enquires.

According to the evidence which has been led before me, the Claimant and the 1st Defendant met and began an intimate relationship in the early 1970's. It is not disputed and there is sufficient independent evidence of the fact, that the Claimant had been a shoe manufacturer operating under the business name Continental Manufacturing Company. I also accept the evidence of the Claimant that he was subsequently an operator of certain buses which were operated under a franchise granted to Con-Urban Transport Limited and giving rise to significant monthly inflows.

The property which is the subject of the dispute in this matter was acquired in or around 1990 for a purchase price of Three Hundred and Eighty Five Thousand Dollars (\$385,000.00). The purchase price was financed by a down payment of Eighty Five Thousand Dollars (\$85,000.00). According to the Claimant, that down payment represented part of the proceeds of a property at 3 Wigton Avenue, Kingston 13 which he had previously owned and which he sold for Two Hundred and

Fifty Thousand Dollars (\$250,000.00). The sale of that property was confirmed in the evidence of his then Attorney-at-Law, Mr. Garth Lyttle. The Claimant secured the balance of the purchase price by way of a mortgage of Three Hundred Thousand Dollars (\$300,000.00) from the Jamaica National Building Society. The mortgage was for twenty (20) years and the Claimant, according to his testimony, placed the name of the 1st Defendant on the Certificate of Title in case "anything happened to him". He also had the name of the child Sheryl O'Connor, then seventeen (17) years old placed on the title.

It is not in dispute that the loan was repaid in three (3) years. The final payment of Two Hundred and Ninety Eight Thousand Six Hundred and Eighty Six Dollars and Thirteen cents (\$298,686.13) was paid on May 31, 1993. The Claimant's evidence in this regard, is that in order to liquidate this liability, he had sold one of two 2 bedroom flats at 26 Silvidene Drive, to Ms Rosie Hinds for Two Hundred and Forty Thousand Dollars (\$240,000.00). The Claimant alleges that he bore all the legal costs which were attendant upon all the transactions.

Sometime in 1994 the relationship between the Claimant and the 1st Defendant broke down and the parties went their separate ways. Notwithstanding the parting of the ways, they continued to share the occupation of the premises at Abberville Avenue until 2004. In or about April of that year the Claimant removed from the said premises and it is alleged the Defendant subsequently changed the locks on that part of the premises occupied by the Claimant thereby denying him access to that part of the premises. There appears to have been some matters between the parties which went before the Family Court and the 1st Defendant was initially granted an occupational order which prevented the Claimant from coming to the premises. This order was subsequently revoked by the court. There also appears to have been some discussions between the parties as to the possibility of one party purchasing the interest if any of the other. Indeed, a valuation of the premises was done in 2004 when, according to the evidence of the 1st Defendant, the property was valued at Four Million One Hundred Thousand Dollars. (\$4,100,000.00) and the Defendants offered to buy the interest of the Claimant. These discussions have not borne fruit and it is now up to this court to determine whether the Claimant can establish his right in terms of the declarations sought or whether the Defendant is able to resist this application.

According to the evidence of the 1st Defendant the property at Abberville Avenue which is the subject of this action, was purchased jointly and in fulfillment of a common intention that it would

provide a better environment for the raising of the family. By that time a child, the 2nd Defendant, had been born to the couple. Ms. Shearer said that at the time when the purchase was being contemplated the Claimant was not working and that she was the person who had been advised of the availability of the property by a Mr. Mullings. She said they looked at the property together and, having decided to acquire it, in order to arrive at the down payment she gave to Mr. O'Connor a total of Sixty Thousand Dollars (\$60,000.00) in two (2) tranches, from savings which she had with Jamaica National Building Society. In fact she also testified that in 1971 she had been a steno-typist in the Ministry of Health, earning a salary of Forty Thousand Dollars (\$40,000.00) per month. It is not surprising that these pieces of evidence are strongly contradicted by the Claimant.

She also said that the mortgage on the Abberville Avenue property was paid from the rent which they collected on the small side of the house. She however, was not aware as to when the mortgage was paid off by Mr. O'Connor, nor of the source of the funds for the redemption of the mortgage in 1993. According to Mr. O'Connor, he and Mr. Mullings shared certain business interests and I accept that it was through the Claimant that the 1st Defendant met Mr. Mullings. This is important because one of the issues which the court has to decide in terms of the evidence is whether it is fair to conclude on a balance of probabilities that it was to the 1st Defendant to whom Mr. Mullings had given information about the availability of the property.

In looking at the evidence which has been presented the court has to decide what is the nature of the evidence it accepts and what are the implications in law of that evidence.

Submissions for the Claimant

Mrs. Shoucair Gayle for the Claimant, submitted that the evidence of the 1st Defendant should not be believed. She was not a witness of truth. In any event, it is clear from her evidence that she knew "precious little" of the business dealings of her cohabitee. She did not know of his race horses or of his buses; nor was she aware that he had more than one shoe store including one in May Pen. She did not know that a valuation was done at the time the mortgage was taken out for Abberville Avenue, nor did she know that the liquidation of the mortgage was from the proceeds of the sale of the Claimant's property at Silvidene Drive. She did not know of the existence of a mortgage card issued by the JNBS for the purposes of facilitating the payment of the mortgage.

She said it was also quite clear that the 1st Defendant was not being truthful when she said that in

1971 she had been earning the sum of Forty Thousand Dollars (\$40,000.00) per month as a stenotypist in the Ministry of Health. She also submitted that it was not true that the 1st Defendant had assisted the Claimant with \$60,000.00 towards the payment of the deposit on the subject property. The Claimant was a man of substance and he would not have needed the help. In any event, the evidence of his then Attorney-at-Law who had carriage of sale of the Wigton Avenue premises, out of which she claimed the deposit had been paid, had confirmed this fact in his evidence.

