Easter Term
[2017] UKPC 17
Privy Council Appeal No 0050 of 2015

JUDGMENT

Marr (Appellant) *v* Collie (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Neuberger
Lady Hale
Lord Kerr
Lord Wilson
Lord Sumption

JUDGMENT GIVEN ON

25 May 2017

Heard on 19 December 2016

Appellant	*Respondent*
Aidan Casey QC Tom Poole Leroy Smith (Instructed by Simons Muirhead and Burton)	Mark Hubbard (Instructed by Munroe & Associates)

LORD KERR:

Introduction

1. The appellant, Terry Marr, is a Canadian citizen. He is a banker working in the Bahamas. The respondent, Bryant Collie, is a citizen of the Bahamas. He is a building contractor. Mr Marr and Mr Collie were in a personal relationship with each other between September 1991 and July 2008. During that time, they acquired a number of properties and other items such as works of art, a boat and a truck. This appeal relates to the ownership of the properties and the other items and how they should be disposed of, now that the personal relationship between the two men has ended.

The pleadings

(a) The properties

2. The appellant's statement of claim makes various claims about the circumstances in which various properties were bought. These are summarised in the succeeding paragraphs.

3. On 30 May 2000, several parcels of land at Dean's Lane, New Providence were acquired in the joint names of the appellant and the respondent. The various parcels of land have become known as the Dean's Lane property. The purchase price was $300,000. This sum was raised by obtaining a loan from Ideal Investments Ltd which took a mortgage over the property. The appellant paid the instalments of interest and capital under the terms of the Dean's Lane mortgage and the fees and taxes in respect of the property. The loan was refinanced by a mortgage taken out on 3 May 2004 with the Royal Bank of Canada (RBC). The appellant claims that this entailed his executing an indenture of mortgage over property in South Westridge of which he was the sole owner. The respondent has admitted that the appellant took out the mortgage but denies that he was the sole owner of the property at South Westridge. The RBC mortgage secured borrowings of $350,000; the appellant claimed that he had paid all sums by way of interest and capital due under the terms of the mortgage. He again paid all bank and legal fees associated with the property.

4. In his defence and counterclaim the respondent claims that while it was agreed that the appellant would be responsible for paying the instalments of interest and capital under the Dean's Lane mortgage, it was also agreed between them that the respondent

would be responsible for all renovation and maintenance of the dilapidated building on the property and for landscaping. He claims that he maintained the property after its purchase. He denied that the RBC mortgage secured borrowings of $350,000 or that the appellant had paid all of the instalments of interest and capital on those borrowings.

5. A property known as Lot 38, Block 3, Section A in the Rainbow Bay area of Eleuthera was acquired on 2 March 2005. One Jorid O Loehr was the vendor and the appellant and respondent were named in the conveyance as purchasers. The property was conveyed into their joint names. The purchase price was $20,000 and the appellant paid all of this sum himself and all legal, bank and ownership fees associated with the purchase. Another property, Lot 39, in the same section of the Rainbow Bay area, was acquired on 2 November 2006. Again, this was conveyed into the joint names of the appellant and the respondent and again the appellant paid all the fees.

6. So far as the Rainbow Bay lots were concerned, the respondent did not deny that the appellant had paid all the fees on these but he claimed that it was agreed that he (the respondent) would be solely responsible for building a holiday cottage on these lands and that, to that end, he paid for an architect to survey the lands and draw up plans.

7. On 14 May 2008 an agreement was made between United Bahamas Development Company Ltd, as vendor, First Caribbean International Bank (Bahamas) Ltd as lender and the appellant and respondent as purchasers. By this agreement, property known as the Hampton Ridge condominium was conveyed into the joint names of the appellant and the respondent. The purchase price of this property was $249,900. An initial down payment of 5% of the purchase price was paid by the appellant. The remainder was financed through a mortgage taken out with RBC on 28 May 2008. The appellant paid all legal fees and bank fees associated with the purchase. He claims to have paid all instalments due on foot of the mortgage and all other incidental fees, apart from two payments made by the respondent in January 2009 and May/June of the same year in respect of insurance. These totalled some $3,000. The appellant further claims to have paid for all the furnishings in this property.

8. The respondent accepts that it was agreed that the appellant would pay the fees on the Hampton Ridge condominium but claims that it was also agreed that he would be responsible for renovating the building and for furnishings which he duly paid.

