

# Casenotes

## Presuming Too Little About Resulting and Constructive Trusts?

Marr v Collie [2017] UKPC 17

☞ Bahamas; Beneficial interests; Co-ownership; Family home; Intention; Presumptions; Relationship breakdown; Residential property; Resulting trusts; Unmarried couples

It will be an all too obvious truth to readers of this journal that the law on implied trusts as it applies to the acquisition and quantification of interests in real property has undergone a period of considerable change and uncertainty over the last decade, and many questions and confusions remain. One principle had, however, seemed to emerge relatively clearly from the dicta in *Stack v Dowden*,<sup>1</sup> *Laskar v Laskar*<sup>2</sup> and *Jones v Kernott*<sup>3</sup>: the starting presumptions identified by Lady Hale in *Stack* applied to domestic cases, broadly stated, but the presumption of a resulting trust was more appropriate where the purchase was for commercial purposes. If this approach was ever correct, it is no longer the case following the decision of the Judicial Committee of the Privy Council in *Marr v Collie*.<sup>4</sup>

### Facts and first instance decision

Terry Marr and Bryant Collie were in an intimate relationship for around 15 years. In the course of their relationship, several pieces of real property were purchased,<sup>5</sup> all but one of which were conveyed into their joint names. Their joint home (South Westridge) was conveyed into Mr Marr's sole name, apparently to enhance his claim to be entitled to permanent residency in the Bahamas. As for the 11 conveyances into their joint names, the evidence suggested that Mr Marr was responsible for purchasing the properties and Mr Collie for developing them, albeit that Mr Collie did not uphold his end of the bargain in a manner that was documented but, conversely, they shared the obligation to pay the mortgages on the properties at various times. In relation to one such "joint names" purchase, of "Harbour Island", an email from Mr Marr to an administrative assistant at a bank

<sup>1</sup> *Stack v Dowden* [2007] UKHL 17.

<sup>2</sup> *Laskar v Laskar* [2008] EWCA Civ 347.

<sup>3</sup> *Jones v Kernott* [2011] UKSC 53.

<sup>4</sup> *Marr v Collie* [2017] UKPC 17.

<sup>5</sup> In addition, a truck, a boat and numerous artworks were purchased by Mr Marr. The judge had applied a resulting trust to all of them so that they were owned beneficially by Mr Marr. The Court of Appeal purported to apply *Stack v Dowden* [2007] UKHL 17 to all of them, dismissing Mr Collie's appeal on the paintings but finding that the truck was beneficially owned jointly because it was in their joint names and finding that that Mr Collie had acquired a 30% interest in the truck through the addition of navigation equipment. The Privy Council treated the truck and boat in the same way as the investment properties when remitting.

stated that the couple were “considering a joint purchase meaning [they] would have a 50% interest”.<sup>6</sup>

After the relationship between the parties broke down, in 2009, Mr Marr sought a declaration that he was the sole beneficial owner of all the properties because he had provided all of the relevant purchase money. Mr Collie countered that they were tenants in common in equal shares. In the Supreme Court of the Bahamas, Isaacs J found in favour of Mr Marr. The *Stack v Dowden* presumption of joint beneficial ownership was considered inapplicable “where the primary purpose of the property purchase had been as an investment, even if there was a personal relationship between the parties”.<sup>7</sup> Isaacs J held that Mr Collie had “fallen far short” of rebutting the alternative presumption of resulting trust in relation to the “investment” properties held in joint names and purchased by Mr Marr.<sup>8</sup> He also held that the result would have been the same even if the *Stack* presumption had been applied. In relation to South Westridge, Isaacs J found insufficient evidence of a common intention to justify an equitable interest for Mr Collie, so that all of the properties “were held on resulting or constructive trust” for Mr Marr’s exclusive benefit.<sup>9</sup>

### Court of Appeal decision

Mr Collie appealed to the Bahamas Court of Appeal.<sup>10</sup> Allen P (with whom Blackman and John JJA simply agreed) held that his contention that the properties held in joint names were not “investment” properties was unsustainable because both parties “clearly and repeatedly assert[ed]” that they were purchased as such.<sup>11</sup>

Content to cite Australian authorities,<sup>12</sup> she also held that in cases of joint legal ownership, the maxim “equity follows the law” is presumptively applicable. That presumption was “displaced or rebutted” where the purchase money was unequally provided, and replaced by a presumption of resulting trust in accordance with the proportions of purchase money provided.<sup>13</sup> In a “joint names” case, whether a non-provider of purchase money had an equitable interest depended on the intention of the purchaser at the time of the purchase, such that “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”.<sup>14</sup> In the instant case, the Court of Appeal considered that the judge had not considered whether there was any such evidence of an intention on Mr Marr’s part.

