

# Non-Declarations of Beneficial Co-Ownership

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⚭ Beneficial interests; Cohabitation; Constructive trusts; Contributions; Co-ownership; Family home; Intention; Unmarried couples

Suppose that a couple declare, when buying a home in joint names, that, “[w]e are not beneficial tenants in common”. If this does not declare that they are to be joint tenants, as most happy couples intend, it does at least seem to preclude any possibility of their holding unequally in undivided shares. Their declaration might be thought to set out parameters within which the beneficial interests should fall.

In *Stack v Dowden*,<sup>1</sup> Dehra Dowden and Barry Stack made this declaration obliquely, in accordance with the practice promulgated at the time of their purchase in 1993, by referring to the entitlement of a survivor to give a receipt for purchase money.<sup>2</sup> They agreed nothing else. Their declaration pointed strongly to a beneficial joint tenancy but the House of Lords ignored their declaration when dividing the equity in the home between Dehra Dowden and Barry Stack unequally in the proportions 65:35. This affirmed a thread of authority starting with *Harwood v Harwood* and running through *Huntingford v Hobbs* and *Mortgage Corp v Shaire*,<sup>3</sup> and overlooked the hostile comments on this line of cases when *Stack* was in the Court of Appeal.<sup>4</sup> *Stack* has been affirmed by the Supreme Court in *Jones v Kernott*.<sup>5</sup>

This article attempts to retrace the history of land registry transfers step by step in order to explain how the technically incorrect solution reached in *Stack* came to appear believable.

## From legal to beneficial co-ownership

*Stack* assumed that a registered transfer to joint proprietors without an express declaration of trust creates a vacuum in the beneficial entitlement, which has to be filled with a constructive trust. This jumping off point was wrong.

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<sup>1</sup> *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 (references to *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 are to the speech of Lady Hale unless otherwise indicated).

<sup>2</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at 434F per Lucy Theis QC at [80].

<sup>3</sup> *Harwood v Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div); *Huntingford v Hobbs* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div); *Mortgage Corp v Shaire* [2001] Ch. 743; [2001] 3 W.L.R. 639 Ch D per Neuberger J.; *Barracks v Barracks* [2005] EWHC 3077 (Ch). The argument to the House of Lords in *Stack* that *Huntingford* was wrongly decided failed decisively: *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at 434F and 436E.

<sup>4</sup> *Stack v Dowden* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [11] per Chadwick L.J. and at [78] per Carnwath L.J.; A. Moran, “Anything to declare? Express declaration of trust on Land Registry form TR1: the doubts raised in *Stack v Dowden*?” [2007] 72 Conv. 364, 365.

<sup>5</sup> *Jones v Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [2] and [5] per Lord Walker and Lady Hale (references to *Kernott* in the SC are to this joint judgment unless otherwise indicated); on appeal from [2010] EWCA Civ 578, [2010] 1 W.L.R. 2401.

### *Joint tenancy before 1926*

Dehra Dowden and Barry Stack bought their house by way of a land registry transfer to joint names in the form “to D and S” executed under the trusts for sale regime in force between 1925 and 1997. In essence this was the same as a pre-1926 conveyance to legal co-owners. A conveyance to concurrent owners could then create either a legal joint tenancy or a legal tenancy in common. What was intended was usually indicated by words of severance or non-severance, but if things were left unclear, the form of co-ownership favoured at law was the joint tenancy which militated against the multiplication of feudal services.<sup>6</sup> Norton states that “[a] limitation ... at common law ... of an estate of the same nature to ... several ... *nominatim* ... without more makes them joint tenants”,<sup>7</sup> a rule treated as axiomatic after 1925.<sup>8</sup> A transfer to Dowden and Stack made pre-1926 passed the property “to D and S as legal joint tenants”,<sup>9</sup> in the absence of words implying a distinctiveness of interests.<sup>10</sup> This legal joint tenancy could be reversed in equity, the legal owners having imposed upon them the duty to hold on trust for themselves as tenants in common beneficially, for example where a beneficial tenancy in common arose under a resulting or constructive trust to reflect unequal contributions. It was not necessary to declare a trust to make D and S beneficial joint tenants, though it was certainly helpful to include their declaration negating the possibility that equity might impose a tenancy in common to reflect unequal contributions.

### *Transitional treatment of tenancies in common*

Joint tenancy and tenancy in common were treated quite differently in 1925. Pre-existing tenancies in common were restructured in order to take effect under a trust imposed by a transitional provision, which became a trust for sale under s.34 of the Law of Property Act 1925 (“LPA 1925”). The two-stage process is shown most clearly in cases involving family charges. Land held by tenants in common subject to a jointure was not settled under the Settled Land Act 1882, the definition which applied during the transitional stage. Section 34 applies to pre-1926 tenancies in common only after a New Year’s Day 1926 transition and at that stage the amended 1925 definition of settled land became relevant.<sup>11</sup> So s.34 applies to post-transition and to post-1925 tenancies in common.

### *Transitional treatment of joint tenancies*

Much less restructuring was required for joint tenants, and so s.36 is made to do the necessary in the same way for pre-1926 conveyances and post-1925

<sup>6</sup> William Blackstone, *Commentaries on the Laws of England* (London: Cavendish, 2001) Vol.2 book II Ch.XII, p.155; see also p.145.

<sup>7</sup> R.J.A. Morrison and H.J. Goolden, *Norton on Deeds*, 2nd edn, (London: Sweet & Maxwell, 1928), pp.435, 441.

<sup>8</sup> H.G. Rivington, *Law of Property in Land*, 2nd edn, (Law Notes Office, 1937), p.244; A.F. Topham, *Real Property*, 3rd edn, (London: Butterworths, 1925), p.53.

<sup>9</sup> *Campbell v Campbell* (1792) 4 Bro. C.C. 15; *Morley v Bird* 30 E.R. 1192; (1798) 3 Ves. Jr. 628 at 631; *Fisher v Wigg* (1700) 1 Salk. 391 at 392 per Holt L.J.

<sup>10</sup> “Concurrent interests in land II” [1944] 9 Conv. (N.S.) 72, 72–76, (especially “Yellowacre” at 73); T. Key and H.W. Elphinstone, *Precedents in Conveyancing*, (London: Sweet & Maxwell, 1953) Vol.3, pp.262–265.

<sup>11</sup> Schedule 1 Pt IV para.1(2) of the Law of Property Act 1925 (“LPA 1925”); *Green v Whitehead* [1930] 1 Ch. 38 CA at 40, 41 and 42 per Eve J.; *Re Ryder and Steadman’s Contract* [1927] 2 Ch. 62 CA.

conveyances, an approach which is “in a manner of speaking” the converse of the method applied to tenancy in common.<sup>12</sup> Hence the different result for land held by joint tenants in fee subject to a family charge. Here there was no initial transition and s.36 came into force as part of the main body of the Act. Both sides in *Re Gaul & Houlston's Contract* agreed that

“section 36 applies both to joint tenancies in existence when the Law of Property Act came into force and to subsequent joint tenancies.”<sup>13</sup>

The decision whether the land was settled as a result of being subjected to a family charge was thus made under post-1925 law, under s.1 of the Settled Land Act 1925 (“SLA 1925”).<sup>14</sup>

We turn therefore to the mainstream joint tenancy unadorned by family charges. If property had been conveyed “to D and S” before 1926, a trust for sale is imposed “in like manner” (as if there was a tenancy in common), “where a legal estate ... is beneficially limited to or held in trust for any persons as joint tenants ...”.<sup>15</sup>

The words of s.36 have been misread by many family judges who failed to appreciate that these words were drafted to be read on January 1, 1926 and to apply to existing joint tenants. On that day land was not limited beneficially to joint tenants if held by:

- legal or equitable tenants in common;
- legal joint tenants who were subject to a resulting trust causing them to hold beneficially as tenants in common;
- joint tenants for life so as to be subject to a settlement; and
- joint tenants who were trustees for sale for third party beneficiaries.

This left two cases for s.36 where land was held by:

- joint tenants on trust for themselves as beneficial joint tenants; and
- legal joint tenants where none of the previous cases applied.