9. A property known as Unit C-53, Town Court Condominiums, Nassau Street, New Providence was conveyed into the joint names of the appellant and the respondent on 19 May 2008. The purchase price was $60,000 and this was paid by the appellant. He also paid all legal and bank fees and claims to have paid all fees associated with the property since the time of its purchase. The respondent accepts that the appellant did in fact pay these fees but says that it had initially been agreed that the parties would pay

fees and taxes associated with the Town Court property in equal amounts. The relationship between them deteriorated, however, a few months after the purchase and the respondent was thereafter unable to obtain access to the "documents pertaining to the condominium". In any event, the respondent claims, it was agreed that he should be responsible for all construction works involved in renovating the building and that he removed all cabinets and carpets from it and repaired plumbing and electrical fixtures at his own expense.

10. In general, the appellant claims that he is entitled to the full beneficial ownership of all the properties, by dint of his having made virtually all payments associated with their purchase. The respondent denies this claim. He says that the properties were acquired in joint names; that the appellant earned more money than he and that the appellant was "the breadwinner" in the relationship.

11. In 1995 a house was bought in South Westridge by the appellant which, it was intended, would become their joint home. The respondent started to construct a cottage, a swimming pool and a garage to accommodate three cars on this property. He used his own finances and resources to fund this work. He therefore claimed to be entitled to an equitable interest in that property. In his reply and defence to counterclaim the appellant denied that there was any agreement about the purchase or renovation of the house at South Westridge. He asserted that he paid the respondent for the services provided by all labourers and tradesmen who were engaged in the construction of the cottage and that he paid for virtually all the building materials. Any sums expended by the respondent were, the appellant claimed, reimbursed by him.

(b) The truck, the boat and the artwork

12. On 18 June 2007 the appellant bought a Ford Sport Trac Truck for $32,000. It was licensed in the joint names of the appellant and the respondent. In November of the same year he bought a motor boat and trailer. Again the appellant claims that he paid for these but the boat was also registered in the joint names of the appellant and the respondent.

13. The appellant also claims to be the exclusive owner of various pieces of art, mainly consisting of paintings, drawings and lithographs but also including items of furniture and furnishing. He claims that, in February 2009 or thereabouts, the respondent took them from the properties at South Westridge and Hampton Ridge where they had been kept, and that he has refused to return them.

14. The respondent claims that the appellant bought the truck as a gift for him but says that it is jointly owned between them. As to the boat, it is disputed that the appellant alone paid for this; the respondent asserts that it was purchased jointly and that it is

owned jointly by them. It is claimed that the artwork and the various other objets d'art are also owned jointly.

The proceedings

15. In the course of a trial before Isaacs J, the parties gave conflicting accounts of their relationship. Mr Marr denied that he was the breadwinner in the sense described by Mr Collie. He claimed that Mr Collie gave repeated assurances that he would make financial contributions but these did not materialise. It was on the strength of the assurances that he agreed to the properties being acquired in joint names. Specifically, he expected Mr Collie to make a contribution equal to that which he had made but that simply did not happen. Mr Marr claimed that Mr Collie carried out minimal renovations to the Town Court property and none at all to the Hampton Ridge unit. As a consequence, these properties, which, it was intended, would be let, did not in fact bring in any rental income. No renovations to the Dean's Lane property took place. It had been intended that this would become a hotel but that fell through because of the lack of work on the building. The result of all this was that considerable sums were owed on the various properties and the property at South Westridge and Dean's Lane were "held by RBC as collateral against the mortgage on the Dean's Lane property".

16. Mr Marr said that he had bought the South Westridge property in 1995. A cottage was built by Mr Collie's company on the land. It was completed in 2007. Mr Marr claimed that he paid Mr Collie approximately $400,000 to cover material, payments to workers and other expenses.

17. Mr Collie said that Mr Marr had bought the South Westridge property so that he (Mr Marr) could qualify for permanent residence in the Bahamas. He wanted to do this so that he could continue to live with Mr Collie. He (Mr Collie) had, he claimed, designed and planned the cottage that was built at South Westridge with the help of an architect and he said that he had contributed approximately $150,000 to the development of the property. In any event, he claimed to believe that Mr Marr's income belonged to both Mr Marr and himself.

18. Having referred to paras 56 and 58 of Lady Hale's speech in *Stack v Dowden* [2007] 2 AC 432 (where she said that a conveyance into joint names indicates legal and beneficial joint tenancy unless the contrary is proved), Isaacs J said, at para 51, that this principle applied "only in the domestic consumer context". He relied on *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 WLR 2695 for the proposition that *Stack* was strictly confined to this context and that it was therefore "not right to apply the so-called *Stack v Dowden* presumption in cases where the primary purpose of the property purchase had been as an investment, even if there was a personal relationship between the parties": para 52. On this basis, Isaacs J found that, since Mr Marr had bought the

properties, there was a presumption that Mr Collie held these on resulting trust for Mr Marr, unless he could "demonstrate that a gift was intended". The judge found at para 57 that Mr Collie had "fallen far short of rebutting the presumption of a resulting trust". In consequence, a resulting trust had been created in relation to all "the investment properties": para 59. A similar finding was made about the boat, the truck and the artwork.