It was also held that the judge had wrongly determined that the burden was on Mr Collie to show that a gift was intended, since:

“all of the authorities provided by [Mr Marr] say that the party who claims the [beneficial] ownership is different from the legal ownership and claims

<sup>6</sup> *Marr v Collie* [2014] BSCA 99 at [16].

<sup>7</sup> *Marr v Collie* Supreme Court of the Bahamas unreported at [52] quoted *Marr v Collie* [2017] UKPC 17 at [18].

<sup>8</sup> *Marr v Collie* Supreme Court of the Bahamas unreported at [57] quoted *Marr v Collie* [2014] BSCA 99 at [4].

<sup>9</sup> *Marr v Collie* Supreme Court of the Bahamas unreported quoted *Marr v Collie* [2014] BSCA 99 at [4].

<sup>10</sup> *Marr v Collie* [2014] BSCA 99.

<sup>11</sup> *Marr v Collie* [2014] BSCA 99 at [8].

<sup>12</sup> *Calverley v Green* [1984] HCA 81, *Muschinski v Dodds* [1985] HCA 78 and *Buffrey v Buffrey* 9 I.T.E.L.R. 455.

<sup>13</sup> *Marr v Collie* [2014] BSCA 99 at [13].

<sup>14</sup> *Marr v Collie* [2014] BSCA 99 at [14].

to be entitled to more than a half interest where the [legal] ownership is joint, must so prove.”<sup>15</sup>

The conveyances, the joint mortgages and the email about Halifax Island constituted:

“cogent evidence, in the absence of any evidence to rebut it, which proves on the balance of probabilities that [Mr] Marr intended [Mr] Collie to have an equal share in the investment properties.”<sup>16</sup>

The presumption of resulting trust was therefore rebutted. The Court of Appeal allowed the appeal and ordered a sale of those properties on the basis that the parties were tenants in common in equal shares.

*Stack v Dowden* was not cited by the Court of Appeal until Allen P came to consider South Westridge, the property conveyed into Mr Marr’s sole name and used by the parties as their home.<sup>17</sup> Having considered the evidence concerning the intimacy of the parties’ relationship, she concluded that the “principles governing resulting trusts are not applicable” to South Westridge.<sup>18</sup> The onus was on Mr Collie to show that he had any interest, and the Court of Appeal found “no reason to disturb” the finding that he had failed because there was no reliable evidence that he spent money developing it, or that there was any agreement between the parties as to his responsibility for outgoings.<sup>19</sup>

## Privy Council decision

Mr Marr appealed to the Privy Council, with the panel consisting of Lord Neuberger (who dissented as to the reasoning in *Stack* but decided *Laskar*), Lady Hale (who gave the lead judgment in *Stack* and jointly did the same in *Jones v Kernott*), Lords Kerr and Wilson (who dissented as to the reasoning in *Jones*) and Lord Sumption. Lord Kerr gave the sole judgment. Mr Marr contended that the email about Harbour Island had featured in neither the Bahamas Supreme Court nor the Court of Appeal hearing and was inadmissible because it had not appeared in the agreed bundle, or in the alternative that the Bahamas Court of Appeal had attached too much weight to it. In addition, he submitted that Isaacs J had been correct to apply the “classic” resulting trust to the investment properties,<sup>20</sup> and that the Court of Appeal had wrongly interfered with his conclusions on the facts and the law.

Lord Kerr embarked on a detailed analysis of the case law. Mindful of Lord Walker’s citation in *Stack* of the *Muschinski v Dodds*<sup>21</sup> approach to cases where a combined domestic and commercial partnership existed, he concluded that “it is the Board’s view that to consign the reasoning in *Stack* to the purely domestic setting would be wrong”.<sup>22</sup> As for Lady Hale’s enunciation of the *Stack* presumption, Lord Kerr held that “there is no reason to doubt its possible applicability to property purchased by a couple in an enterprise reflecting their joint commercial, as well

<sup>15</sup> *Marr v Collie* [2014] BSCA 99 at [15].