In the former case the section ensured that the express trust became a statutory trust for sale, but this was an unlikely limitation to have been created before 1926. In the latter case s.36 replicated the legal estate in equity before imposing the trust for sale and when the section was applied transitionally to pre-1926 conveyances it was usually to conveyances of this form. The conveyance “to D and S as joint tenants” must have left the land “beneficially limited to” D and S, provided only that there was no resulting trust in unequal shares. If this was not the case *there was no statutory trust on any registered land transfer to joint proprietors* who were joint tenants. The correct meaning of s.36 is best studied in *Green v Whitehead*.<sup>16</sup> A parcel of development land at Bury was acquired in 1925 (i.e. before the Birkenhead legislation) by a conveyance made to “A and B as joint

<sup>12</sup> “Concurrent interests in land II” [1944] 9 Conv. (N.S.) 72, 72.

<sup>13</sup> *Re Gaul & Houlston's Contract* [1928] Ch. 689 CA at 698–699 and 699–700.

<sup>14</sup> The position became more complicated when the operation of the strict settlement was made optional by amendments made in 1926.

<sup>15</sup> Section 36(1) LPA 1925; *Goodman v Gallant* [1986] Fam. 106; [1986] 2 W.L.R. 236 CA (Civ Div) at 109–111 per Slade L.J.

<sup>16</sup> *Green* [1930] 1 Ch. 38 CA at 42 per Eve J., affirmed in the Court of Appeal. See also *Re Gaul & Houlston's Contract* [1928] Ch. 689 CA at 692 per Clauson J. and at 701 per Russell L.J.; *Re Cook* [1948] Ch. 212 Ch D per Harman J.

tenants in fee simple". Both parties agreed that this was, translated, on the first day of 1926, into a conveyance to "A and B as joint tenants on trust for sale for themselves as joint tenants". They only joined issue on the ability or inability of A (as a trustee for sale) to delegate his power of sale. Both counsel and Eve J. accepted that a conveyance to legal joint tenants in fee simple was "beneficially limited to" the joint tenants so as to bring into play s.36; the land was not *not* limited to them as beneficial joint tenants. Two negatives make a positive.

More or less the same occurred in *Re King's Theatre Sunderland*, a case plain enough "apart from the simplifying statutes", in which a beneficial joint tenancy existed behind a legal estate outstanding in bare trustees.<sup>17</sup> As the clock turned to midnight on January 1, 1926 the transitional provisions stripped the legal estate from the bare trustees and vested legal title in the beneficial joint tenants, Thompson and Collins, so the equitable interests merged into the legal estate and collapsed. One instant later, when the main co-ownership reforms came into force, the land was limited to Thompson and Collins with no separated beneficial entitlement. They held as legal joint tenants, and a trust for sale was now imposed, s.36(1) making them beneficial joint tenants of the proceeds of sale. Legal joint tenants became trustees for themselves.<sup>18</sup> Readers of this magazine will be left wrapped in admiration for the technical wizardry of Wolstenholme and Cherry.

### *Unregistered conveyances 1926–1996*

Every word that has just been said about the application of s.36 to pre-1926 conveyances to joint tenants must apply equally to conveyances executed after 1925 to joint tenants. Although it became normal to convey unregistered land to joint tenants as trustees for themselves, this was never necessary. It remained perfectly possible to convey land "to D and S as joint tenants" if the purchasers were willing to accept the uncertainty that equity might impose a resulting trust.<sup>19</sup> The survival of this possibility is the price to be paid for the shortcut in drafting which made a single section cover both pre-1926 and post-1925 conveyances.

### *LR transfers between 1926–1996*

Registered conveyancing involved a direct transfer of legal title to the intended co-owners, leaving the statute to complete the job by importing a trust. A form of transfer was promulgated in November 1925 for a transfer to a single purchaser with the reassurance that, "[w]here the transfer is to two or more jointly, no addition need be made to the form".<sup>20</sup>

Joint proprietors were expected to take a transfer without even executing the transfer document, in short to act like pre-1926 legal co-owners. With the benefit of hindsight this note seems extraordinary, and yet it was surprisingly close to the truth.

<sup>17</sup> *Re King's Theatre Sunderland* [1929] 1 Ch. 483 Ch D at 490 per Astbury J.

<sup>18</sup> *Re King's Theatre Sunderland* [1929] 1 Ch. 483 Ch D at 495–496 per Astbury J.

<sup>19</sup> J.T. Farrand, *Emmet on Title*, 18th edn, (London: Oyez Longman, 1983), pp.318–319; reference is also made hereafter to J.T. Farrand, *Emmet on Title*, 16th edn, (London: Oyez Longman, 1974) and to previous editions by J. Gilchrist Smith, 13th edn, (Solicitors Law Stationary, 1949–1950) and 15th edn, (1967).

<sup>20</sup> Form 19 in the Schedule of the Land Registration Rules 1925 ("LRR 1925"), and note thereto.

In order to respect the trust for sale curtain, transfers of registered land omitted any declaration of trust in favour of the transferees.<sup>21</sup> Unnecessary verbiage was thrown onto the bonfire of unregistered vanities. A transfer “to D and S” did not need to state that they received the legal title as joint tenants since they could no longer hold in common, nor to say that they held under a trust for sale because statute imposed it anyway, nor to state that they held as joint tenants beneficially because s.36 transformed the legal joint tenancy into a beneficial joint tenancy. There was no vacuum, no void, not even a thinly populated aether.

Numerous judges have read the requirement for a joint tenancy to be limited to joint tenants “beneficially” to mean that it is necessary to make an express declaration of a beneficial joint tenancy before s.36 can operate. Judges have repeatedly stressed the need for a registered transfer to make an express declaration of their beneficial capacity and (if unequal) the size of their beneficial shares; the facts of *Walker v Hall* stood as a warning

“[t]o those who think that houses with registered title can be safely conveyed by buying forms from law stationers, filling them up and posting them to the Land Registry.”<sup>22</sup>

Lady Hale assumed as much in *Stack*.<sup>23</sup>

This cannot stand with the transitional provisions. Land can be “beneficially limited to” without it being “held in trust for” them as otherwise there would be no need for the two alternatives. If a conveyance would have been effective to vest land in D and S as legal joint tenants before 1926, the same form of transfer was effective afterwards to vest land in D and S on the statutory trust for sale for themselves as beneficial joint tenants. There was no vacuum in the beneficial interest but merely an uncertainty about whether equity might imply a resulting or constructive trust.

### *Joint purchases of family homes*

The revisionist interpretation of s.36 derives from the decision in *Bernard v Josephs*, where a transfer of a family home, “to Dion Emmanuel Josephs and Maria Teresa Bernard”, without more was assumed to have the same effect as a transfer without more, “to Dion Emmanuel Josephs and Maria Teresa Bernard as trustees for themselves”.<sup>24</sup>

Both limitations were thought to leave beneficial vacua but these two limitations were not equivalents. The first created a statutory beneficial joint tenancy. Equity had presumptions in the second case, starting from equality until something else was proved, leaving uncertainty but no vacuum. *Huntingford* considered a transfer to joint proprietors with a survivor’s receipt declaration but no formal declaration of trust. At first instance the judge allowed Mr Huntingford only £3,500 out of a value of £95,000, a tenancy in common in extremis. The notice of appeal was amended to allow argument that the receipt clause constituted a declaration of

<sup>21</sup> Section 74 of the Land Registration Act 1925 (LRA 1925).

<sup>22</sup> *Walker v Hall* [1984] Fam. Law 21; (1983) 80 L.S.G. 2139 CA (Civ Div) at 136 per Lawton L.J.; *Cowcher v Cowcher* [1972] 1 W.L.R. 425; [1972] 1 All E.R. 943 Fam Div at 442; *Bernard v Josephs* [1982] Ch. 391; [1982] 2 W.L.R. 1052 CA (Civ Div) at 403E-F; *Carlton v Goodman* [2002] EWCA Civ 545; [2002] 2 F.L.R. 259 at [44].

<sup>23</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [52].

<sup>24</sup> *Bernard* [1982] Ch. 391; [1982] 2 W.L.R. 1052 CA (Civ Div) at 403G per Griffiths L.J.

trust, an argument quite properly rejected because no one ever thought that it was. It was intended to shield against a resulting trust, but this went untested in argument.