19. So far as the South Westridge property was concerned, Isaacs J held that there was no reliable evidence that Mr Collie had spent any of his own money on its development and that there was no evidence of an agreement that he should be responsible for outgoings relating to that property. Mr Marr had bought the property, the judge found, to enhance his claim to be entitled to permanent residency in the Bahamas. On that basis, he should be considered as the sole legal and beneficial owner of the property.

20. Mr Collie appealed. On 29 May 2014, the Court of Appeal (Allen P, Blackman JA and John JA) delivered judgment allowing the appeal in part. Allen P, with whom the other justices of appeal agreed, held that Isaacs J had failed to examine the question whether Mr Marr had intended to benefit Mr Collie at the time the various properties were bought. He was wrong, the Court of Appeal found, to decide that the onus was on Mr Collie to prove that a gift to him was intended: para 15.

21. In para 16 of her judgment, Allen P referred to what she described as "the only evidence [which was] contemporaneous to the purchase of the joint properties". This was an email of 10 March 2005 sent by Mr Marr to Lydia Gardiner, an administrative assistant in the RBC Commercial Banking Centre. Among other matters discussed in the email, reference was made to the purchase of property on Harbour Island. Mr Marr told Ms Gardiner that he and Mr Collie were considering a joint purchase of this property, "meaning that we would have a 50% interest." Having quoted this statement, Allen P observed, "[t]he email clearly shows that to Marr a joint purchase means a 50% interest held by each party".

22. The only other evidence of the parties' intention, Allen P said, was the conveyances themselves. These, she considered, "clearly show[ed] that a total of eleven properties were systematically purchased in both the appellant's and the respondent's names as joint tenants over the course of the relationship." As well as this, she found that the parties at various times shared the obligation to repay the mortgages on the properties. All of this constituted "cogent evidence" that Mr Marr intended that Mr Collie should have an equal share in the investment properties: para 19.

23. Mr Collie had appealed on three grounds: (i) that Isaacs J had erred in finding that the properties held in joint names were "investment properties"; (ii) that he was

wrong not to have found that there was a common intention on the part of Mr Marr and Mr Collie that they would have equal beneficial ownership of the properties; and (iii) that he was wrong to determine that a resulting trust arose in favour of Mr Marr.

24. The Court of Appeal summarily rejected the first of these grounds, the President observing (at para 8 of her judgment) that both parties had repeatedly asserted that the properties had been bought as investments. Although she did not make an explicit finding on the second ground, the statement in para 19 of Allen P's judgment, that there was cogent evidence that Mr Marr intended that Mr Collie should have an equal share in the properties, is a clear indication that this submission was accepted. At para 20 the President said that she found merit in the third ground of appeal. She concluded that "the evidence clearly shows that at the time of the purchase of the properties it was the intention of the appellant [Mr Collie] to share equally with the respondent [Mr Marr], the beneficial interest in the investment properties, and as such, the presumption of resulting trust in favour of the respondent is rebutted".

25. Although the Court of Appeal had not been asked by either party to do so, it ordered that the properties held in joint names be sold and that the case should be remitted to a judge of the Supreme Court to assess the contributions made by Mr Marr and Mr Collie to the improvements that had been made, so that these could be reflected in payments to each of them of sums commensurate with the contributions made.

26. In relation to the South Westridge property, the Court of Appeal held that Mr Collie had not demonstrated that it was the common intention of the parties to share the beneficial interest in it. His appeal in relation to this was dismissed, therefore. As to the paintings, the court decided that Mr Collie had not shown that he had a beneficial interest in these. His appeal against this aspect of Isaacs J's ruling was also dismissed. The Court of Appeal found that the circumstance that the truck was registered in the names of both Mr Collie and Mr Marr meant that there was a common intention that they should share the ownership of it. It was ordered that it be sold and the proceeds of sale divided between the parties. In relation to the boat, the Court of Appeal accepted that Mr Marr had paid for this and also the clearing fees associated with it. Mr Collie had paid for "ancillary equipment". This had enhanced its value. It was therefore ordered that the boat be sold and that the proceeds of sale be divided between the parties on the basis that Mr Marr should receive 70% of these and Mr Collie 30%.