<sup>16</sup> *Marr v Collie* [2014] BSCA 99 at [19].

<sup>17</sup> *Marr v Collie* [2014] BSCA 99, at [29], citing *Stack v Dowden* [2007] UKHL 17.

<sup>18</sup> *Marr v Collie* [2014] BSCA 99 at [29].

<sup>19</sup> *Marr v Collie* [2014] BSCA 99 at [35].

<sup>20</sup> *Marr v Collie* [2017] UKPC 17 at [29].

<sup>21</sup> *Muschinski v Dodds* [1985] HCA 78, cited *Stack v Dowden* [2007] UKHL 17 at [32].

<sup>22</sup> *Marr v Collie* [2017] UKPC 17 at [39].

as their personal, commitment” and “it is clear that she did not intend that the principle should be confined exclusively to the domestic setting”.<sup>23</sup> The intention of the parties is key, and that was not undermined by *Laskar*. Conversely, even on Lord Neuberger’s dissenting analysis in *Stack* with its preference for the resulting trust:

“[w]here additional evidence is available in the form of testimony from the parties themselves as to what their intentions were when the property was acquired...this can rebut the presumption of resulting trust.”<sup>24</sup>

Lord Kerr addressed the issue of the conflict between the *Stack* and resulting trust presumptions, noting that a “simplistic” solution might be to say 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 ... [and] the resulting trust presumption obtains.”<sup>25</sup>

He was nevertheless anxious 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”.<sup>26</sup> He emphasised the importance of context, determined on these facts by common intention or the lack thereof. He held that:

“[i]f 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.”

But:

“[i]f, 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.”<sup>27</sup>

On the facts of the present case, each party was considered to be relying on the central question of common intention but they disagreed on what it was. Both lower courts were held to have engaged in insufficient analysis of that intention. Isaacs J had not given a sufficient reason for saying that the result would have been the same had the *Stack* approach been applied: that 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,”<sup>28</sup>

<sup>23</sup> *Marr v Collie* [2017] UKPC 17 at [40].

<sup>24</sup> *Marr v Collie* [2017] UKPC 17 at [46].

<sup>25</sup> *Marr v Collie* [2017] UKPC 17 at [53].

<sup>26</sup> *Marr v Collie* [2017] UKPC 17 at [54].

<sup>27</sup> *Marr v Collie* [2017] UKPC 17.

<sup>28</sup> *Marr v Collie* [2017] UKPC 17 at [59].

and of the contents of the email. The Court of Appeal, for its part, had failed to consider the judge's findings that Mr Marr did not intend equal beneficial shares (in light of the fact that he found Mr Marr more credible than Mr Collie) and that the decision to convey into joint names was on the basis that Mr Collie would make an equal contribution to development. It had also erred by basing its decision on an email on which Mr Marr and his counsel were never even given the opportunity to comment.

The Board felt that it had no alternative but to remit the case for a proper examination of the common intention of the parties in relation to the investment properties. It also held 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.”<sup>29</sup>

That remission “did not include the South Westridge property”, the implication being that its beneficial ownership was no longer in dispute.<sup>30</sup> The Board therefore did not appear to analyse the vexed question of the matters relevant to the acquisition in a “sole name” case, as distinct from the quantification in a “joint names” case, of an interest under a common intention constructive trust.<sup>31</sup>

## The prominence given to Lord Neuberger's approach

The weight given by the Board to Lord Neuberger's approach in *Stack* is striking, given its character as a dissenting judgment on the reasoning. The implication seems to be that, even if he was incorrect to apply the resulting trust to the facts of *Stack* itself, Lord Neuberger's analysis of that trust was nevertheless accurate, including on the point that:

“[w]here additional evidence is available in the form of testimony from the parties themselves as to what their intentions were when the property was acquired, ... this can rebut the presumption of resulting trust.”<sup>32</sup>