*Stack* is the first case to reach the Lords concerning equitable entitlement to a property purchased in joint names. It swept away the heresy of *Bernard* but followed the error in *Huntingford*, so it was at best a partial *auto-da-fé*. Lady Hale articulated a presumption that a joint purchase of the legal estate in the home is intended to give rise to a beneficial joint tenancy unless and until the contrary is proved.<sup>25</sup> She reversed the unrealistic decision in *Bernard* that the destination of the legal title had no effect whatever on the beneficial entitlement,<sup>26</sup> and reverted to the earlier, higher, and better authority of Lord Upjohn who recognised in *Pettitt v Pettitt* a joint tenancy with survivorship from a conveyance into joint names “in the absence of all other evidence”.<sup>27</sup> Academic commentators have welcomed a radical innovation in *Stack*,<sup>28</sup> rather than an unwitting return to the pre-Birkenhead position restated slightly inaccurately. The Justices stated, in *Kernott*<sup>29</sup> that

“it is not possible at one and the same time to have a presumption or starting point of joint beneficial interests and a presumption ... that the parties’ beneficial interests are in proportion to their respective financial contributions.”

Yet that is exactly how equity stood for 200 years until 2004.

From that starting point it was quite inconsistent to require the parties to declare a beneficial joint tenancy. Chatsworth Road was transferred to Dehra Dowden and Barry Stack in 1993 and registered in their joint names,<sup>30</sup> a beneficial joint tenancy arose under a statutory trust for sale,<sup>31</sup> the legal joint tenancy being replicated so that there was a matching joint tenancy in equity. Litigation between them proceeded on the mistaken basis that the beneficial entitlement was entirely open and a gap had to be filled, one way or the other, by a resulting or constructive trust.<sup>32</sup> In fact, if s.36 did not apply, there was no trust. When the House of Lords asked whether the Stack-Dowden declaration was sufficient evidence of an intention to declare a trust, it was the wrong question, wrongly answered. They had no need to execute a formal declaration of trust.

### Resulting trusts

A home bought in joint names using pre-1997 forms passed to the couple as legal joint tenants, reliance being placed on the statute to supply a trust for sale. However, equity might reverse the legal joint tenancy because of the absence of one of unities (the unities required in equity being more extensive than at common law) or because of a commercial basis between the co-owners or to take account of unequal

<sup>25</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [58]; *Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [10] and [15].

<sup>26</sup> It was surely evidence of an express oral agreement.

<sup>27</sup> *Pettitt v Pettitt* [1970] A.C. 777; [1969] 2 W.L.R. 966 HL at 813H–814B per Lord Upjohn.

<sup>28</sup> W. Swadling, “An opportunity missed” (2007) 163 L.Q.R. 511, 514; M. Pawlowski “Beneficial entitlement — no longer doing justice” [2007] 72 Conv. 354.

<sup>29</sup> *Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [23].

<sup>30</sup> Section 20 L.R.A. 1925; see now s.27, Sch.2 of the Land Registration Act 2002 (“LRA 2002”).

<sup>31</sup> Section 36(1) LPA 1925 as it stood before 1997.

<sup>32</sup> *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [12]–[14] per Chadwick L.J.; *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [55].

contribution. The last two equitable rules were presumptions and open to rebuttal, or in other words equity was searching for the true intentions of the parties,<sup>33</sup> using the vehicle of a resulting trust but also allowing the admission of evidence to negate the resulting trust. In slightly out of date terminology, the trust was presumed not automatic.<sup>34</sup>

If land is held on trust without declared beneficial interests, there is a vacuum, a *tabula rasa*, a clean slate ready to be written on for the first time. That was how *Stack* visualised the equitable interest underlying a land registry transfer to joint names. This is wrong. A more persuasive image is conjured up by taking one step back in time to when the slate was previously filled with writing, and the question is whether what is there should be preserved or whether it should be wiped clean (*rasa* = erased) in order that it can be rewritten. A receipt declaration is a means of ensuring that the original is preserved, that the joint tenancy is not reversed in equity. It is a form of words of non-severance. All that Dowden and *Stack* needed to do to ensure survivorship was to exclude the possibility that the couple might become tenants in common, to exclude a resulting trust. Informal evidence could be used<sup>35</sup> but the enquiry should not have gone beyond the cogent contemporaneous evidence of the power of the survivor to give a receipt.

The receipt clause indicated a joint tenancy unless the transfer could be rectified to remove it.<sup>36</sup> A case for rectification is difficult to prove, but no more than that.<sup>37</sup> Was Ms Dowden's version of events leading up to the purchase to be accepted, and if so did it sufficiently establish a case for rectification?<sup>38</sup> Against this was Mr *Stack*'s statement that he was trying to secure a survivorship,<sup>39</sup> and, surely decisive, her purported severance of the joint tenancy between them.

### *Constructive trusts*

*Stack* moved to constructive trust analysis of joint purchases of the family home, a move re-emphasised and consolidated in *Kernott*.<sup>40</sup> By sleight of hand the survivor's receipt declaration was rubbed away. A joint purchase had created a beneficial vacuum, Dehra Dowden gave evidence—all too believable—that she had not understood the declaration she had made, and so it could be discarded when inferring the common intention she had with Barry *Stack* at the time of the purchase. This is a conjuror's trick, a false illusion. The real position was that their joint purchase had made them beneficial joint tenants under a statutory trust, and the common intention that was needed was an intention to shift away from equality. The evidence of Barry *Stack* favouring survivorship negated a common intention

<sup>33</sup> *Robinson v Preston* 70 E.R. 211; (1858) 4 Kay & J. 505 at 511 per Page Wood V.-C.; *Harrison v Barton* 70 E.R. 756; (1860) 1 John. & H. 287 at 292 per Page Wood V.-C.

<sup>34</sup> *Re Vandervell's Trusts (No.2)* [1974] Ch. 269; [1974] 3 W.L.R. 256 at 294 per Megarry V.-C.; contrast *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669; [1996] 2 W.L.R. 802 HL at 707 per Lord Browne-Wilkinson.

<sup>35</sup> *Shepherd v Cartwright* [1955] A.C. 431; [1954] 3 W.L.R. 967 HL.

<sup>36</sup> *Goodman v Gallant* [1986] Fam. 106; [1986] 2 W.L.R. 236 CA (Civ Div) at 111A; *Pettitt v Pettitt* [1970] A.C. 777; [1969] 2 W.L.R. 966 at 813; *Wilson v Wilson* [1963] 1 W.L.R. 601; [1963] 2 All E.R. 447 CA; *Leake v Bruzzi* [1974] 1 W.L.R. 1528; [1974] 2 All E.R. 1196 CA (Civ Div) at 1532; *Pink v Lawrence* (1978) 36 P & C.R. 98 CA (Civ Div) at 101.

<sup>37</sup> *Wilson v Wilson* [1969] 1 W.L.R. 1470; [1969] 3 All E.R. 945 Ch D; *Singla v Brown* [2007] EWHC 405 (Ch); [2008] Ch. 357.

<sup>38</sup> *Roy v Roy* [1996] 1 F.L.R. 541; [1996] Fam. Law 280 CA (Civ Div).

<sup>39</sup> *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [33] per Chadwick L.J.

<sup>40</sup> *Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [23]–[25].

to share unequally. While that stood, the declaration that they had made should have operated to negate the implication of any informal trust and also, it should be noted because it referred to the survivor of them, to preclude any informal variation during their joint lives.

## Restrictions 1925–1997

Joint purchasers can only be registered as co-proprietors once their beneficial capacity is known. If D and S are joint tenants they should appear on the proprietorship register without more, but if beneficial entitlement is as tenants in common they must appear subject to the joint proprietor restriction. Proper operation of the overreaching provision is secured by ensuring that at least two proprietors receive any capital money generated by a transaction with the land, the restriction freezing the register when the number of proprietors falls to a single survivor. The discussion that follows demonstrates that s.58 of the Land Registration Act 1925 (“LRA 1925”) did not make proper provision for joint proprietor restrictions and that some editions of *Emmet on Title* used by the judiciary relied on the wording of s.58 without taking account of the rules.<sup>41</sup> In fact s.58 was practically reversed by r.213 of the Land Registration Rules 1925 (“LRR 1925”).