She submitted that the court had to decide:

1. What were the intentions of the parties at the time of the acquisition; was there a common intention?
2. What were the respective contributions to the acquisition of the property?
3. How does the First and Second Defendants' contribution, (direct or indirect) throughout the life of the mortgage, three years, impact on their interest (if any) in the property?
4. If the First and Second Defendants contributed to the acquisition, what is their respective share (if any) in the property? (quantification)
5. What were the respective intentions at the time of the acquisition?

She submitted that it was the clear intention of the Claimant to purchase the property for his own benefit and this is exemplified by his insistence that he put their respective names on the title for "convenience" in case anything should happen to him. She submits impliedly that, if there was an intention for the Defendants to benefit, it would only be in the event that "something happened to him"; by that "something" I understand him to be referring to his death, in which case, by virtue of the right of survivorship, the Defendants would become the legal and beneficial owners of the property. She also submitted that there was no joint mortgage application to Jamaica National and that, in any event, the fact that the First Defendant stopped working in 1990, was a basis for saying that she would not have been eligible for a mortgage and so, any mortgage secured must have been on the basis of the Claimant's ability to make the mortgage payments. It was clear in her view that the entire purchase price for the subject property was met from the Claimant's resources. The down-payment was part of the proceeds of sale of Wigton Avenue and the pay-off amount of the

mortgage was from the sale of Silvidene Avenue. All of this she submits is evidence of a lack of intention, at least on the part of the Claimant, to share any interest in the property.

Counsel for the Claimant submitted that the locus classicus was the decision of the English Court of Appeal in Pettit v Pettit [1969] All ER 385. She submitted that absent an express statement of intention, the court must look at the conduct of the parties to see whether any intention may be inferred. In pursuance of that submission, she cited the case of Edmondson v Edmondson [1992] JLR 234, a decision of the Jamaican Court of Appeal. There, as here, the property was held in the joint names of the parties who were husband and wife. The court had held that if it could be proven that a party's name was put on the title "as a matter of convenience only *and not pursuant to a common intention that the property be jointly owned*", then it might be possible to also prove that the beneficial interest in the property is invested in one party only. (The italics are mine). In that case, the court found evidence including admissions of intention to own jointly. Counsel further cited Harris v Harris [1982] 19 JLR 319, another decision of the Jamaican Court of Appeal. There the court found evidence of a common fund from which the property had been acquired. Importantly, the court pronounced that where property is transferred into the joint names of husband and wife, *prima facie*, the parties are treated as beneficially entitled in equal shares.

A second principle advanced by Counsel for the Claimant is that where the intention of the parties as to whom the property is to belong and what definite share each should hold is ascertainable, effect is to be given to that intention. As I shall show below, neither of these principles is exceptional nor have they been affected by case law developments such as Stack v. Dowden (2007) U.K.H.L. 17, to which I refer below. It was the submission that neither evidence of a common fund, nor any admissions had been evinced here and so, despite the joint names, the Claimant should be given sole beneficial ownership. Finally, counsel for the Claimant cited Burns v. Burns [1984] 1 All ER 244, a decision of the UK Court of Appeal. The similarity with the instant case is that the parties were unmarried and had a cohabiting relationship for seventeen (17) years. The property was in the sole name of the male Defendant, who had purchased it in his own name without any contribution from the female plaintiff. The court in that case held that "where property had been purchased in the man's name without the woman making any direct contribution to the purchase price or without the parties making an agreement or declaration regarding the

beneficial interest in the property, there was a prima facie inference that the man was the sole legal and beneficial owner. That inference could only be displaced if the court could determine from the conduct of the parties down to the date of the separation, a common intention that the woman was to have a beneficial interest in the property, and that in turn depended upon whether *the woman had made a substantial financial contribution towards the expenses of the couple's household which could be related to the acquisition of the property; e.g. where her financial contribution to the household expenses enable the man to pay the mortgage instalments*". (Emphasis supplied) I should right away say here that it is my view that this statement of the law is inconsistent with the judgment in *Stack v Dowden* and must be considered to have been overruled.

Defendants' Submissions

Mr. Frankson for the Defendants, submitted that the essential issue in the trial is about determining the property rights of a cohabiting couple in a home which they owned and occupied together as their home until the breakdown of their relationship, and whether the Claimant is entitled to the entire beneficial interest in the property as he claims. It was his submission that where title is registered in the names of both parties and the Claimant seeks sole beneficial ownership the burden is on him to show that the other registered owner does not have a beneficial interest.

In opposing the Claimant's application for the declaration, he pointed out that there was evidence from the Claimant himself in his own witness statement, that at the time of the purchase of Abberville Avenue property, he opened an account with Jamaica National Building Society with the names of both Defendants on it. It is not disputed that the couple cohabited for many years, first at 3 Wigton Avenue and then at Abberville Avenue for a further period of about fourteen (14) years up to 2004. It was also his submission that, at all material times during the period of cohabitation, the 1st Defendant was gainfully employed. This fact is also supported by the Claimant's evidence where he says that he had paid for all of the outgoings of the family unit, although the 1st Defendant was always gainfully employed.

He invited the court to find that the mortgage payments for the subject property were made from the joint account of the parties at JNBS but there is no evidence to confirm this. He also says that it was the evidence of the 1st Defendant that the rent from the small side of the house in which they resided was used to pay the mortgage. There is, with respect, no independent confirmation of this.