Lord Kerr's purpose was perhaps to demonstrate that whether the resulting trust or the *Stack* approach applied, both were merely presumptions (however strong on particular facts) that could be rebutted by evidence of what the parties actually intended. It is noteworthy, however, that Isaacs J does not appear to have applied Lord Neuberger's tentative suggestion in *Laskar* that:

“a mortgage in joint names ... for which [the parties] were jointly and separately liable, in respect of a property which they jointly owned ... should be treated in effect as representing equal contributions ... by each party to the acquisition of the property.”<sup>33</sup>

<sup>29</sup> *Marr v Collie* [2017] UKPC 17 at [60]. A sum of money had been awarded to Mr Collie by Isaacs J to represent contributions to one property. The Court of Appeal had remitted so that contributions to the *improvement* of the jointly owned property could be determined.

<sup>30</sup> *Marr v Collie* [2017] UKPC 17.

<sup>31</sup> See, generally, B. Sloan, “Keeping up with the Jones case: Establishing Constructive Trusts in ‘Sole Legal Owner’ Scenarios” (2015) 35 *Legal Studies* 226.

<sup>32</sup> *Marr v Collie* [2017] UKPC 17 at [46].

<sup>33</sup> *Laskar v Laskar* [2008] EWCA Civ 347.

since he found that the properties were entirely owned by Mr Marr, notwithstanding the fact that Mr Collie was a party to joint mortgages and had made some mortgage contributions.

## Domestic v Commercial situations

In the aftermath of *Stack, Laskar* and other cases, Piska wrote that “the court must shoe-horn the parties’ relationship [including the reasons for the property purchase] into the domestic or commercial dichotomy that determines the appropriate legal principles”.<sup>34</sup> The dichotomy appeared to be strengthened by the assertion in *Jones* that:

“[t]he time has come to make it clear ... that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is *no* presumption of a resulting trust,”<sup>35</sup>

albeit that Lady Hale and Lord Walker later said that such a presumption would merely be “rare in a domestic context”.<sup>36</sup>

This dichotomous approach had its difficulties because of the ambiguities surrounding when precisely a case might be considered “domestic”.<sup>37</sup> Piska considered it problematic precisely because the same factors are being evaluated in asking whether the case is a domestic one and whether there is a common intention sufficient to found the existence of a constructive trust, and Yip and Lee have recently queried the desirability of a “commercialisation” of trusts law more generally.<sup>38</sup> The courts, moreover, have on occasion had to grapple with difficult categorisations. Recently, for example, the resulting trust has been applied to a buy-to-let property purchased by a married couple in joint names,<sup>39</sup> and to a dispute over a residential property between a step-mother and step-daughter who were not close.<sup>40</sup>

But Sloan did at least write that “*Laskar* does attach significance to the categorisation of a case”,<sup>41</sup> and now the assertion that *Laskar* “is authority for the proposition that the principle in *Stack v Dowden* ... applies only in ‘the domestic consumer context’” has been specifically rejected without casting doubt on the correctness of the decision.<sup>42</sup> While the need to deal with “mixed” cases was recognised in *Stack* itself,<sup>43</sup> the appropriate presumption could previously seem relatively clear once a case had been categorised using *Laskar*’s “primary purpose”

<sup>34</sup> N. Piska, “Two Recent Reflections on the Resulting Trust” [2008] Conv. 441, 446.

<sup>35</sup> *Jones v Kernott* [2011] UKSC 53 at [25], emphasis added.

<sup>36</sup> *Jones v Kernott* [2011] UKSC 53 at [31].

<sup>37</sup> See, e.g. B. Sloan, “Proprietary Estoppel: Recent Developments in England and Wales” (2010) 22 Singapore Academy of L.J. 110; N. Hopkins, “The Relevance of Context in Property law: A Case for Judicial Restraint?” (2011) 31 *Legal Studies* 175; A. Hayward, “Finding a Home for ‘Family Property’” in N. Gravells (ed), *Landmark Cases in Land Law* (Oxford: Hart Publishing, 2013), Ch.10.

<sup>38</sup> M. Yip and J. Lee, “The Commercialisation of Equity” *Legal Studies*, forthcoming at <http://dx.doi.org/10.1111/lest.12167> [Accessed 7 July 2017].

<sup>39</sup> *Erlam v Rahman* [2016] EWHC 111 (Ch).