### *Section 58(3) of the Land Registration Act 1925*

The 1925 legislation continued the rule that all settled land was saleable under the process which was newly christened overreaching<sup>42</sup> but now regulated by new and mandatory rules about the payment of the purchase money to two trustees for sale.<sup>43</sup> A rigid curtain was imposed,<sup>44</sup> so declarations of beneficial entitlement had to be kept out of transfers. Official forms had no space for declarations of beneficial entitlement, the “Bible” did not mention them,<sup>45</sup> and conveyancers needed to invest in the Chief Land Registrar’s unofficial publications to appreciate the wisdom of any such declaration.<sup>46</sup>

Purchasers were made aware of the purchase money rule appropriate to a particular title by a restriction entered on the register, with which any subsequent transactions were required to comply. Mandatory provisions were introduced in 1924 and took effect under s.58(3) LRA 1925. Linked to the previous enactment by a seemingly innocuous “and”, is the element of compulsion:

“In the case of joint proprietors ... subject to general rules, such an entry ... as may be prescribed ... shall be obligatory unless it is shown to the registrar’s satisfaction that the joint proprietors are entitled for their own benefit, or can give valid receipts for capital money, or that one of them is a trust corporation.”<sup>47</sup>

<sup>41</sup> Farrand, *Emmet on Title*, 18th edn, (London: Oyez Longman, 1983), p.320.

<sup>42</sup> Section 2 LPA 1925.

<sup>43</sup> Section 27(2) LPA 1925; *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [5] per Chadwick L.J.; T.B.F. Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 5th edn, (Stevens, 1986), p.398.

<sup>44</sup> Section 74 LRA 1925; s.78 LRA 2002 is rather different in form.

<sup>45</sup> Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 5th edn, (Stevens, 1986), pp.433–434.

<sup>46</sup> T.B.F. Ruoff, *Land Registration Forms*, 2nd edn, (London: Sweet & Maxwell, 1973), p.162; Farrand, *Emmet on Title*, 16th edn, (London: Oyez Longman, 1974), p.297; Farrand, *Emmet on Title*, 18th edn, 1983, p.320.

<sup>47</sup> Section 58(3) LRA 1925.

Section 58(3) was so loose as to provide “only a partial solution to registered proprietors being required to work the overreaching machinery”.<sup>48</sup> The unrefined legislation was in truth meaningless because it looked at the position while there are joint proprietors, not at the position of a survivor.

In a co-ownership the joint proprietor restriction is not mandatory where “the joint proprietors are entitled for their own benefit”. This, standing alone, would have allowed the registration of co-owners free of restriction when they were beneficial tenants in common.<sup>49</sup> So s.58 read in isolation leads one to conclude that a declaration about capital money is not at all germane to the decision whether there was a beneficial joint tenancy or a tenancy in common.<sup>50</sup> The unvarnished section was used misleadingly for a time in editions of *Emmet*,<sup>51</sup> but it was not alone: Cheshire’s ninth edition reassured that “no problem arises when land subject to co-ownership is registered”<sup>52</sup> whilst *Megarry & Wade* dealt with the whole of this article with the words “and see s 58(3) as to joint proprietors”.<sup>53</sup> Solicitors could scarcely be expected to unravel what these great masters lacked the space to discuss.

### *Rule 213 of the Land Registration Rules 1925*

Section 58(3) which made joint proprietor restrictions mandatory was stated to operate “subject to general rules”, but it was in fact practically reversed by r.213 LRA 1925:

“Entry under section 58(3) ... need only be made where, by law, the survivor will not have power to give a valid receipt for capital on a disposition ...”.

*Re Gorman* discussed all this in detail and is a pillar of technical excellence,<sup>54</sup> but it was lost sight of in *Stack*.

This rule separated beneficial joint tenancy from beneficial tenancy in common for the first time by shifting the focus to the position of the survivor and thus establishing a link with the overreaching provision. The stock restriction has been refined over the years so as not to inhibit matters such as appointments of trustees.<sup>55</sup> Exemption from the obligatory restriction under r.213 depends upon entitlement of the survivor to give a receipt arising “by law”, that is from the operation of the *ius accrescendi*. Tenants in common with mutual wills had to apply for a restriction, though this was scarcely an inconvenience given that the restriction did not bite on a tenant in common bringing forward proof of the equitable title.<sup>56</sup> Clearly a

<sup>48</sup> Law Commission, *Third Report on Land Registration*, (Law Com. No.158, 1987) [4.55].

<sup>49</sup> *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC at 621A per Vinelott J.

<sup>50</sup> *Shaire* [2001] Ch. 743; [2001] 3 W.L.R. 639 Ch D at 752E–753E per Neuberger J.

<sup>51</sup> Farrand, *Emmet on Title*, 16th edn, 1974, p.296; Farrand, *Emmet on Title*, 18th edn, 1983, p.319; both passages are followed by the words “see also LRR 1925 r 123”. Slade L.J. referred in *Harwood* to the 19th edn (1986) [10]–[136]. Contrast the accurate statements later at Farrand, *Emmet on Title*, 16th edn, 1974, p.624; Farrand, *Emmet on Title*, 18th edn, 1983, p.610; and in earlier editions: *Emmet*, 13th edn, (1949–1950) p.1,273; 15th edn, (1967), p.606.

<sup>52</sup> G.C. Cheshire, *Modern Law of Real Property*, 9th edn, (London: Butterworths, 1962), p.820.

<sup>53</sup> R.E. Megarry and H.W.R. Wade, *Law of Real Property*, 3rd edn, (London: Stevens, 1966), p.1058, fn.59; 4th edn, (1975), p.1,072, fn.96; 5th edn, (1984), p.215, fn.5.

<sup>54</sup> *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC at 622A-C per Vinelott J.

<sup>55</sup> Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 5th edn, (Stevens, 1986), p.437.

<sup>56</sup> Rule 214 LRR 1925; Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 5th edn, (Stevens, 1986), pp.439, 443; 6th edn, [27]–[19]; *Re Cook* [1948] Ch. 212; [1948] 1 All E.R. 231 Ch D. This procedure is fraught with priority problems.

restriction is essential when co-owners have declared that the survivor will not be able to receive capital monies.<sup>57</sup>

### *Receipt clauses 1925–1975*

As a consequence of r.213 LRR 1925 it became necessary for joint applicants for registration to make clear whether the survivor of them would have the power to give a valid receipt for capital on a disposition. This is the origin of the survivor's receipt declaration in the Dowden-Stack transfer.<sup>58</sup>

It is a perfectly reasonable response to the challenge of dealing with trusts and dealing with overreaching whilst keeping the register clear of trusts, and was never intended to act as a declaration of trust. This was only needed to shift away from joint tenancy. No receipt clause was included in the form of transfer promulgated in November 1925, which provided for a joint transfer as if to a single purchaser with “no addition”.<sup>59</sup> Joint proprietors were neither required nor expected to execute the transfer document. Purchasers' solicitors made two declarations when applying to register the transfer<sup>60</sup>:

“Are the transferees ... entitled to the land for their own benefit?  
Can the survivor of them give a valid receipt for capital money arising  
on a disposition of the land?”

These certificates might be given in the application form A4 or otherwise, but if they were omitted a joint proprietor restriction would be entered.<sup>61</sup> The dual declaration from the belt and braces school of conveyancing surely points unequivocally to joint tenancy, as Vinelott J. decided in *Re Gorman*.<sup>62</sup>

### *Receipt clauses 1975–1997*

The start of 1975 saw the introduction of the transfer form 19JP (used for the Dowden-Stack transfer) and the application cover in form A4. By then, most transfers were into joint names, a development attributed by Professor Farrand to the influence of “women libbers”.<sup>63</sup> It may have been a *Fear of Female Buying* that motivated the Chief Land Registrar to devote New Year's Eve 1974 to issuing a new form which incorporated a receipt declaration in these terms:

“The transferees declare that the survivor of them can/cannot give a receipt for capital money arising on a disposition of the land.”<sup>64</sup>

The parties themselves now made the declaration, greatly reducing the risk of rectification. If the power of the survivor to give a receipt was declared by selecting

<sup>57</sup> *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div) at 287; *Huntingford* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div) at 657; *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC at 622A; J.T. Farrand, *Wolstenholme and Cherry's Conveyancing Statutes*, 13th edn, (London: Oyez, 1972), Vol.6, p.53.

<sup>58</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at 434F and at [80].

<sup>59</sup> Form 19 in the Schedule of the LRR 1925, and note thereto.

<sup>60</sup> A.V. Risdon, *Modern Conveyancing Practice and Law: Registered and Unregistered*, (Isaac Pitman, 1952), pp.185–188.

<sup>61</sup> Rule 20 LRR 1925; T.B.F. Ruoff, *Land Registration Forms*, 2nd edn, (London: Sweet & Maxwell, 1973), p.164 (Precedent 92).

<sup>62</sup> *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC at 621B and 622E.

<sup>63</sup> J.T. Farrand, *Contract and Conveyance*, 4th edn, (London: Oyez Longman, 1983), p.307.