He also submitted that there was a presumption of advancement in relation to the transfer of the property into the names of the parties including his cohabitee and their daughter and that it was for the Claimant to rebut that presumption. In support of his contention that the claimant should not be granted the declarations sought, he cited the Jamaican first instance unreported decision of Stewart v. Stewart Suit No. E. 122 of 1982, a decision of Ellis J. There his lordship held that while the court must seek to ascertain the intention of the parties in order to determine the beneficial interests, "the intention which the court seeks is the intention at the time of the acquisition of the property". He found support for this view in Lord Denning M.R.'s dictum in Cobb v. Cobb [1955] 2 All. E.R. 696 that :

"... when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so even where the conveyance is taken in the name of one of them only and their contributions to the costs are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares. The legal title is in them both jointly, and the beneficial interest is in them both as equitable tenants in common in equal shares."

Citing Stack v Dowden [2007] UKHL 17, he also says that as Baroness Hale had suggested in that case, where the parties to a joint conveyance intended their equitable holdings in the property to be different from their legal holdings, they should be expected to define those differences, and in the absence of that definition, it should be presumed that equity followed the law. In that regard, he also cited Lord Upjohn in Pettit v Pettit [1970] AC 777 at p 813 where his lordship said:

"But the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to the intentions from their conduct. If there is no such available evidence then, what are called the presumptions come into play."

He submitted that the intentions of the parties at the time of acquisition of the property are manifest and are reflected in the fact that they appear on the title as joint tenants. If the Claimant was now seeking to assert his sole beneficial ownership, the burden was on him to show to the court, not only that there was no intention to share the beneficial ownership equally but also what other apportionment ought to be countenanced. Indeed, the fact that the parties had all signed the Agreement for Sale and the Transfer, on neither of which occasions had the Claimant indicated any reservation on the beneficial interest of the other parties, was in Mr. Frankson's view, a powerful indication of the real intention of the parties to share the beneficial interest

Mr. Frankson also urged the court to reject the Claimant's attempt to suggest that he had merely added the names of the Defendants as a "convenience". He felt that the Defendant had provided evidence of her own contribution to the purchase price and submitted that the court should accept her evidence as truthful, in this regard.

Finally, he sought to suggest that the fact that there was a joint account at JNBS, was itself evidence of a common pool of funds out of which the mortgage was paid, and he cited the decision of the Court of Appeal in Harris v Harris, also referred to by counsel for the Claimant as further support for the court rejecting the Claimants request for declarations in his favour. As far as this submission is concerned, there is, however, no evidence of what funds went into the joint account or what came out of it. In fact, the 1st Defendant's own evidence was that the mortgage was paid from the proceeds of the rent of the small side of the house, and there was no indication that those funds ever found themselves in the joint account. In light of the evidence which he suggested the court should accept, it was his submission that even though there was no formal agreement between the parties or no expressed intention, the court could infer the intention from the conduct. In this regard, he called in aid the case of Jones v Jones (1970) 27 J.L.R. 65. There Rowe P. delivered himself of dictum to the following effect:

"The law applicable in a case of this nature is well settled. Where husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal, the law leans towards the view that the beneficial interest is held in equal shares".

It was the view of counsel that despite the fact that the couple were not married, their cohabiting relationship over a period of some thirty-odd years, meant that the principles were equally applicable.

Court's Reasoning and Ruling

The Evidence

In so far as the facts are ascertainable, I do have to consider the evidence of both parties as given in their witness statements and under cross-examination in court. I also need to consider along with the evidence given, as well the demeanour of the each witness. I was not surprised to find that, given the recent history of this relationship, (court battles and occupational orders being given and then discharged) there was a lot of bitterness shown and little in the way of agreement on any fact. Neither was a particularly confident witness and issues could be taken with both.

One of the notable things in this case is that the parties in their witness statements provide very little in the way of facts with regards to the real issue at play. There are a lot of allegations about their personal relationship and the difficulties therein; the suspicion about involvement with a person purportedly employed to assist with household chores; the Claimant being incarcerated for ten (10) days because of lies told on him by the 1st Defendant; the disputes between the parties which ended up in the Family Court with an Interim Protection and Occupation Order being made against the Claimant and the subsequent reversal of that order in August 2005. There were allegations of his womanizing and violence toward the 1st Defendant, issues which do not, per se, affect the rights of the parties in the premises.

On the 1st Defendant's side there are averments about the Claimant being thrown out of his then residence by the woman with whom he had been living, all clearly hearsay, and his having to come to live with her at Wigton Avenue; statements about his differences with his family which are not strictly relevant to the issue to be decided.

En passant, I should note that I proceed on the basis that any interest held by the 2nd Defendant was not beneficial and merely held in derogation from the interests of the Claimant and the 1st Defendant and in the proportion of their entitlements, as there is no indication that she was able to

or did in fact contribute in anyway to the acquisitions of the property. The 2nd Defendant who is now in her thirties also did not give any witness statement or other evidence in support of a proposition that she owned an interest independently. I also hold that there is no presumption of advancement in favour of the 2nd Defendant. She was, after all, at that time an infant and schoolgirl. In support of my statement about the rights of the 2nd defendant, I would also call in aid the witness statement of the 1st defendant that it was after the decision to buy the house that the Claimant said he wanted to put Sheryl's name on the title, "and I agreed to that". I would also adopt Lord Walker of Gestingthorpe's view in *Stack v Dowden* (2007) U.K.H.L. 17 that the House of Lords in *Pettitt* had formed the view that as between husband and wife, the presumption of advancement was "no longer appropriate for determining property disputes". A fortiori, where there is merely a cohabiting relationship, I would be very unwilling to come to the view that a presumption of advancement applied.