<sup>40</sup> *Wodzicki v Wodzicki* [2017] EWCA Civ 95, cf. *Adekunle v Ritchie* [2007] B.P.I.R. 1177, where the *Stack* presumption was applied to a mother and son who lived together.

<sup>41</sup> B. Sloan, “Proprietary Estoppel: Recent Developments in England and Wales” (2010) 22 Singapore Academy of L.J. 110, [44].

<sup>42</sup> *Marr v Collie* [2017] UKPC 17 at [49].

<sup>43</sup> *Stack v Dowden* [2007] UKHL 17 at [32].

test,<sup>44</sup> even if the clarity was not always evident.<sup>45</sup> Somewhat similarly to Isaac J's approach, the English High Court specifically held in *Erlam v Rahman* that "[t]here is no reason to apply the special approach to the acquisition of homes to an acquisition of property as a business proposition".<sup>46</sup> The impact of the Privy Council's decision in *Marr v Collie*, however, appears to be that even the categorisation of a case as "commercial/investment" will not necessarily preclude the operation of the *Stack* presumption. As we seek to demonstrate in the next sub-section, the converse may also be true and such an approach based on categorisation has been branded "simplistic".<sup>47</sup>

## The future role of *Stack* and the effect on litigation

A difficulty with the suggestion that whether the starting point (of *Stack* or the resulting trust) itself depends on the common intention of the parties after categorisation is that, as Thompson and George have pointed out:

"[i]t is integral to [purchase money resulting trust] cases ... that it is unnecessary, in order for a resulting trust to arise, to have regard to the actual intention of the parties in order for the contributor to acquire an interest in the property under a resulting trust."<sup>48</sup>

While it is true that some basic reference to the parties' intentions in relation to the property is necessary in order to decide whether the case is domestic or commercial, their purpose in buying it can be distinguished from their intended ownership, and the factual inquiry for the former is likely to be more straightforward, broader brush and less realistically the subject of a dispute. For the latter, the essential problem is that while both the resulting trust and the *Stack* presumption could be *rebutted* by evidence of some contrary common intention about their ownership, their very purpose is to provide a starting point where such evidence might be insufficiently clear. If both presumptions depend on an analysis of the parties' common intention *before they arise in the first place*, even after a case has been categorised, that function is lost.<sup>49</sup> That leads to a logical flaw in the interaction between the two types of trust, as the presumption of a resulting trust can be displaced by the existence of an agreement which gives rise to a constructive trust.<sup>50</sup> How can that displacement happen if the presumption of a resulting trust is not applied by default to any purchase in joint names where they have contributed unequally to the purchase price, prior to adducing evidence regarding the parties' intentions?

This additional layer of investigation into the parties' intentions prior to the application of either presumption prompts wider reflection about the impact of the current line of authorities on common intention constructive trusts. It should be

<sup>44</sup> *Laskar v Laskar* [2008] EWCA Civ 347 at [17].

<sup>45</sup> See, e.g. *Geary v Rankine* [2012] EWCA Civ 555.

<sup>46</sup> *Erlam v Rahman* [2016] EWHC 111 (Ch) at [41].

<sup>47</sup> *Marr v Collie* [2017] UKPC 17 at [53].

<sup>48</sup> M. P. Thompson and M. George, *Thompson's Modern Land Law*, 6th edn (Oxford: OUP 2017), p.305.

<sup>49</sup> B. Sloan, "Burdens, Presumptions and Confusion in the Law of Want of Knowledge and Approval" *University of Cambridge Faculty of Law Research Paper No.26/2017* at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2977319](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977319) [Accessed 7 July 2017] has recently pointed out a similar difficulty with inconsistent presumptions and whether presumptions arise or are rebutted in the context of want of knowledge and approval of wills.

<sup>50</sup> See, e.g. *Agarwala v Agarwala* [2013] EWCA Civ 1763; [2014] 2 F.L.R. 1069.

remembered that the entire rationale for the alleged strength of the starting presumption in domestic cases (that equity follows the law) was, according to Lady Hale in *Stack*, because “strong feelings are aroused when couples split up”, which leads “people to spend far more on the legal battle than is warranted by the sums actually at stake”.<sup>51</sup> The idea, according to the Privy Council in *Marr v Collie*, that one should identify whether the parties have a “mutual wish” before the presumptive starting point can be identified, flies in the face of the desire to make the law as clear and predictable as possible. The people in relationships which break down will normally have different views about what their intention was or is—indeed, that is the normally the reason for the dispute about ownership—and clear categories of presumption allow pragmatic advice to be given to clients in the hope of avoiding the financial and emotional cost of a court case.