<sup>64</sup> T.B.F. Ruoff, “Transfer to joint proprietors” (1975) 39(2) Conv. (N.S.) 152.

“can” this was equivalent to declaring a beneficial joint tenancy as the registration bible makes clear.<sup>65</sup> The declaration made by joint buyers was supplemented by the conveyancer’s certificates in Form A4 used to apply for registration.<sup>66</sup> Clearly these declarations were given to register the Dowden-Stack purchase. Their conveyancer was entitled to confirm the receipt declaration executed by the parties in the transfer and was also entitled to sign the certificate of beneficial entitlement in the absence of third party contribution. Taken together all this is pretty convincing proof of what was intended.

## Receipt clauses and contributors to registered purchases

A receipt clause executed by a couple buying a home is unlikely to be conclusive against a third party contributor, but should in principle be conclusive as to the couple’s position. The case law which denies this effect must now be considered.

### *External contribution to a sole purchase*

Equity always recognised that a purchase results to those who have paid for it,<sup>67</sup> and a contribution could be proved informally off the legal documents of title.<sup>68</sup> The possibility of a resulting trust for unequal contributors remained after 1925; the only question in *Bull v Bull* was how to ensure that the resulting trust took the form of an overreachable trust for sale, a convenient solution being found in s.36(4) SLA 1925.<sup>69</sup> This form of trust is very difficult to guard against. If legal title is conveyed by A to B on the basis that B declares that he is himself beneficially entitled to the land, this statement creates an estoppel against B, but it in no way precludes a claim by an outsider X that he has contributed. The most that can be done is to show that the legal title holder has paid all the price from his own resources.

### *External contribution to a joint purchase*

*Stack* treats a survivor’s receipt declaration made by two purchasers in a registered transfer as inconclusive as to a beneficial joint tenancy because it was consistent with other intentions. Such a declaration could properly be made by a couple holding on trust for a single third party, as suggested by the facts of *Harwood*. The Harwoods were involved in a trust threesome in which the potential beneficial owners of the family home were a husband, his wife and a third party partnership X. The partnership interest was possibly merely a smokescreen raised (unsuccessfully) by the husband to keep the family home out of the ancillary relief pot,<sup>70</sup> but, on the other hand, there was substantial evidence that the family home

<sup>65</sup> Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 1986, p.437.

<sup>66</sup> Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 1986, pp.376–377, 437. It is not at all clear why the second declaration was not included in the transfer.

<sup>67</sup> *Lake v Gibson* (1729) 1 Eq. Cas. Abr. 291, affirmed *Lake v Craddock* (1732) 3 P. Wms 158; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 93, Eyre CB; M. Friend and J. Newton “Undivided shares — a draftsman’s error?” [1982] 46 Conv. 213; C. Harpum, “Overreaching, trustees’ powers and the reform of the 1925 legislation” [1990] C.L.J. 277, 298.

<sup>68</sup> *Harrison* 70 E.R. 756; (1860) 1 John. & H. 287 at 293.

<sup>69</sup> *Bull v Bull* [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78 CA at 237 per Denning L.J.; *City of London BS v Flegg* [1988] A.C. 54; [1987] 2 W.L.R. 1266 HL at 77 per Lord Oliver.

<sup>70</sup> On the most favourable assumption to the husband the divorce court still had power to award ancillary relief to the wife.

had been bought by a partnership running a magazine called *Taxation International* and that the profits from the magazine publication was the source of the funds used to buy the house.<sup>71</sup> If so the matrimonial home was held under a bare trust for a third party investor described as “Stoney”, a situation just possibly consistent with husband and wife making a survivor’s receipt declaration.

At the time of the transfer in *Harwood*, before the trusts of land reform, the two trustee receipt rule applied to trusts for sale but did not extend to bare trusts. There was nothing to prevent a single bare trustee from giving a receipt for sale proceeds of property.<sup>72</sup> It is not quite so clear that a single bare trustee could sell, since there was no statutory overreaching machinery, and one would expect title to be based on concurrence of the bare beneficiary or the exercise of an express power of sale,<sup>73</sup> preferably coupled with a power on the survivor of the trustees to exonerate a purchaser from enquiries about the conduct of a sale.<sup>74</sup> So the *Harwood* supposition is more complex than the Court of Appeal realised.

Slade L.J. proposed a possibility consistent with a survivor’s receipt clause, that is to “H and W holding on trust for X”.<sup>75</sup> In that limitation the problem was the *Bull* problem, that a statement between a couple could not create an estoppel against an outsider. However, Slade L.J.’s omissions are more instructive. He *did not* refer to the far more likely case of a couple holding “for H, W and X as beneficial joint tenants”. This omission shows that the cases postulated *had to be consistent with* the declaration made. More puzzlingly, Slade L.J. did not refer to the possibility that H and W might hold on trust for H absolutely (or for W absolutely), a far more troubling case since it is consistent both with a survivor’s receipt clause and a declaration of beneficial entitlement. This omission shows that Slade L.J. thought that the range of possibilities to be considered *had to fit with the known facts of the case*. Lady Hale in *Stack* stuck precisely to the *Harwood* line<sup>76</sup> suggesting a trust for a third person but making no mention of a *co-ownership with* a third person because a survivor could not in that latter case give a valid receipt against a third party co-owner. Against a third party contributor the receipt clause should be binding in a negative sense: a declaration should define a set of possibilities and everything outside the possible range becomes a set of impossibilities. The receipt clause is not conclusive when the set of possibilities does not provide a unique solution. That is the logic of the reasoning, but the outcome of *Harwood* and subsequent cases suggests that the law is otherwise.

### *Internal contributions by joint purchasers—consistent results*

When Dowden and Stack executed the survivor’s receipt declaration, it was held not to be conclusive. “However appealing the proposition might at first sight

<sup>71</sup> *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div) at 279–280 per Slade L.J.; Stoney entered a caution but did not participate in the litigation, presumably because of the partnership debts.

<sup>72</sup> Section 27(2) LPA 1925; *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div) at 289 per Slade L.J.

<sup>73</sup> The position was unclear: *Hodgson v Marks* [1971] Ch. 892; [1971] 2 W.L.R. 1263 CA (Civ Div); Harpum, “Overreaching, trustees’ powers and the reform of the 1925 legislation” [1990] C.L.J. 277, 310; G. Ferris and G. Battersby, “General principles of overreaching and the reforms of 1925” (2002) 118 L.Q.R. 270, 289.

<sup>74</sup> Sections 12–17 of the Trustee Act 1925; H. Potter, “Repetition of history in the statute of uses and the Settled Land Act 1925” (1928) 44 L.Q.R. 227, 233–234.

<sup>75</sup> The Court of Appeal decision ignores the certificate of beneficial entitlement given by the solicitor acting for H and W when they applied to be registered.

<sup>76</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [51].

appear, choosing ‘can’ rather than ‘cannot’ on the form is consistent with other intentions”.<sup>77</sup> This suggests that the declaration ought to be conclusive in the negative sense that it defines a range of possible outcomes and requires the award made in the case to fall within that consistent subset.

The methodology derives from *Re Gorman* which will be addressed on the assumption that the couple had executed the declaration made.<sup>78</sup> A married couple had bought a house together in circumstances which made it clear that they were collectively sole beneficial owners. The Land Registry transfer to the couple contained two declarations:

- (1) that they were entitled for their own benefit; and
- (2) that the survivor of them would be able to give a receipt for capital money.

The husband’s trustee in bankruptcy was subsequently able to rely on the husband’s declaration to claim a half-share for the creditors. Neither declaration was on its own decisive; the first excluded possibilities other than beneficial co-ownership and the second effectively precluded a beneficial tenancy in common. If each declaration was valid in the negative sense that it created a set of permissible permutations, the two declarations in conjunction would be a declaration of the subset of possibilities within both declarations, which on the facts was held to leave a single possibility standing—beneficial joint tenancy.<sup>79</sup> The decision that a joint tenancy had been declared seems to have been accepted in a number of subsequent cases,<sup>80</sup> but it is difficult to know how the case stands after *Stack*.

Lady Hale gave two specific examples of consistent explanations of the receipt clause other than beneficial joint tenants, which must now be examined.