Mr. O'Connor, for his part, seeks to convey the impression in his evidence of a successful businessman who in turn, owned a shoe manufacturing business, a fleet of buses under contract with a franchise operator, and a race horse owner of several horses. For this reason, it is suggested, he would not need any assistance from Ms. Shearer to pay a deposit on the subject premises. He was to be seen as the generous and responsible person, who assumed responsibility for his child and her mother until the woman, for no reason, had him evicted from his own home. Apart from an identification card describing him as an owner of a race horse, nothing was provided to give objective support to his other claims. There were, for example, no accounts, or income tax returns or any other documentary evidence. Against the background of his relatively well-to-do position, is to be seen and believed, that it was merely for "convenience", or as he puts it, "if anything should happen to me", that the defendants' names were placed on the title.

The 1st Defendant also asserts that during the continuance of cohabitation, it was her duty to provide the money for food for the family (The Claimant does not deny this but says that she eventually stopped doing so, necessitating him employing a helper). She said that the Claimant was in fact responsible for other outgoings such as utilities and taxes. She makes no claim of having paid personally any of the mortgage payments nor did she assist in the final liquidation of the mortgage which was funded from the sale of the Claimant's property at Silvidene Drive. She seeks to paint the Claimant as not being the successful businessman that he claimed to be. It was

her story, for instance, that at the time he purchased the property he was not working and had no savings, which is why she had to help with the down payment. She is unaware of his owning any horses and said that he had one bus, which was itself not in working condition. She, on the other hand, was a civil servant with a steady job and savings in an account at the Jamaica National Building Society. Neither did the 1st Defendant provide much in the way of hard evidence to substantiate her claims. But pay stubs for Ms. Shearer for 2004 and 2005 show that her then monthly income was between \$18,000.00 and \$22,000.00. In that regard I am mindful of the fact that her evidence as to her earnings as a steno-typist in the Ministry of Health in 1971 is not to be believed. A figure of \$40,000.00 per month as a stenotypist in 1971, I simply reject as not true. I do also have some reservations with respect to the 1st Defendant's evidence that she was able to provide, what was then a princely sum of Sixty Thousand Dollars (\$60,000.00) from her savings towards the deposit. But I am prepared to hold, on a balance of probabilities, that she did contribute some money to the deposit.

In a strange way, the fact that the Claimant had to sell Wigton Avenue which he had already "given" to the 1st Defendant, (see my next paragraph) lends itself to the view that he may not have been as cash flush as he would have this court believe. Money is fungible and I believe that if the 1st Defendant gave the Claimant some money, even if it were used for some other purpose, that gift would have assisted him being able to put up the \$85,000.00 for the deposit. I should only add that where, as in these cases, the evidence is sparse or tenuous, the court has to do the best it can with what it has. See in this regard, the dictum of Arden L.J. in Fowler v Barron, cited below, in the following terms:

As often occurs in a case of this kind, the facts as found or appearing from the evidence in this case are not detailed, and in themselves raise many issues. The court however must just do the best it can on the evidence that the court has and the inferences that may properly be drawn therefrom.

The Claimant cannot deny that the names of the Defendants were put on the title with his approval. In fact, he admits as much. It is interesting, to say the least, that in his witness statement the claimant said that when the first defendant became pregnant with his first child shortly after he met her, "I gave her a two bedroom flat at 3 Wigton Avenue Kingston 13 which I owned at the time while I lived elsewhere. She remained living there for 16 years free of cost along with two children". Based on my calculation, this would have taken them up to around 1989, when they

moved to Abberville Avenue. It was this same Wigton Avenue which he had previously “given”, that subsequently provided at least a part of the down payment for the purchase of the subject property. The Claimant does not contradict the 1st Defendant’s assertion that she signed both the Agreement for Sale and the Transfer along with the Claimant. It may even be possible to decide this matter on that short point. If there was a “gift” of the property and it was perfected by the defendant being put into possession and thereafter exercising rights of dominion over it, then the sale of the property in order to provide the down payment would have been on the basis of at least, part of the deposit being a contribution by the defendant. His plaintive plea that he should now be regarded as having been misguided and that his act of placing the property in both their names should be seen as no more than a convenience, is to be considered in the light of the new developments in this area of the law.

The Law

Stack v Dowden

This case is similar in many respects to the case of *Stack v Dowden (2007) U.K.H.L. 17* which has become the touchstone for the analysis and determination of cases of this sort. That case analyzed the development of the law in relation to the ownership of property in the context of whether the apportionment of the beneficial interest in property were to be considered different from the legal interests in the property appearing on the face of the title. In this case the question is whether the Claimant is able to assert successfully a right to the entire beneficial ownership in the disputed property, notwithstanding the evidence of a legal title which not only has his name, but the names of the 1st and 2nd Defendants. The Claimant asserts that both names were placed on the title for convenience as joint tenants in the event anything “should happen” to him. In particular he makes the point that he had insisted that the name of the 2nd Defendant also be included although she was at the time a minor. Baroness Hale of Richmond who gave the leading judgment in the House of Lords, (and whose reasoning was supported in most respects by the other law lords subject to some dissent by Lord Neuberger), in formulating the issue for determination, at paragraph 40 used the following construct which I respectfully adopt for the purposes of this case.