The appeal before the Board

27. Central to Mr Marr's appeal against the decision of the Court of Appeal was the claim that that court, in order to found its critical determination that it had been the intention of the parties that they should hold the investment properties in equal beneficial shares, had focused on an item of evidence which had not featured in the trial

before Isaacs J. This was the email that had been sent by Mr Marr to Ms Gardiner. This had not been put to Mr Marr during his testimony. It was not mentioned in the hearing before the Court of Appeal, it was claimed. Moreover, the email was, the appellant contended, inadmissible. It was not listed in the agreed bundles and the position of the Bahamian courts was to treat contents of documents which had not been agreed as inadmissible unless introduced in evidence - *Colco Electric Co v Gold Circle Co* [2003] BHS J No 53 (BSC). The email had been included in Mr Collie's bundle of documents but it was not in the agreed bundle and had not been tendered in evidence. No oral testimony had been given as to its contents and Mr Marr never had the opportunity to say anything about its import.

28. By way of alternative, Mr Marr's counsel submitted that the Court of Appeal was wrong to invest the email with the significance that it had. It did not constitute direct evidence of his intention at the time that the investment properties were acquired; it was sent at a time quite different from the dates of acquisition of the investment properties; and did not provide a sound footing for interfering with Isaacs J's determination.

29. It was also argued that the Court of Appeal had applied the wrong test and had erroneously held that Mr Marr was fixed with the burden of proving that the beneficial ownership of the investment properties differed from their legal ownership. Mr Casey QC, on behalf of Mr Marr, submitted that the principles of resulting trust still apply where property is purchased as an investment. Relying on *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 WLR 2695, he argued that this statement held true even where the investment property was bought by members of the same family. On that basis, the Court of Appeal was wrong, Mr Casey said, to treat this case as one where the "common intention trust" analysis identified in *Stack v Dowden* applied. Isaacs J was right, Mr Casey argued, to hold that the governing principle for determining beneficial ownership of the investment properties was that of classic resulting trust. In those circumstances, no burden of proof was cast on Mr Marr to prove that he was entitled to the entire beneficial ownership of the properties. On the contrary, there was a presumption that Mr Marr did not intend that Mr Collie should have half of the beneficial ownership of the investment properties. It was therefore incumbent on him to show that Mr Marr intended that this was the case and Isaacs J had correctly found that Mr Collie had failed to do so. It was also argued that the Court of Appeal had wrongly followed the common intention constructive trust route in determining the beneficial ownership in the truck and the boat.

30. Finally, it was submitted that the Court of Appeal had failed to give sufficient weight to the findings of fact made by the trial judge and had wrongly interfered with those findings and had impermissibly substituted their own conclusions on the evidence.

31. On behalf of the respondent, Mr Hubbard pointed out that the Court of Appeal had held that the law applicable to the dispute was as stated in *Calverley v Green* [1984] HCA 81, *Muschinski v Dodds* [1985] HCA 78 and *Buffrey v Buffrey* 9 ITELR 455 (Supreme Court of New South Wales). The appellant had not suggested, Mr Hubbard claimed, that these authorities were not applicable or that they did not accurately state the law of the Bahamas which governed disputes of this kind. Nor had the appellant claimed that the Court of Appeal's summary of the cases and the findings as to their effect were flawed.

32. The Court of Appeal had summarised the effect of the three decisions in paras 13 and 14 of its judgment:

> "13. The authorities are clear, where parties are said to own property jointly, the beneficial interest is presumed to correspond to the legal interests in that land, as reflected in the maxim 'equity follows the law'. The presumption, however, may be displaced or rebutted by evidence that the purchase money was provided by the co-owners in unequal shares, in which case a presumption of resulting trust for themselves as tenants in common in proportions in which they contributed the purchase money replaces the presumption that the legal and equitable title coincide. Where however, a person purchases property in his name and another's name jointly, and provides all of the purchase money, the question is whether the other person, who did not provide any of the purchase money, acquires a beneficial interest in the property.
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> 14. The aforementioned authorities clearly suggest that the answer to that question depends on the intention of the purchaser who provided the purchase money at the time of the purchase of the property. The presumption of a resulting trust will be negated by clear evidence that it was the intention of the purchaser, at the time of the purchase, to share the beneficial interest in the property with his co-owner."

33. Having correctly identified the applicable principles, the Court of Appeal was entirely right, the respondent argued, to apply them as it did in para 20 of its judgment - see para 24 above. It was therefore submitted that the appellant's argument, that the Court of Appeal had wrongly held that Mr Marr was required to rebut a presumption based on the transfer of legal title into joint names, was unsustainable. To the contrary, the court had reviewed the evidence and had held that this admitted of no conclusion other than that Mr Marr had intended that the beneficial ownership should be shared between him and Mr Collie.