One was a third party bare trust. In *Harwood* there was a genuine possibility that the matrimonial home in fact belonged to a partnership and the declaration was consistent with either possibility. This was a completely unreal way of looking at *Stack*. A price of £190,000 was contributed as to £125,000 in cash and £65,000 from a mortgage advance, facts which left no room for a trust in favour of an outside party. The pleaded cases of both parties recognised a co-ownership between them, Dowden never claimed that she was the outright owner and when the property had been bought their conveyancer had certified that they were together beneficially entitled to avoid entry of a restriction. So the declaration Dowden and Stack made was consistent only with a beneficial joint tenancy.

Apart from the bare trust a second possibility suggested in *Stack* was that:

<sup>77</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [51]; Swadling, “An opportunity missed” (2007) 163 L.Q.R. 511, 514, 512; A.J. Cloherty and D.M. Fox “Proving a trust of a shared home” [2007] C.L.J. 517, 517–520, 518–519.

<sup>78</sup> *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC at 621 and 623E–624B per Vinelott J.; he considered a declaration binding without execution by the declarants, a view always dubious and now clearly disapproved: *Roy* [1996] 1 F.L.R. 541; [1996] Fam. Law 280 CA (Civ Div); *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [50] and [52].

<sup>79</sup> The judge at first instance found that H and W held on trust for W absolutely, a result which might have been consistent with both declarations made (though not the extrinsic evidence).

<sup>80</sup> *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div) at 288–289 per Slade L.J.; *Huntingford* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div) at 657 per Sir Christopher Slade, 663 per Steyn L.J., 667 per Dillon L.J. dissenting; *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [14] per Chadwick L.J.

“The transferees may ... intend that, while the survivor can give a good title to a third party without appointing a new trustee, the capital moneys received should be subject to different trusts.”<sup>81</sup>

This suggestion is fallacious when read against s.27(2) LPA 1925, which requires (capital) proceeds of trust land to be paid to two trustees “[n]otwithstanding anything to the contrary in the instrument ... creating a trust”; this rule applied to a trust for sale, now applies to a trust of the land and has applied throughout to a trust of the net proceeds of sale.<sup>82</sup> So trustees of land cannot, in fact, decide to contract out of the overreaching scheme or to rework it for themselves. The suggestion to the contrary does not withstand a moment’s scrutiny.

The point about offering examples of inconsistency is that this is only necessary if the declaration is seen to be binding on the parties in the negative sense that it demarcates the range of permissible permutations to be considered. Otherwise why offer examples at all?

### *Internal contributions by joint purchasers—incompatible results*

In *Stack* the transfer of a house bought by Dehra Dowden and Barry Stack to which no one else contributed contained a declaration that the survivor of them would be able to give a capital receipt. Yet the House of Lords divided the equity in the house 65:35. This was outside the range of possibilities left open by the declaration, a logical disconnect already fixed in the case law by the explanation of *Harwood* provided in *Huntingford*.

In *Harwood*<sup>83</sup> the incompatibility between the declaration and the result arose almost by accident. The permissible field of possibilities was beneficial joint tenancy (H and W as joint tenants) or bare trust (H & W holding on trust for X partnership), a multiplicity of possibilities which meant that a joint tenancy had not been declared.<sup>84</sup> Since it was not a declaration of trust, the court searched out a common intention on which to found a resulting or constructive trust. The common intention found was that W held a half interest, with the remainder held by H and the X partnership in proportions that the court did not determine.<sup>85</sup> If W, H and X were indeed tenants in common beneficially, a restriction was required and the survivor’s receipt declaration executed by W and H was improper. When either spouse died the survivor held the legal estate as a trustee for sale and the land was unsaleable until a second trustee had been appointed to share in the receipt of proceeds. The award went outside the permissible set of possible outcomes and hence outside the ratio of the case.

That paradox was not understood, but it became painfully apparent in *Huntingford*.<sup>86</sup> This represented a logical progression from a case in which a third party might have been sole beneficial owner to a case whose matrix of facts

<sup>81</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [51]; *Shaire* [2001] Ch. 743; [2001] 3 W.L.R. 639 Ch D at 752H–753A per Neuberger J.

<sup>82</sup> The exception relevant to the context of the family home is the act of a sole personal representative; however odd it may seem, a transfer can be made by a sole personal representative of the last survivor: Ruoff et al., *Ruoff & Roper on Land Registration Practice*, 5th edn, (Stevens, 1986), p.443.

<sup>83</sup> *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div).

<sup>84</sup> *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div) at 288. A declaration between H and W would not bind X, but it is odd that it did not bind H in relation to X’s interest as against W.

<sup>85</sup> *Harwood* [1991] 2 F.L.R. 274; [1992] F.C.R. 1 CA (Civ Div) at 293.

<sup>86</sup> *Huntingford* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div).

excluded any possibility of any third party involvement. *Huntingford* had shackled up with Mrs Hobbs in the home that she had previously shared with her husband, but afterwards they moved, the transfer of the new home in Old Woking declaring the right of the survivor to give a receipt despite the contributions weighted 60:40 in her favour. Sir Christopher Slade (continuing to sit after his retirement) dubbed the distinction between a two and a three party case “a distinction without any material difference”.<sup>87</sup> In *Huntingford* the woman admitted there was a beneficial co-ownership and had declared she was not a tenant in common, but nevertheless ended up as a beneficial tenant in common with a 61 per cent share. One can only admire counsel who succeeded with such unpromising material. *Huntingford* shows how wrong *Harwood* was because the earlier case had to be explained and modified, thus

“the question for the court is simply whether or not the declaration in the transfer ... constituted a declaration of trust. ... [F]or the purpose of answering this question the meaning of the words used alone is material. According to their fair meaning they either do, or do not, constitute a declaration of trust.”<sup>88</sup>

A survivor’s receipt declaration is not a declaration of trust because the court had “impressed on these words a meaning falling short of a declaration of beneficial interest”.<sup>89</sup> So the court implies a resulting trust and this can achieve a division of the property inconsistent with the declaration made by the parties. Together the majority nullified the much more convincing dissent of Dillon L.J., who correctly suggested that what the declaration did was to negate a resulting trust. It was the same if he had been judging in the constructive trust era, since Dowden and Stack shared the absence of a common intention.

*Shaire*<sup>90</sup> fits the pattern established by the *Huntingford* majority, the only novelty being Neuberger J.’s decision to override the declaration made by the couple without the benefit of the direct citation to him of the authorities. As we have seen the Court of Appeal in *Stack* doubted the correctness of the earlier cases<sup>91</sup> but Lady Hale spoke for all the Lords when she affirmed two inconsistent things: the consistency reasoning in *Harwood* and the inconsistent result in *Huntingford*.<sup>92</sup> Thus the ratio of *Stack* is not contained in any of the speeches in the Lords but is that stated by Sir Christopher Slade in *Huntingford*: a declaration which is not conclusive declares nothing.

If so, we must return to reassess the two pronged declaration made by the Gormans, covering both beneficial entitlement and entitlement of a survivor to give a receipt. Neither statement was a declaration of trust. Vinelott J. visualised this as creating two sets of possibilities and hence two sets of impossibilities, these sets forming a conjunction containing the single possibility of beneficial joint tenancy. *Stack* suggests that this was all wrong; two non-declarations of trust in conjunction add up to a single non-declaration. Mrs Gorman having made these declarations with their self-evident meaning could perhaps have been allowed to

<sup>87</sup> *Huntingford* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div) at 657 per Sir Christopher Slade, 663 per Steyn L.J.

<sup>88</sup> *Huntingford* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div) at 657 per Slade L.J., 663 per Steyn L.J.

<sup>89</sup> *Huntingford* [1993] 1 F.L.R. 736; (1992) 24 H.L.R. 652 CA (Civ Div) at 663 per Steyn L.J.

<sup>90</sup> *Shaire* [2001] Ch. 743; [2001] 3 W.L.R. 639 Ch D at 752E–753E per Neuberger J.

<sup>91</sup> *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [113] per Chadwick L.J.

<sup>92</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [51] per Lady Hale.

argue, as the first instance judge found, that she was solely beneficially entitled.<sup>93</sup> Thus can *Stack* be reduced *ad absurdum*.