The issue before us is the effect of a conveyance into the joint names of a cohabitating couple but without an explicit declaration of their respective beneficial interests of a dwelling house which was to become their home. This is so far as I am aware the first time that this issue has come before the house whether the couple be married or, as in this case, unmarried. The principles of law are the same whether or not the couple are married. Although the inferences to be drawn from their conduct may be different (*see Bernard v Joseph (1982) Ch 391 per Griffiths L.J. at 402*). The starting point of any discussion must be stated in the following terms:- where a party is alleging that the beneficial interest in property are different from those stated on the legal title it is for that party to show to the court the evidence to support that proposition.

Lord Hope of Craighead in the said case sought to identify the court's starting point for the analysis. He stated:

"I think that consistency is to be found by deciding where the onus lies if a party wishes to show that the beneficial ownership is different from the legal ownership. I agree with Baroness Hale, that this is achieved by taking sole beneficial ownership as the starting point in the first case and by taking joint beneficial ownership as the starting point in the other. So in a case of sole legal ownership the onus is on the party who wishes to show, that he has any beneficial interest at all and if so what that interest is. In a case of joint legal ownership it is on the party who wishes to show that the beneficial interests are divided other than equally."

It is relevant, in seeking to establish whether the Claimant has satisfied the court on his claim, to determine whether there was any express agreement, expressed or implied, or any intention evinced, as to whether there was to be any beneficial interest at all, and if so in what shares. If there is no express agreement between the parties at the time of the acquiring, as is most often the case, the court must first search for such intention and then seek to identify the proper share of such entitlement. Here, as in most of these types of cases, the evidence of both parties reveal diametrically opposed historical recall as to what took place and whether there was any common intention. Ms. Shearer said it was the common intention that they should both own the property. Mr. O'Connor on the other hand says the defendants' names were put on for convenience. The divergence of recall as to the evidence was noted in Stack by Baroness Hale when she stated at paragraph 68 of her judgment, in relation to the evidence which is to be adduced:

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. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms.

For the purposes of the analysis of the instant case, it is not my view that one has to rehearse all the old law including the oft-cited cases of *Pettitt v Pettitt*, *Gissing v Gissing*, and *Lloyds Bank plc v Rossett* [1991] AC 107. I adopt as sufficiently apt the characterization of Lord Walker of Gestingthorpe at paragraph 15 in *Stack* as reason to focus on the law as it has now been stated in *Stack*.

Those cases shared three features not present in this case: the dispute was between a husband (or his secured creditor) and a wife; the property in question was in single legal ownership; and the matter relied on by the non-owner claimant was no more than relatively trivial work and expenditure on the property. This last feature made them (as Lord MacDermott LCJ said of the first two in *McFarlane v McFarlane* [1972] NI 59, 66) "not such as to facilitate or encourage a comprehensive statement of this vexed branch of the law.

My point of departure is therefore *Stack v Dowden* (see cite above). The decision was eagerly anticipated by practitioners and academics in the United Kingdom. When it was finally delivered, it was seen as having "the potential to apply to all cases of legal and / or equitable co-ownership, in the absence of a declaration of the parties' beneficial interests, its most striking effect is likely to be on cohabiting couples who are joint legal owners". The decision has been widely commented upon and has been cited in several cases dealing with our Property (Rights of Spouses) Act, in this jurisdiction within the last year. The case has also been followed by the Judicial Committee of the Privy Council in *Abbott v Abbott Privy Council Appeal 142 of 2005* judgment handed down on July 26, 2007, and, at least with respect to the latter case, there is authority to which this court may look. It should be noted that the Board in *Abbott* had three members in common with the House of Lords Bench in *Stack*. It is not surprising that the latter case re-inforced the earlier decision of *Stack*.

Baroness Hale's leading judgment in their Lordship's House is a tour-de-force of analytical reasoning, tracing and analyzing the case law and historical development in this area of the law. She stated her starting point in these cases in the following terms at paragraph 58.

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. The onus is upon the person seeking to show that the beneficial

ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

In delivering her judgment at paragraph 58 of the report, she said:

The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prima facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, 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.

And at paragraph 68 she said:

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.

Lord Walker of Gestingthorpe in agreeing with Lady Hale said:

I am in full agreement with the observation in paragraph 68 of Lady Hale's opinion, which I take to be of central importance to her reasoning and conclusions, that in cases where a house or flat has been registered in the joint names of a married or cohabiting couple (but with no express declaration of trust) there will be a considerable burden on whichever of them asserts that their beneficial interests are unequal, and do not follow the law.

And her ladyship also added:

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.

In pursuing the search to "divine" the parties true intentions, Baroness Hale at paragraph 69 of the report set out a number of factors which may need to be considered. She said:

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 authorized to give a receipt for the capital moneys; 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. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for 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. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual. (emphasis mine)

I adopt with respect the above citation from her ladyship and say that in the instant case, the court must consider the evidence of these factors which form the context in which the search for intention must be grounded. It will be seen here from the evidence which I have accepted, that at the time of the purchase the joint names were put in the title. The parties had at least one child between them, the 2nd defendant herein. The Claimant had previously "given" an apartment to the 1st Defendant in which to live and raise their child. At the new property, there was an agreement to share expenses although the Claimant seemed to have accepted responsibility for the mortgage instalments. The Claimant said the 1st Defendant subsequently reneged upon her agreement to purchase food for the family. It would also be fair to proceed on the basis that since they were joint tenants they were jointly and severally liable on the mortgage though there is no direct evidence that this was so. In these circumstances, has Lady Hale said:

"The arithmetical calculation of how much was paid by each is likely to be less important. It will be easier to draw the inference that each should contribute as much to the household as they reasonably could".