34. It was accepted by the respondent that the appellant should have been given an opportunity to make submissions to the Court of Appeal about the 10 March 2005 email. Mr Hubbard argued, however, that this was only one part of the evidence which the Court of Appeal had considered and that, in any event, the appellant had had the opportunity, in his presentation of the case to the Board, to address the question of what significance should or should not be given to this item of evidence.

35. The further evidence available to the Court of Appeal included, the respondent claimed, the terms of the conveyances themselves which transferred the properties into joint names; the "systematic" purchase of the properties by the parties as joint tenants over the course of their relationship; the fact that the parties at various times shared the obligation to repay the mortgages; that Dean's Lane was mortgaged jointly and when re-mortgaged by means of the RBC mortgage, the proceeds were used to repay the original charge and to invest the balance in the construction of the home at South Westridge; that the parties entered into a joint mortgage to pay for the Hampton Ridge property; and the nature and quality of the personal relationship between the parties.

Stack v Dowden

36. In this case the parties were in a relationship between 1975 and 2002. They did not marry. The female partner bought a house in her sole name in 1983. They lived there together and had four children. Throughout their time together the female earned more than the male. She paid the mortgage and the household bills. The parties worked together to improve the house and in 1993 it was sold for three times the sum it had cost in 1983. The parties then bought another property, which was conveyed into their joint names. Most of the purchase price was paid out of funds belonging to the female partner. The balance was provided by a loan secured by a mortgage in the parties' joint names and two endowment policies, one in their joint names and one in the female's sole name. The male partner paid the mortgage interest and the premiums due under the endowment policy in their joint names and the female paid the premiums due under the endowment policy in her sole name. The parties kept separate bank accounts and made separate savings and investments. Over the course of their years in the house together the mortgage loan was paid off by a series of lump sum payments of which the defendant provided just under 60% of the capital. In 2002 the male left the property. The female remained with the children. The male successfully applied for an order for the sale of the property and an equal division of the proceeds. The Court of Appeal allowed the female's appeal and ordered that the net proceeds of sale be divided 65% to 35% in her favour.

37. The House of Lords dismissed the male's appeal. It was acknowledged that where a domestic property was conveyed into the joint names of cohabitants, without any declaration of trust, prima facie both the legal and beneficial interests in the property were joint and equal. That prima facie position could be displaced if it was concluded

that the parties had a common intention that their beneficial interests were to be different from their legal interests but the onus of proving this lay with the party who asserted it. To discover what the parties' common intention was, the court should look at the parties' whole course of conduct in relation to the property. Significantly, the House of Lords held that the law had moved on from the presumption of a resulting trust. Many factors other than the parties' respective financial contributions could be relevant in divining their true intentions. But the Appellate Committee was careful to say that when all relevant factors had been considered, cases in which the joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal interests would be very unusual. As it happened, the majority in the House of Lords considered that this was such an unusual case.

38. In *Stack,* Lady Hale gave the leading opinion and it is on this that the main focus must fall. Before turning to it, however, it is worth looking at some of the observations of Lord Walker. At para 32 he said:

> "… The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership. The well-known Australian case of *Muschinski v Dodds* (1985) 160 CLR 583 is an example. The High Court of Australia differed in their reasoning, but I find the approach of Deane J, at p 623, persuasive:
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> > 'That property was acquired, in pursuance of the consensual arrangement between the parties to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connection with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation in which each party is entitled to insist upon realisation of the asset, repayment of her or his contribution and distribution of any surplus.'"

39. In *Muschinski,* as Deane J said (at para 3), the inescapable conclusion from the evidence was that it was the "shared intention" of the parties that from the time of the purchase, "each should have a full one-half beneficial, as well as legal, interest in the property." The emphasis was therefore on the question as to what the intention of the parties was at and from the time of the purchase. In *Muschinski*, of course, the partnership between the parties was, as in the present case, a commercial as well as an emotional one. The outcome proposed by Deane J, therefore, was that the proceeds of the realisation of the property were to be divided equally after each party was repaid the

contributions that he or she had made towards its purchase. It is to be noted that the Court of Appeal in the present case, although it purported to follow *Muschinski*, did not stipulate that the assessment which it proposed should be carried out by a judge of the Supreme Court should include an account of the contributions made by the parties towards the purchase of the properties. This omission will be considered later. In the meantime, however, it is the Board's view that to consign the reasoning in *Stack* to the purely domestic setting would be wrong.