## Trusts of land

### *Transfers to trustees of land*

The trusts of land regime is an unequivocal success. A clean break was made with the past on the first day of 1997 when trusts of land displaced the old statutory trusts for sale and the co-ownership regime was modified to suit.<sup>94</sup> Practitioners now have far more guidance from the texts but too late for all the solicitors involved in drafting the documents under discussion in this article.<sup>95</sup>

Beneficial co-ownership remains curtailed off the register but it is brought onto the transfer forms. The form prescribed, slightly late in April 1998, included an express declaration of beneficial capacity.<sup>96</sup> Most couples declare a beneficial joint tenancy.<sup>97</sup> It would be interesting to know whether the percentage of couples opting for a tenancy in common matches the percentage of tenancies in common forced on parties by the family courts. Little further change to the transfer forms was made when the Land Registration Act 2002 (“LRA 2002”) came into force.<sup>98</sup> *Huntingford* cannot quite be consigned to the dustbin of land registration history while there remains no technical compulsion to execute the declaration of beneficial entitlement.<sup>99</sup> This desirable minor tweaking of the rules has apparently been treated as an undesirable new regulatory burden on businesses and has been put on hold leaving the solution to *Stack* incomplete.<sup>100</sup> One assumes, without any great confidence, that a post-1996 transfer containing an express declaration of trust would not be subject to variation by a *Kernott* constructive trust.

### *Restrictions affecting trustees of land*

The restriction in Form 62 which was evolved so arduously over the trust for sale years between 1925 and 1997 remains unchanged into the trust of land era, except that it is now designated as Form A.<sup>101</sup> Consent is desirable from both joint proprietors, to avoid the procedure for allowing a challenge to the restriction,<sup>102</sup> a

<sup>93</sup> *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC at 621 per Vinelott J.

<sup>94</sup> Section 5, Sch.2 to the Trusts of Land and Appointment of Trustees Act 1996.

<sup>95</sup> C. Harpum, S. Bridge and M.J. Dixon, *Megarry & Wade's Law of Real Property*, 7th edn, (London: Sweet & Maxwell, 2008), [6-054]; K. Gray and S.F. Gray, *Elements of Land Law*, 5th edn, (London: Butterworths, 2008), [2.2.46ff].

<sup>96</sup> Schedule 1 Land Registration Rules 1997, as from April 1, 1998; J. Wilson “Tripping up on the TR1” (2006) 26 *Family Law* 301–311.

<sup>97</sup> *Clarke v Harlowe* [2005] EWHC 3062 (Ch); [2007] 1 F.L.R. 1; [2006] 1 P. & C.R. DG11; *Wilcox v Tait* [2006] EWCA Civ 1867; [2007] 2 F.L.R. 871.

<sup>98</sup> Form TR1 (and on first registration Form FR1); s.25 LRA 2002; rr.58, 206(1), Sch.1 to the Land Registration Rules 2003 (LRR 2003). The choice is between beneficial joint tenancy, beneficial tenancy in common in equal shares or holding by another method that is specified in the transfer.

<sup>99</sup> *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at [52]; *Review of the Land Registration Rules 2003* (Land Registry Consultation, 2007), pp.57–60; M. Dixon “Anything to declare?” [2007] 72 Conv. 364, 364, 369.

<sup>100</sup> M.J. Dixon “New rules at the Land Registry” [2008] 73 Conv. 355, 356–357; E. Cooke “The tale of TR1” [2011] Fam. Law 1142; *Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [18].

<sup>101</sup> Section 44 LRA 2002; r.95 LRR 2003.

<sup>102</sup> Section 45 LRA 2002.

consent generally given through completion of the additional provisions panel of the transfer form.<sup>103</sup>

### *Rules regulating trustees of land*

Section 58(3) of the 1925 Act remained the master in the context of very odd amendments to the registration rules of the 1996 and 1997 vintages made without confronting directly the cases about the survivor's receipt were not addressed front on.<sup>104</sup> Provisions were designed to ensure a restriction was entered on first registration by tenants in common (though not by beneficial joint tenants)<sup>105</sup> or where the sole proprietor disposed of land held in trust.<sup>106</sup> This left an extraordinary gap affecting a transfer to joint proprietors who were beneficial tenants in common. No provision was made for this case in the rules which operated between 1997 and autumn 2003 since s.58(3) applied unalloyed by rules, which merely specify the form to be used for the restriction.<sup>107</sup> This section required a restriction in every case of joint proprietors, but qualified this with a wide ranging exemption from obligation whenever the proprietors (not, note, the survivor of the proprietors) were able to give a receipt or were collectively entitled for their own benefit. From January 1997 until October 2003, therefore, beneficial tenancy in common did not require a restriction. It is fair to assume that the registry relied on the much improved transfer forms without realising that these no longer meshed with the rules requiring entry of a restriction.

Further changes made in October 2003 when LRA 2002 came into force had no profound impact on practice since the intention was to carry forward the existing regime,<sup>108</sup> but the technical formulation of the land was vastly improved through proper linkage between overreaching and the entry of a restriction.<sup>109</sup> The new legislative scheme finally does what it says on the tin, setting out a clear function for restrictions linked to overreaching<sup>110</sup> which is in turn linked to the obligation to apply for the mandatory restriction set out in s.44:

“If the registrar enters two or more persons in the register as proprietor of a registered estate in land, he must also enter in the register such restriction as rules may provide for the purpose of securing that interests which are capable of being overreached on a disposition of the estate are overreached.”<sup>111</sup>

The rule in s.44 differentiates clearly between the absence of obligation in the case of a beneficial joint tenancy and the obligation operative for beneficial tenancy in common and other trusts of land.<sup>112</sup> This is to be applauded particularly as the

<sup>103</sup> Rule 92 LRR 2003.

<sup>104</sup> Neither *Harwood* nor *Huntingford* is mentioned in any edition of *Ruoff & Roper*, nor in I. Clarke, *Wolstenholme & Cherry's Annotated Land Registration Act 2002*, (London: Sweet & Maxwell, 2003), [4-102].

<sup>105</sup> Rule 213(2) LRR 1925, as substituted by Sch. para.16 LRR 1996, and further substituted by Sch.1 para.41 LRR 1997.

<sup>106</sup> LRR 1925 substituted r.213(3).

<sup>107</sup> LRR 1925 substituted r.213(1). In *Shaire* [2001] Ch. 743; [2001] 3 W.L.R. 639 Ch D at 752E-753E per Neuberger J. considered a pre-TLATA transfer referring to s.58(3) LRA 1925 without r.213 but referring to a post-TLATA edition of *Megarry & Wade*.

<sup>108</sup> *New Rules Consultation—Land Registration Rules 2003*, (Land Registry, 2002), 49ff.

<sup>109</sup> Sections 40, 44 LRA 2002; r.94(1) LRR 2003.

<sup>110</sup> Section 40 LRA 2002.

<sup>111</sup> Section 44 LRA 2002; r.94(1) LRR 2003.

<sup>112</sup> *Explanatory Notes to the Land Registration Act 2002*, para.89 does not address beneficial co-ownership, but the meaning is clear.

work of a master on overreaching (Charles Harpum) which has found a direct and technically sophisticated way of saying that at which the previous rules had hinted—that the need for a restriction turns on the legal title and not the possibility of making a title (fraught with priority problems) with the assistance of the equities.

### *Removal of the bare trust anomaly*

The Trusts of Land and Appointment of Trustees Act 1996 dispensed with the various forms of conveyancing and made all beneficial interests overreachable.<sup>113</sup> When Ms Dowden and Mr Stack bought their home in 1993 it is unlikely that that they intended to hold it on trust for some extraneous third party X under a bare trust, but this was perhaps consistent with their survivor's receipt declaration. If so, the position changed on New Year's Day 1997. As bare trustees they became trustees of land and so acquired overreaching powers, but this bought with it the requirement for a two trustee receipt, so thereafter a survivor would no longer have the power to give a receipt for the land. A *Harwood* bare trust was no longer a possibility when *Stack* was heard.<sup>114</sup>

A new duty was imposed on joint proprietors to seek entry of a mandatory restriction when after their initial registration a situation arose in which the survivor would be unable to give a capital receipt<sup>115</sup> and also when a change of trustees coincided with a change of benefit.<sup>116</sup> One can imagine that Dehra Dowden herself may have lived in ignorance of this duty, but her advisers should have been aware of it and she must have been in breach of this obligation at some time between the service of her notice of severance in November 2002 (when she must have thought that she was a joint tenant)<sup>117</sup> and September 2003 when she commenced proceedings to claim a 65 per cent share.<sup>118</sup> Immediately after she began proceedings, the authority for imposing this same duty rolled forward into the rules of the new registration scheme.<sup>119</sup> Once that was the case the appropriate step for Ms Dowden's advisers was to apply for a unilateral restriction on the basis that she had become a tenant in common either when they bought in 1993 or at some subsequent time under an ambulatory trust. In fact no restriction was sought.