It must be borne in mind that the Claimant in seeking the declaration of his 100% beneficial ownership of the property, states that his intention were to place the title in joint names in the event that something should happen to him. There is no evidence that I accept that he communicated this intention to the 1st defendant. In Stack her ladyship also considered the possibility of "changing intentions" and dealt with it in this way:

Furthermore, although the parties' intentions may change over the course of time, producing what my noble and learned friend, Lord Hoffmann, referred to in the course of argument as an "ambulatory" constructive trust, at any one time their interests must be the same for all purposes. They cannot at one and the same time intend, for example, a joint tenancy with survivorship should one of them die while they are still together, a tenancy in common in equal shares should they separate on amicable terms after the children have grown up, and a tenancy in common in unequal shares should they separate on acrimonious terms while the children are still with them. (My emphasis)

Fowler v Barron

In the case of Fowler v Barron [2008] EWCA Civ 377, [2008] All ER (D) 318 (Apr) the Court of Appeal has attempted to seize the opportunity to interpret and apply the Stack principles, providing what one commentator¹ has described as "some much needed clarity for the courts below".

The facts of Fowler v Barron may be taken to be as summarized by the author, Greer cited above.

Ms. Fowler and Mr. Barron purchased a property in 1998 and registered it in joint names. They purchased the property by means of a significant cash contribution from Mr. Barron, and a mortgage taken out in both their names. Mr. Barron paid all of the mortgage instalments, together with the utilities bills and council tax. Ms Fowler paid for expenses relating to their two children and for holidays and clothing. The couple never had a joint bank account. In purchasing the property, they made no express declaration of trust, but the transfer document contained the standard declaration that the survivor of the parties could give a valid receipt for capital money arising on the disposition of the property. Following their separation, Mr. Barron contended that the property belonged to him beneficially in its entirety. At first instance, the judge, applying the Court of Appeal's decision in Stack, held that, based on his financial contributions, Mr. Barron was indeed the sole beneficial owner of the property.

The Court of Appeal noted that the judge at first instance did not have the benefit of the House of Lords' decision in Stack. Baroness Hale had made it clear that the starting point for the court in all such cases was the presumption that if the property had been registered in joint names, then the parties would also be deemed to have intended to be joint tenants in equity. It was then for the party asserting otherwise—in this case, Mr. Barron—to adduce evidence to the contrary. This was a "default rule", which if not rebutted, must be applied. It would not be easy to displace the

¹ Sarah Greer, Senior lecturer in law University of Greenwich in an article: "No More Nonsense: Fowler v Barron" posted on the Internet"

presumption. (per Arden L.J. at paragraph 34 of the judgment)

Lady Justice Arden fully accepted the approach of Lady Hale in Stack and also dealt with the question of intention which may have been secretly held in the bosom of one party. In the Fowler case, her ladyship said the following:

The starting point is of course that the transfer of the property was into the joint names of Mr. Barron and Miss Fowler. Whatever Mr. Barron's motive was for doing this, it was a deliberate choice. As a matter of law, a presumption of joint beneficial ownership arose from the fact that they were joint legal owners: see Stack at [58] per Baroness Hale. It was open to Mr. Barron to rebut this presumption. There was no direct evidence of the parties' intentions, and accordingly the only evidence was circumstantial.

At this point it may be appropriate to make some observations about the effect of the presumption. It provides a default rule that, unless and until the contrary is proved, joint tenants in this context are treated as joint legal and beneficial owners. If the contrary were not proved, the mere fact that the property was transferred into their joint names would be enough to give both parties an equal beneficial share.

In determining whether the presumption is rebutted, the court must in particular consider whether the facts as found are inconsistent with the inference of a common intention to share the property in equal shares to an extent sufficient to discharge the civil standard of proof on the person seeking to displace the presumption arising from a transfer into joint names.

The emphasis is on the parties' *shared* intentions. As Lord Diplock said in Gissing v Gissing [1971] AC 886 at 906B-C, "...the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party." This would be broadly consistent with the principles applicable to the interpretation of a written document, if that had set out their intention.

With respect to the issue of determining intention she added:

Thus any secret intention of Mr. Barron, that Miss Fowler should only benefit in the event of his death and on the basis that they were then still living together, does not provide the evidential basis for rebutting the presumption, since it is not evidence of the parties' shared intention. (Moreover, there was nothing on the face of the document to prevent Miss Fowler from severing her interest before the date of his death.) For the same reason, the fact that Mr. Barron was mistaken as to the effect of putting the property into joint names, and did not appreciate that

that would give Miss Fowler an immediate and absolute entitlement to a beneficial interest is of no materiality. He did not communicate his belief to Miss Fowler, and there is no basis for saying that it should have been apparent to her.

In *Fowler*, Arden L.J also reiterated the need for the court to bear in mind the warning given by Baroness Hale in *Stack*, that in this situation former co-habitees may (consciously or subconsciously) reinterpret the past. In the instant case before me, it is unclear how Mr. O'Connor's private intention as to the reason for including the 1st defendant's name on the title, which seems to be his main substantive bone of contention, can avail him in seeking to overcome the presumption implicit in the joint names on the title.