40. At para 56 of her opinion in *Stack* Lady Hale expressed the fundamental principle in commendably clear and simple terms: "the starting point where there is joint legal ownership is joint beneficial ownership". Although that statement was made in a case where the dispute between the parties was in relation to property which was a family home, there is no reason to doubt its possible applicability to property purchased by a couple in an enterprise reflecting their joint commercial, as well as their personal, commitment. When Lady Hale said, in para 58, that, "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", it is clear that she did not intend that the principle should be confined exclusively to the domestic setting. Of course, when the conveyance occurs in circumstances where the parties are involved only in a personal relationship, the fact that they have elected to have the property in their joint names may make it easier to infer an intention that they should share the beneficial ownership. But that does not mean that where there is a commercial dimension to the acquisition of the property, the decision to have the legal ownership declared to be jointly shared is bereft of significance. The intention of the parties will still be a crucial factor.

41. In para 59 *et seq* Lady Hale addressed the question of how the prima facie position (that the legal and beneficial interests should be joint and equal where a domestic property was conveyed into the joint names of cohabitants) could be displaced. She posed the question whether the starting point was the presumption of resulting trust, reflecting the financial contributions made by the respective parties to the acquisition of the property or whether one should look at all the circumstances in order to discern the parties' intention. She pointed out, at para 60, that the presumption of resulting trust was not a rule of law and concluded that 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". (The words "inferred" and "imputed" have taken on a greater significance more recently, particularly in the case of *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776, which is discussed below. They are not of particular importance in *Stack*, however.)

42. So far as concerns the present appeal, passages from paras 68 and 69 of Lady Hale's opinion encapsulate the essential reasoning:

> "68. 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 …
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> 69. … 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 purpose for which the home was acquired; the nature of the parties' relationship; … 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."

43. Although Lord Neuberger disagreed as to the approach to be taken to ascertaining, whether what he described as "the resulting trust solution" should be applied, under the rubric, beneficial ownership in acquisition in para 109 he said:

> "In the absence of any relevant evidence other than the fact that the property, whether a house or a flat, acquired as a home for the legal co-owners is in joint names, the beneficial ownership will also be joint, so that it is held in equal shares. This can be said to

> result from the maxims that equity follows the law and equality is equity. On a less technical, and some might say more practical, approach, it can also be justified on the basis that any other solution would be arbitrary or capricious."

44. Under the rubric, "beneficial ownership on acquisition: differential contributions", however, Lord Neuberger in para 113 adumbrated a number of "practical reasons" which, he said, favoured rejection of the equality approach and supported the resulting trust solution:

> "The property may be bought in joint names for reasons which cast no light on the parties' intentions with regard to beneficial ownership. It may be the solicitor's decision or assumption, the lender's preference for the security of two borrowers, or the happenstance of how the initial contact with the solicitor was made …"

45. It is important that these observations are seen in light of the prefatory words in para 110:

> "*Where the only additional relevant evidence* to the fact that the property has been acquired in joint names is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held, in my view, in the same proportions as the contributions to the purchase price." (Emphasis supplied)

46. Where additional evidence is available in the form of testimony from the parties themselves as to what their intentions were when the property was acquired, even on Lord Neuberger's formulation, this can rebut the presumption of resulting trust. In that event, there should be a direct focus on what the intentions of the parties were. That focus could only be avoided if the decision in *Stack* could properly be regarded as applying only to purely domestic arrangements. For the reasons given earlier (in paras 38 and 39) the Board considers that it cannot be so regarded and that the trial judge was wrong to dismiss it on that basis. In doing so, he relied on the decision in *Laskar v Laskar* and it is necessary now to turn to consider the judgment in that case.

Laskar v Laskar

47. The defendant, who had been a secure tenant of a council house exercised her right to buy the house. Since her income alone was insufficient to fund the purchase,

she agreed to buy the property jointly with the claimant, her daughter. The purchase was partly funded by a loan secured by a mortgage in the parties' joint names. The claimant made a small payment towards the balance. It was not intended by the parties that they would use the property as their home and as soon as it was transferred to them, it was let to tenants. The rent was paid to the defendant who used it to meet the mortgage repayments and pay for repairs and other outgoings on the property. After a disagreement between the parties the defendant severed the joint tenancy, and the claimant began proceedings claiming a joint beneficial interest in the property. The judge held that since the mortgage had been serviced from rental income and the claimant had not been required to pay any sums due under it, the mortgage loan should not be taken into account when calculating the extent of the claimant's contribution to the purchase price. Accordingly, based solely on her contribution towards the purchase price, the judge held that the claimant had an equitable interest in the property of 4.28%. The claimant appealed. It was held that where members of the same family purchased in joint names a property which they intended to be and in fact was occupied by them as a home, there was a presumption of equality; where the property was primarily intended as an investment that presumption did not apply. In para 17 of his judgment, Lord Neuberger said:

> "In this case the primary purpose of the purchase of the property was as an investment, not as a home. In other words, this was a purchase which, at least primarily, was not in the 'domestic consumer' context but in a commercial context. To my mind it would not be right to apply the reasoning in *Stack v Dowden* to such a case as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one."