### *Ambulatory restrictions for ambulatory trusts*

Variations on the theme of *Stack* present challenges to the registration scheme, since the registration rules assume that trusts are certain and fixed; although the rules require application for a restriction when a trust becomes ambulatory. *Stack* shows how unrealistic these provisions and why they are so often overlooked in practice. The point is driven home by *Kernott*.<sup>120</sup> An unmarried couple bought a property at Thundersley in Essex in 1984 and lived there together until October

<sup>113</sup> This was surely too all-embracing; why should the interest of a pre-2003 adverse possessor be overreached?

<sup>114</sup> Section 27(2) LPA 1925 as amended; but in any event the transfer form was made more explicit in 1996.

<sup>115</sup> Rule 213(4) LRR 1925 as substituted in 1996.

<sup>116</sup> Rule 213(5) LRR 1925 as substituted in 1996.

<sup>117</sup> *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [4] per Chadwick L.J.; *Stack* [2007] UKHL 17; [2007] 2 A.C. 432 at 434F. Why on earth was she not estopped by this notice which she herself must have signed: *Harris v Goddard* [1983] 1 W.L.R. 1203; [1983] 3 All E.R. 242 CA (Civ Div) at 1207 per Lawton L.J.?

<sup>118</sup> *Stack* [2005] EWCA Civ 857; [2006] 1 P. & C.R. 15 at [2] per Chadwick L.J.

<sup>119</sup> Rule 94 LRR 2003.

<sup>120</sup> *Jones v Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121.

1993. The value had increased modestly from the £30,000 purchase price to perhaps £60,000.<sup>121</sup> Leonard Kernott then moved out, leaving Patricia Jones in occupation with her children. He played no further part in the property, leaving her to make mortgage repayments and to repair, while he bought another property nearby. He could not have forced a sale while the children were young and was rebuffed when periodically suggesting that a sale should be considered. Meanwhile house price inflation let rip and the value increased to £240,000. Like *Stack* the predominant fact is the inflation of value,<sup>122</sup> though on the particular facts of *Kernott* this plays in the reverse direction in favour of the woman claimant, since almost all the increase in value has occurred while the woman was in sole charge of the property, and the male claimant benefitted from similar inflation of the house he had bought for himself. Treated as a *Stack* case, the property was presumptively held by beneficial joint tenants, and it was conceded that this continued to be the case at the time of their separation in 1993<sup>123</sup> and the question is whether that position had since changed. Around the time of the separation the couple cashed in an insurance policy and Mr Kernott used half the proceeds as a deposit on a new house, and also weighing against him was his apparent subsequent disinterest in the house in terms of mortgage repayments and repairs. These considerations led to a division of the equity 90 per cent to her and 10 per cent to him,<sup>124</sup> on the basis that an agreement could be inferred that Kernott's interest was to crystallise at the moment of separation, the view of Lord Walker, Lady Hale and Lord Collins affirming H.H. Judge Dedman.<sup>125</sup> However, a minority of the Supreme Court (Lords Kerr and Wilson) and most of the lower courts (Nicholas Strauss QC and Jacob L.J.) would have imputed that same common intention to the couple, whereas a majority of the Court of Appeal (Wall and Rimer L.J.J.) found no common intention to vary from equality. There is the uncertainty engendered by *Stack* in a nutshell.

For the purposes of this article the issue is the underlying assumption that the facts of *Kernott* fell into the *Stack* pattern, of a pre-1997 registered transfer failing to declare an express trust. This is a false narrative. Thundersley was one of the very last areas of the country to be made compulsory, several years after the purchase in 1984, so they cohabited in an unregistered property. The unregistered conveyance must surely have declared a trust?<sup>126</sup> First registration of the title occurred in September 1999, fifteen years after the purchase and six years after Mr Kernott moved out, and was occasioned by the destruction of the title deeds by fire.<sup>127</sup> The case falls within the post-1996 rule for first registrations.

A first registration by joint proprietors would have required a mandatory restriction had they been tenants in common under the form of the rules promulgated in 1996.<sup>128</sup> The title appears in September 2011 free of restriction (despite a severance in 2008) and the report of the case makes no reference at all

<sup>121</sup> The property was put on the market in 1995 for £70,000 but remained unsold.

<sup>122</sup> P. Sparkes "How beneficial interests stack up" [2011] 75 Conv. 156.

<sup>123</sup> *Jones v Kernott* [2010] EWCA Civ 578; [2010] W.L.R. 2401 at [69] per Rimer L.J.

<sup>124</sup> *Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [49].

<sup>125</sup> *Kernott* [2011] UKSC 53; [2012] 3 W.L.R. 1121 at [48] and [64] per Lord Collins.

<sup>126</sup> *Re Gorman* [1990] 1 W.L.R. 616; [1990] 1 All E.R. 717 DC.

<sup>127</sup> Title EX623429, accessed September 12, 2011.

<sup>128</sup> It is true that this requirement was removed in error by the substitution of r.213(2) LRR 1925, first by Sch.1 para.16 LRR 1996, and then by Sch.1 para.41(2) LRR 1997; but the Land Registry would surely have entered a restriction anyway.

to the register,<sup>129</sup> so it seems reasonable to infer that first registration occurred without any restriction on the register. The parties must have provided the normal details required for first registration and certified (themselves or by a conveyancer) their beneficial capacity as joint tenants.<sup>130</sup> The concession in the case that a joint tenancy existed at their separation in 1993 must be carried forward to 1999, but it is inconsistent with the inference of a common intention to crystallise the interests in 1993. They must have accounted for the destruction of the deeds and reconstructed the title well enough for it to be registered as absolute,<sup>131</sup> probably including a draft of the conveyance to Ms Jones and Mr Kernott. Very likely the application would have constituted a signed memorandum sufficient to support the direct enforcement of an express trust.<sup>132</sup> Mr Kernott purported to sever the joint tenancy in 2008, but what one would give to know how the creation of the joint tenancy was described in his s.36 notice!

*Kernott* is not, therefore, a *Stack* case of undefined beneficial interests, but an attempt to vary informally an expressly declared trust. It demonstrates most eloquently that the land registry mechanisms cannot cope with ambulatory trusts. If the beneficial interests may start to wander, there needs to be a restriction from the outset under a new framework of rules.

## Conclusion

*Stack* applies two completely inconsistent principles to the beneficial ownership of a house bought in joint names, recognising both a presumption of beneficial joint tenancy and a beneficial vacuum to be filled only by an express declaration of trust or by a constructive trust. There could be a straight legal joint tenancy (just conceivably) or a beneficial co-ownership (the general and correct view), but never under any circumstances a beneficial vacuum. A transfer to joint proprietors vests title as legal joint tenants when the transferees are registered. If they are not tenants in common because of (for example) unequal contributions, they are joint tenants and a statutory trust is imposed by s.36 LPA 1925. It is not necessary to declare this trust and a survivor's receipt declaration was not supposed to do so. It was intended to negate equitable variation by resulting or constructive trust of the legal entitlements established by the transfer. The line of authorities which reject the conclusiveness of survivor's receipt declarations breaks down an examination, their ratios inconsistent with their own reasoning.

Most couples who bought homes together in the 1970s and 1980s wished, at the time of their purchase at least, to be joint tenants, because survivorship was what mattered to them. A survivor's receipt declaration should have ensured that beneficial joint tenancy lasted until a notice of severance was received. A property would pass by survivorship would follow in due course without the fuss of making wills and contracting not to revoke them. This assumption has been undermined for hundreds of thousands of couples by a dubious interpretation of a survivor's receipt clause and by allowing beneficial interests to ambulate. This helped a few

<sup>129</sup> No relevant documents were produced: *Kernott* [2010] EWCA Civ 578; [2010] W.L.R. 2401 at [11] per Wall L.J.

<sup>130</sup> Box 10 of Form FR1: Sch.2 LRR 1997.

<sup>131</sup> Land Registry Practice Guide 2.

<sup>132</sup> Section 53(2) LPA 1925.

ill-advised parties who paid the larger share of the price of a house without bothering to have that contribution properly recorded. All in all, the effort devoted in the courts to the demolition of the land registry procedures has been unwarranted. Legislation should be introduced to reverse *Stack* in order to protect couples who bought homes with registered titles before 1997 and were not advised to make mutual wills.