The judgment of Lady Justice Arden in *Fowler* is a studied attempt to clarify the ruling in the House of Lords in *Stack v Dowden*. It will be useful in those circumstances to cite, in extensu, some of her ladyships judgment in order to see how that seminal decision affects cases such as the present one. At paragraph 16, 17 and 18 of her judgment, she said:

In the House of Lords, Baroness Hale, with whom Lords Hoffmann, Hope and Walker agreed, gave the leading speech. Her speech is detailed and needs to be read in its entirety. However, the salient points in my judgment so far as this case is concerned are as follows. She held that where property was put into joint names, the starting point was joint beneficial ownership. The onus was on the person seeking to show that the beneficial ownership was different from legal ownership ([56]). It was unlikely that the parties intended that the beneficial ownership should be held as joint tenants in many commercial situations because, if one of them died, the entire property would pass to the other by virtue of the right of survivorship (see [57] and the citation from the speech of Lord Brightman in *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 559). At the least in the domestic consumer context, a transfer into joint names indicated both legal and beneficial joint tenancy unless and until the contrary was proved ([58]). The contrary could be shown by ascertaining 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 ([60]). In this regard, Baroness Hale noted that the law had moved on in response to changing social and economic conditions.

At [61], Baroness Hale held that it was preferable to ask what shares were intended rather than what was fair. She gave two reasons:

"First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair....."

She held that the burden was on the person alleging that the parties intended their interests to be different from their legal interests and in what way. She observed that

this task was not to be embarked on lightly because the parties might reinterpret events after their relationship broke down. Baroness Hale clearly contemplated that the parties could be equal joint owners even though their financial contributions to the purchase cost had been unequal (see [68]).

At paragraph 24 of her learned judgment, Lady Justice Arden in the Fowler case, set out to “recapitulate the important points decided by the House (of Lords)” for the purposes of that appeal. I agree with her formulation and respectfully adopt it for the purposes here:

To recapitulate, the important points decided by the House for the purpose of this appeal were as follows. The legal technique that the court will use to ascertain whether both joint owners who had been co-habitees had a beneficial interest is that of the common intention constructive test, rather than that of resulting trust. This will enable the court to take a holistic view of the whole of the parties' conduct so far as it illumines their shared intentions about the ownership of the property. The court will not impose any particular allocation of property on the parties. It is not a question of the court deciding what is *fair* as regards the division of ownership but of determining what the co-owners' shared intentions were as regards beneficial ownership. This was a deliberate policy choice to make the law respond to current needs: see per Baroness Hale at [60]. Where, as here, a house is transferred into the joint names of two individuals as their home, without any declaration of trust, the transfer will indicate that the parties intended to own the house in equal shares and thus the onus will be on the one (here, Mr. Barron) who asserts that property is owned by them other than in equal shares to show that they had a shared intention to own the property in some other shares. The conduct that the court will take into account will include, but is not limited to, the financial contributions that they made towards the acquisition of the property or repayment of any loan raised for such purpose. The onus will not be easy for that person to discharge.

In the *Fowler* case, Toulson L.J. in agreeing with Arden L.J. said:

It was argued strongly on Mr. Barron's behalf that even if the judge went too far in holding that Miss Fowler had no beneficial interest in the property, it would not be a fair overall result to hold that they should share the property equally. Opinions on that might differ but it is not the question to be decided. Baroness Hale made it clear in *Stack v Dowden* at [61] that it is not for the court to decide a case such as this on its own general view of what would be fair in the situation in which the parties find themselves. It is for the court to apply the law.

I advert to this dictum of the learned judge to reiterate that the quest for fairness, as admirable as that may be in relevant circumstances, is not the function, or at least not the primary function, in matters of this kind.

Finally, I should refer to the decision of the Judicial Committee of the Privy Council in the case of Abbott v Abbott, referred to above, a case from the jurisdiction of Antigua and Barbuda.

Abbott v Abbott

In Abbott v Abbott Privy Council Appeal 142 of 2005 decided as noted above on July 26, 2007, the Board re-affirmed the principles enunciated in Stack v Dowden. In that case, a single name case, the husband was registered as the sole owner on the title to the matrimonial home. This had been built on land transferred into the husband's name by his mother some years before. The house was eventually constructed on the land between 1990 and 1991. The following is a summary of the factual situation as set out in the judgment of Baroness Hale who again gave the leading opinion.

The construction was financed partly by a bridging loan, which was later replaced by a mortgage, and partly by gifts from the husband's mother. The mother contributed cash totalling some EC\$400,000 but it is unclear how this was paid. The wife's case was that some was paid into the couple's joint bank account and some was paid direct to the tradesmen. The bridging loan of EC\$250,000 was made by the Bank of Nova Scotia in November 1990. This too was paid into their joint account. In August 1991, it was replaced by a loan of the same amount, secured by a mortgage, from the Barbados Mutual Life Assurance Society. The husband, as legal owner, executed the charge over the property. But the wife also made herself jointly and severally liable for the repayment of the principal and interest on the loan. The loan was also secured by insurance policies on each of their lives, for EC\$150,000 on the husband's life and for EC\$100,000 on the wife's. The husband also took out a mortgage protection policy. The husband first stated in evidence that "apart from the insurance I do not recall the claimant being involved in the loan in any other way" but had then to accept that "she is a party to the charge. I do not know why". He later claimed that "today is the first that I heard that she was asking for 50%" although he had signed the defence to the statement of claim in which she had claimed an equal share. He then stated "she has a share in the house, but I do not know what her share is. It should be linked to the \$100,000 policy".

At first instance, the court determined that each party had an equal beneficial interest in the property. This was based upon the judge's views that the husband's mother could hardly have intended to give the land to her son entirely for his own beneficial interest, but rather must have intended a gift to both. Secondly, with respect to the loan from the Barbados Mutual, both had put up their insurance policies to secure the loan. Both thereby became liable for its repayment. This was clear evidence of her acting to her detriment. He also gave some weight to the fact that all the income from both parties had been paid into one joint account.