48. In *Laskar*, of course, the co-funding of the purchase was required because the mother could not have afforded to buy the house herself. This was a joint investment impelled by her circumstances. Although the relationship was familial, the financial venture on which the parties had embarked was not associated with a mutual commitment to each other for the future. The investment could therefore be characterised as a purely financial one, designed to pay dividends to each of the participants but shorn of any aspiration for a future equal sharing of proceeds. Further, as stated in para 8 of Lord Neuberger's judgment, the judge had found that there were no discussions between the parties as to the ownership of the beneficial interest in the property, and it does not appear to have been suggested that the court could or should infer any intention in that connection on the part of the parties.

49. The Board does not consider, therefore, that *Laskar* is authority for the proposition that the principle in *Stack v Dowden* (that a conveyance into joint names indicates legal and beneficial joint tenancy unless the contrary is proved) applies only in "the domestic consumer context". Where a property is bought in the joint names of

a cohabiting couple, even if that is as an investment, it does not follow inexorably that the "resulting trust solution" must provide the inevitable answer as to how its beneficial ownership is to be determined. Lord Neuberger did not intend to draw a strict line of demarcation between, on the one hand, the purchase of a family home and, on the other, the acquisition of a so-called investment property in whatever circumstances that took place. It is entirely conceivable that partners in a relationship would buy, as an investment, property which is conveyed into their joint names with the intention that the beneficial ownership should be shared equally between them, even though they contributed in different shares to the purchase. Where there is evidence to support such a conclusion, it would be both illogical and wrong to impose the resulting trust solution on the subsequent distribution of the property.

Jones v Kernott

50. In this case, an unmarried couple bought in their joint names a property in which they lived as man and wife. In 1993 the parties separated and the defendant moved out of the property. The claimant remained there with their two children, and she assumed sole responsibility for all the outgoings and maintenance of the property. It was accepted that at the time of their separation the parties held the beneficial interest in the property in equal shares. The parties subsequently cashed in a life insurance policy and shared the proceeds, enabling the defendant to put down a deposit on a home of his own which he bought with a mortgage in 1996. In 2006 the defendant initiated correspondence with a view to claiming his interest in the property. The claimant began an action for a declaration that she owned the entire beneficial interest in the property. The judge in the county court held that (1) the parties were to be taken as having intended that their respective beneficial interests would alter to take account of changing circumstances; (2) in the absence of any indication by words or conduct as to how they should be altered, the appropriate criterion was what the court considered just and fair; and (3) in the circumstances the claimant was entitled to 90% of the value of the property. The Court of Appeal, by a majority, allowed the defendant's appeal, held that there was no evidence from which the judge could have inferred an intention by the parties that their beneficial shares should be other than equal and declared that the parties held the severed joint tenancy as tenants in common in equal shares.

51. On appeal to the Supreme Court, it was held that where a family home had been bought in the joint names of an unmarried cohabiting couple who were both responsible for any mortgage, but without any express declaration of their beneficial interests, the starting point was that equity followed the law so that the presumption was that they were joint tenants both in law and in equity. That presumption could be displaced by showing that the parties had had a different common intention at the time when they had acquired the home or that they had later formed a common intention that their respective shares would change. The primary search was for what the parties had actually intended and their common intention was to be deduced objectively from their words and conduct.

52. At para 31 of their joint judgment, Lord Walker and Lady Hale, having confirmed that the search was to be primarily directed at ascertaining "the parties' actual shared intentions, whether expressed or to be inferred from their conduct", proceeded to outline "at least two exceptions" to that general rule. The first of these was where what they described as "the classic resulting trust presumption applies". Lord Walker and Lady Hale suggested that this would "be rare in a domestic context, but might perhaps arise where domestic partners were also business partners: see *Stack v Dowden*, para 32." The second exception considered by them arose where it was impossible to divine a common intention as to the proportions in which the beneficial interests are to be shared, the court would be driven to impute an intention to the parties which they may never have had. That circumstance is not relevant, at least at present, in this appeal.

A clash of presumptions?