It is also difficult to see how this contextual approach laid out in *Marr v Collie* might work in practice. Suppose that evidence is adduced that A and B did not wish their joint legal ownership of the property to be reflected as joint beneficial ownership. According to Lord Kerr, a resulting trust solution may provide the answer in these cases,<sup>52</sup> but that could also constitute one of the factors to rebut the presumption of joint beneficial ownership under a constructive trust.<sup>53</sup> That wish, in other words, does not of itself tell a court which trust path to take in the absence of a prior presumption about which framework is more appropriate to apply to the dispute between A and B.

### The weight of Privy Council decisions

The potential effect of *Marr v Collie* on the law is clearly significant, but one complicating factor is that it has been handed down by the Judicial Committee of the Privy Council, rather than the UK Supreme Court. The Privy Council is the final appellate court for a number of Commonwealth countries, as well as the 14 British Overseas territories, the Channel Islands, and the Isle of Man. The status of Privy Council decisions in English law’s system of precedent was recently clarified by the Supreme Court in *Willers v Joyce (No.2)*,<sup>54</sup> and several points bear repetition in the present context. First, while a court in England and Wales should find a Privy Council decision of “great weight and persuasive value”, it is clearly not binding on an English court as a matter of precedent.<sup>55</sup> Secondly, an English court should never follow a decision of the Privy Council if it is inconsistent with a decision that would be binding under the normal system of precedent. Thirdly, and by exception, where the Privy Council decides that an earlier decision of the House of Lords or Supreme Court, or Court of Appeal, is wrong, they can expressly direct that the earlier decision is incorrect and the Privy Council decision should be treated as representing the law of England and Wales.<sup>56</sup> There is also the possibility that the Privy Council was merely providing “guidance” about the

<sup>51</sup> *Stack v Dowden* [2007] UKHL 17 at [68].

<sup>52</sup> *Marr v Collie* [2017] UKPC 17 at [54].

<sup>53</sup> As per Lady Hale’s non-exhaustive factors listed in *Stack v Dowden* [2007] UKHL 17 at [69].

<sup>54</sup> *Willers v Joyce (No.2)* [2016] UKSC 44.

<sup>55</sup> *Willers v Joyce (No.2)* [2016] UKSC 44 at [12].

<sup>56</sup> *Willers v Joyce (No.2)* [2016] UKSC 44 at [21].



proper interpretation of the English authorities, particularly given the panel membership.<sup>57</sup>

There was no express indication in *Marr v Collie* that any otherwise binding decision should be seen as wrong, nor that the decision should be taken to represent English law. That omission must be because of Lord Kerr's assertion that the House of Lords in *Stack* had never meant to confine the presumption to domestic cases alone, and equally it had not been Lord Neuberger's intent to carve out commercial purchases as the sole province of resulting trusts in *Laskar*. This is a delicate argument, to say the least, because it disregards the near universal view on the composite reasoning of those cases, as well as *Jones v Kernott*.<sup>58</sup> The suspicion might be that this approach was taken precisely so that the Privy Council were not faced with the prospect of declaring an English court decision incorrect. Not only that, there is also a possible conflict with the Court of Appeal's decision in *Wodzicki v Wodzicki*, where the *Stack* presumption was not applied because 'there was nothing close about the relationship' between the appellant and respondent.<sup>59</sup> The Court of Appeal's reasoning had nothing to do with any ascertainment of the intention that the parties had, but rather the dynamic or strength of their relationship. The High Court decision in *Erlam v Rahman* more obviously conflicts with the decision in *Marr v Collie*; it applies that "simplistic" dichotomy of resulting trusts applying in commercial cases, as it understood *Laskar* to be authority for. What should a Circuit Judge, faced with a dispute of this kind, now do: apply the doctrine of precedent strictly and follow the English line of authorities from *Laskar* to *Erlam*, or bow to the weight of the Privy Council decision in *Marr v Collie*?