On appeal to the Eastern Caribbean Court of Appeal, the court found that there was no factual basis support a finding that the husband's mother intended the gift of the land to be to both. It is of interest that both the court at first instance and at the appeal level purported to act consistent with the dictum of Lord Bridge of Harwich in Lloyds Bank v Rossett [1991] 1 AC 107 at pp 132-133. There his lordship had stated the law to be as follows:

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. . . .

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as 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."

According to Baroness Hale, both had given to much importance to the dicta, especially the part about the need for "direct contribution". Both Lord Walker in *Stack* and herself were of the view that the law had undoubtedly moved on from such a slavish reliance upon proof of contributions to determine beneficial entitlement. At paragraph 4 of her judgment, she articulated the matter in the following terms, while citing with approval the conceptual parameters for the discussion as laid out by Peter Gibson L.J in Drake v Whipp:

There are, of course, two separate questions: first, was it intended that the parties should share the beneficial interest in a property conveyed to one of them only; and second, if it was so intended, in what proportions was it intended that they share the beneficial interest? There are two separate concepts which may help in answering those questions, explained by Peter Gibson LJ in Drake v Whipp [1996] 1 FLR 826, 827:

"A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to

which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention.”

The correct conceptual starting point is therefore, the constructive trust and I can do no better than to set out here in some length, another section of her ladyship’s judgment at paragraph 4 et seq.

It is now clear that the constructive trust is generally the more appropriate tool of analysis in most matrimonial cases. As Lord Walker of Gestingthorpe explained in Stack v Dowden [2007] UKHL 17, at para 31:

“In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the name 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.”

Lord Walker also commented upon the passages from the speech of Lord Bridge of Harwich in Lloyd’s Bank plc v Rosset [1991] 1 AC 107 quoted in para 3 above. Lord Walker pointed out, at para 25, that although Lord Bridge had drawn a sharp contrast between cases in which there had been some prior agreement to share and those where there had not, he and all the other members of the House were “unanimously, if unostentatiously, agreeing that a ‘common intention’ trust could be inferred even when there was no evidence of an actual agreement”. Lord Walker went on to comment, in para 26:

“Lord Bridge’s extreme doubt ‘whether anything less will do’ was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in Gissing v Gissing (see especially Lord Reid [1971] AC 886 at pp 896G-897B and Lord Diplock at p 909D-H). It has attracted some trenchant criticism from scholars as potentially productive of injustice (see *Gray & Gray, Elements of Land Law, 4th ed [(2005)], paras 10.132 to 10.137*, the last paragraph being headed ‘A More Optimistic Future’). Whether or not Lord Bridge’s observation was justified in 1990,

in my opinion the law has moved on, and your Lordships should move it a little more in the same direction . . .” (Emphasis mine)

Lord Walker, Lord Hoffmann and Lord Hope of Craighead all agreed with my own opinion, in which I summed the matter up thus at para 60:

“The law has indeed 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.”

Ruling

Given the findings of fact which I am prepared to make based on the evidence before me, I have come to the view that the Claimant must fail in his application for the declarations sought. Those facts that I have found include the following:

The legal title is in the name of both the Claimant and the 1st Defendant;

The 1st Defendant's shared responsibility for the expenses of the family unit;

The 1st Defendant had made some contribution towards the deposit on the acquisition of the Abberville Avenue property;

The property at Wigton Avenue, the sale of which generated some or all the funds for the deposit had, on the evidence of the Claimant, been “given” to the 1st Defendant in order that they might have a good environment in which to raise the 2nd Defendant. Accordingly at least part of those proceeds represented a contribution by Ms. Shearer. The Claimant has failed to discharge the burden of proving that the parties should not hold their beneficial interests in the same proportion as held in the legal title, and that the shares should be other than equal.

The Claimant, at no time ever communicated to the 1st Defendant that it was his intention that she be on the title merely for convenience if he should pre-decease her but that if he did not, their

interests and shares would be different. It is settled law that where there is a severance of the joint tenancy as now is to be effected here, the result is that each party now owns a corresponding interest as a tenant in common. As Baroness Hale said at paragraph 49 of Stack

No-one now doubts that (such) an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see Goodman v Gallant [1986] Fam 106. That case also establishes that severance of a beneficial joint tenancy results in a beneficial tenancy in common in equal shares.

In my judgment, it is proper for the court to order that the Claimant, on the one hand, and the 1st and 2nd Defendants on the other, are entitled to a fifty per cent (50%) interest in the subject property. The Claimant is to have the first option to purchase the 50% interest of the Defendants, and this is to be based upon a valuation of the property to be carried out by reputable firm of valuers agreed by the parties through their attorneys within thirty (30) days. If there is no such agreement, the Registrar is to appoint a valuator. The valuation is to be effected within sixty (60) days of the appointment and the cost of the valuation is to be borne equally by the parties according to the interest determined above.

Thereafter, the Claimant is to have the right to purchase the 50% interest of the Defendants within a period of ninety (90) days from the date of the valuation. If the Claimant fails to purchase within the time given above, the 1st Defendant may purchase the Claimant's interest in the property within ninety (90) days from the end of the period given for purchase by the Claimant. If neither party is willing or able to purchase the property, the property is to be sold either by private treaty or at public auction and the net proceeds of sale are to be divided evenly between the Claimant on the one hand, and the 1st Defendant on the other. The Registrar of the Supreme Court is hereby empowered to sign and or execute any and all documents which may be necessary or desirable to give effect to this Order.

Costs to the 1st Defendant, to be agreed or taxed.

ROY K. ANDERSON

PUISNE JUDGE

April 24, 2009