53. If what Lady Hale described as a "starting point" (that joint legal ownership should signify joint beneficial ownership) is to be regarded as a presumption, is it in conflict with the presumption of a resulting trust where the parties have contributed unequally to the purchase of property in their joint names? A simplistic answer to that question might be that, if the property is purchased in joint names by parties in a domestic relationship the presumption of joint beneficial ownership applies but if bought in a wholly non-domestic situation it does not. In the latter case, it might be said that the resulting trust presumption obtains.

54. The Board considers that, save perhaps where there is no evidence from which the parties' intentions can be identified, the answer is not to be provided by the triumph of one presumption over another. In this, as in so many areas of law, context counts for, if not everything, a lot. Context here is set by the parties' common intention - or by the lack of it. If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.

55. Of course, the initial intention (or lack of it) at the time of purchase may change. This was the reason that the majority in *Stack v Dowden* emphasised that examination of the course of conduct of the parties over the years in which they dealt with the property is relevant. And it is why an intense examination is warranted of why the properties acquired in this case in 2008 were purchased in joint names. By that time, many of the contributions which, according to Mr Marr, he expected Mr Collie to have made, had not materialised. Why did he continue to agree that the properties should be acquired in joint names?

The centrality of the question of intention

56. In this case, each party was relying on common intention, although they could not agree on what it was. Given that the intention of the parties is central to the resolution of the issues in this appeal, has it been addressed sufficiently by the trial judge and/or the Court of Appeal?

57. Isaacs J concluded that the burden was on Mr Collie to rebut the presumption of a resulting trust in favour of Mr Marr and that he had failed to discharge it. At para 60 of his judgment, however, he said that "the result would be the same even if the common intention constructive trust analysis applied in *Stack* were applied to the facts of the instant case". The Court of Appeal focused on the intention of Mr Marr (see para 14 of the judgment of the President). The email of 10 March 2005 was considered to be pivotal. Allen P, at para 16, stated that this "clearly [showed] that to Marr a joint purchase means a 50% interest held by each party."

58. Isaacs J did not expatiate on his reasons for saying that, if the common intention constructive trust analysis was applied, the result would be the same as that produced by the resulting trust solution. Such a conclusion would have required, as a minimum, an examination of the reasons that Mr Marr continued to agree that properties purchased in 2008 should be conveyed into his and Mr Collie's joint names when, on his account, the anticipated contributions from Mr Collie had not materialised. It would also have required consideration of the email of 10 March 2005 which was, at least, highly relevant to the question of whether Mr Marr intended that Mr Collie should share the beneficial interest in the investment properties. The unvarnished statement that the result would have been the same if the *Stack v Dowden* approach had been applied cannot be regarded, therefore, as a sufficient examination of that issue.

59. The Court of Appeal's finding that there was sufficient evidence to permit a conclusion that it was the common intention of the parties that the beneficial interest should be shared is likewise unsustainable. In the first place, it failed to address a number of factual findings made by Isaacs J, albeit that those were made against the background of his view that the resulting trust solution should be applied. In particular, the judge found that Mr Marr's evidence was more credible than that of Mr Collie. It is to be presumed that this included his assessment of the evidence of Mr Marr that he did not intend to confer an equal beneficial interest in the investment properties on Mr Collie and that the decision to have the properties conveyed into joint names was on the basis that the latter would make an equal contribution to their development. Quite apart from this, the Court of Appeal's decision rested crucially on its consideration of the effect of the email of 10 March 2005. Mr Marr and his counsel were never given the opportunity to comment on this, much less to make submissions on the significance, if any, which should be placed on it.

Disposal

60. Both parties to the appeal invited the Board not to remit the case for the determination by a lower court of the issues which arise. The Board is conscious of the undesirability of prolonging what have already been protracted proceedings. It has concluded, however, that there is no feasible alternative to this course. No proper examination of the actual intentions of the parties has taken place. For the reasons given earlier, the Board considers that such an examination is unavoidable if a proper determination is to be made of the respective beneficial interests of the parties in respect of the investment properties, the truck and the boat. Moreover, it is of the view that, in line with the decision in *Muschinski*, it is necessary that it be decided whether account be taken of the contributions made by the parties to the purchase of the various properties and assets whose beneficial interest is in dispute. (This does not include the South Westridge property.)

61. The Board will therefore humbly advise Her Majesty that the appeal should be allowed and that the case should be remitted for hearing before the Supreme Court of the Bahamas in order that the issues outlined in this opinion, particularly the intention of the parties at the time of the purchase of what have been described as the investment properties and in the course of dealing with those properties, be determined.

62. The parties shall have 28 days in which to make submissions on costs.