## Conclusion

Presumptions about how the division of property is regulated and calculated when relationships, whether commercial or domestic in origin, break down are important. At their core, they reduce the potential scope, and indeed threat, of litigation; in Lord Hope's words in *Stack*, "[t]he advantage of this approach [of joint beneficial ownership] is that everyone will know where they stand with regard to the property".<sup>60</sup> This is true even if the reported cases suggest that it is relatively easy to rebut the *Stack* presumption, as both *Stack* and *Jones* themselves demonstrate.<sup>61</sup> The commercial/domestic dichotomy had theoretical weaknesses, but there was a great deal of practical sense to it. Commercial partners usually do not expect survivorship with its "tontine 'winner takes all' effect"<sup>62</sup> to be applied to their relationships, which is at odds with a presumption of joint beneficial ownership. Instead, they want out what they put in, and the admittedly simplistic but

<sup>57</sup> *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 at [68] per Arden LJ.

<sup>58</sup> See, e.g. B. McFarlane, N. Hopkins and S. Nield, *Land Law: Text, Cases and Materials*, 3rd edn (Oxford: OUP, 2015), pp.371–372, pp.553–554; P. S. Davies and G. Virgo, *Equity & Trusts: Text, Cases and Materials*, 2nd edn (Oxford: OUP, 2016), p.455; M. Dixon, *Modern Land Law*, 10th edn (Abingdon: Routledge, 2016), pp.174–175; M. P. Thompson and M. George, *Thompson's Modern Land Law*, 6th edn (Oxford: OUP, 2017), pp.300–302.

<sup>59</sup> *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at [25] per David Richards LJ. Confusingly, the judge at first instance had identified the intentions of the claimant and defendant before deciding that they owned the property according to their contributions under a resulting trust.

<sup>60</sup> *Stack v Dowden* [2007] UKHL 17 at [5].

<sup>61</sup> cf. e.g. *Fowler v Barron* [2008] EWCA Civ 377.

<sup>62</sup> *Stack v Dowden* [2007] UKHL 17 at [57] per Lady Hale, applying *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] A.C. 549.

unquestionably efficient presumption of a resulting trust achieves precisely that. Cohabiting couples, in contrast, have a much more complex attachment to their property and to each other, and the presumption of joint ownership together with the non-exhaustive factors listed in *Stack* to rebut that presumption provides a nuanced and discretionary (if sometimes difficult) approach.

The decision of the Privy Council in *Marr v Collie* is to be regretted because it takes the law one step back; commercial partners could now find themselves tied up in litigation over what they had intended or not intended because one party is encouraged to chance their arm, in the hope they could take a higher proportion of the equity under the *Stack* framework,<sup>63</sup> and cohabiting couples could equally be faced with a submission that the presumption of joint beneficial ownership should not be used at all. Ultimately, while the application of two presumptions in two different circumstances may indeed be “simplistic” and cannot be entirely divorced from common intention, it is also conceptually simple and efficient, and the loss of those presumptions renders the law of implied trusts as it applies to the purchase of real property even more needlessly complex and uncertain.

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## A Proprietary Right to Recreate

Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2017] EWCA Civ 238

☞ Easements; Sports and leisure facilities; Validity

### Introduction

*Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*<sup>1</sup> (*Regency Villas*) presented the Court of Appeal with the first opportunity since *Re Ellenborough Park*<sup>2</sup> to consider the issue of whether an easement can exist for the use of recreational facilities. In a single judgment delivered by Vos LJ it was held that, in principle, there could be a valid easement to use recreational facilities, provided that the right gives a utility or benefit to the dominant tenement. Accordingly, a number of the rights claimed by the claimants (who were the respondents in the appeal) did amount to a valid easement, although some others did not.

<sup>63</sup> Lord Neuberger described the approach in *Stack* as “invitation to an expensive and time consuming exercise at all stages—disclosure, witness statements and court hearing”. See “The Conspirators, The Tax Man, The Bill of Rights and a Bit About the Lovers”, Chancery Bar Association Annual Lecture, 10 March 2008 at [18].

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<sup>1</sup> *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238.

<sup>2</sup> *Re Ellenborough Park* [1956] Ch. 131.