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***Kernott, Stack, and Oxley* made simple: a practitioner's view**

Juanita Roche*

Introduction

The law on constructive trusts of the home has a reputation for being difficult. This reputation is undeserved: as regards cases where there is one legal owner and someone else asserts a beneficial interest, the law has been perfectly clear since *Oxley v Hiscock* [2005] Fam 211; as regards cases where the property is in joint names, the law has been clear since *Stack v Dowden* [2007] 2 AC 432.

Put very simply, for introductory purposes: *Oxley* established that, where someone who is not a legal owner of a property is held to have a beneficial interest in it on the basis that this was the parties' common intention, but no common intention as to the size of that beneficial interest can be found, the court should assess the size of the parties' shares in terms of what is "fair having regard to the whole course of dealing between them in relation to the property."¹ In what follows, I will call this last 'the *Oxley* quantification mechanism' or simply 'the *Oxley* test', as it is what is distinctive about *Oxley*. *Stack* laid down that, where a property is legally held in joint names, there is a presumption that the beneficial interest is also held as a joint tenancy; if that presumption is rebutted to the extent of establishing that the parties did not intend beneficial joint tenancy but not to the extent of establishing a common intention as to the size of their shares, the court should apply the *Oxley* test.²

In practice, the main difficulty in relation to *Oxley* has been that some lawyers and some judges have failed to consider the last five words of the *Oxley* test, "in relation to the property"; as described below, this is one of the two things found by the House of Lords

* Barrister, London. I am grateful to Nick Isaac for encouraging me to write an article on this subject; to Amanda Gourlay, Richard Jones, and Rob Kealey for acting as property-Bar, family-Bar, and lay guinea pigs; and to the Editor, for comments both trenchant and kind. Any errors or outrages remain, of course, my own.

¹ *Oxley v Hiscock* [2005] Fam 211 at [69].

² When *Stack* first came out, there were some people who thought, on the basis of what is said in a single paragraph, [61], of Lady Hale's speech, that she and the majority in *Stack* had disapproved *Oxley*; and this view is still sometimes expressed—for recent example, by Sir Terence Etherton, albeit only in passing, in 'Constructive trusts and proprietary estoppel: the search for clarity and principle' [2009] Conv 104 at 107. This is, with great respect, a misinterpretation, of the majority view in general and even of Lady Hale's [61], for reasons discussed in detail below. See also *Megarry and Wade*, 7th ed (2008), para 11-029 fn 188, stating in terms and as usual correctly that *Oxley* at [69] was approved in *Stack* at [61].

to have gone wrong at first instance in *Stack*. The difficulty with *Stack* is that their Lordships and her Ladyship covered an enormous amount of territory obiter, such that the explanation of the actual reasoning linking the actual facts of the case at hand to the result got short shrift. Further, while there was only one dissenting speech, it was by Lord Neuberger; and, although he actually concurred in the result, his concerns regarding reasoning were seductively vividly expressed.³ It therefore took longer than it might have done for the essentially simple nature of the ratio in *Stack* to become clear; and there has been a continuing lure to digression on the part of counsel and judges.

The result is *Kernott v Jones* [2010] EWCA Civ 578, in which the majority spend a great deal of time discussing *Stack*, and in particular the issues which concerned Lord Neuberger, despite the fact that those issues turn out to have no relevance to the matter before them. The risk therefore arises that the essentially simple nature of the ratio in *Kernott* will also be obscured, and that misunderstandings of *Stack* and *Oxley* will be reinforced. This article is an attempt (even if arguably doomed) to nip that risk in the bud, in the case of *Kernott*, and, in the cases of *Stack* and *Oxley*, to cut a path through the undergrowth for the lawyer on the ground.⁴

What *Kernott* does

In *Kernott*, an unmarried couple had purchased a house, in joint names, with a joint mortgage, and lived there with their two children, one born a year before and the other born a year after the purchase.

Eight years later, in October 1993, the couple's personal relationship broke down and Mr Kernott moved out. From then on, Mr Kernott made no contribution to the property, no contribution to Ms Jones, and little or no contribution to the children, and Ms Jones did not pursue him for any contributions; nor, conversely, did Mr Kernott seek or Ms Jones pay any contributions to Mr Kernott.

Fourteen years after the separation, however, Mr Kernott popped up and asserted his entitlement to a 50% share of the house. Ms Jones issued a claim for a declaration that she was the sole beneficial owner. Crucially, though, "[i]t was common ground between the

³ The key features of Lord Neuberger's speech will be described in the third section of this article.

⁴ Only after submitting the final draft of this article did I discover that the Supreme Court is to consider *Kernott* after all; I hope the court will take the opportunity, even if obiter, to provide a clear restatement of the rules laid down by *Rosset*, *Oxley*, and *Stack*.

parties [before the judge at first instance and in the subsequent appeals] ... that the parties held the beneficial interest in [the house] in equal shares until October 1993”.⁵

At first instance, HHJ Dedman held that Mr Kernott’s failure, for 14 years, to make any contribution to the property entitled the court to infer that the parties’ common intention had changed, such that equal shares were no longer intended.⁶ He did not however find an alternative common intention and therefore relied on the *Oxley* quantification mechanism to find that Ms Jones had a 90% and Mr Kernott a 10% beneficial interest.⁷ Nicholas Strauss QC, sitting as a Deputy High Court Judge, dismissed Mr Kernott’s appeal.⁸

In the Court of Appeal, the simple question—ultimately—was whether, in the absence of an express agreement that the shares of beneficial ownership should change, there had been sufficient evidence for the judge to infer that the parties’ common intention had changed.⁹ HHJ Dedman and Mr Strauss had felt the evidence did suffice. Jacob LJ felt that it was not for an appellate court to interfere with a trial judge’s inferences from all the facts unless that inference were positively perverse, and he did not think HHJ Dedman’s inference was.

Rimer LJ, however, with whom Wall P agreed (on this point), felt that the trial judge’s conclusion was perverse, albeit that he put it marginally more politely: “the evidence ... simply provide[s] no support” for an inference that the parties intended a change in beneficial ownership.¹⁰ In particular, Rimer LJ noted that, while Mr Kernott had not made any direct or indirect contribution to the property after 1993, he had received no benefit from the property after 1993 either. The latter fact had to be set against the former, and the two taken together did not justify an inference of changed intention; there would have to be something more, “and there was nothing more of relevance”.¹¹

⁵ *Jones v Kernott* [2010] 1 All ER 947 at 949h, [2], and see *Kernott* [2010] EWCA Civ 578 at [58]. Commentators who have overlooked the significance of this fact have found it “difficult to distinguish *Stack*”, e.g. N. Piska, ‘Ambulatory trusts and the family home: *Jones v Kernott*’ [2010] Tru LI 87 at 90. In *Stack*, however, “there never was a stage when both parties intended that their beneficial interests in the property should be shared equally.” (*Stack* [2007] 2 AC 432 at [12])

⁶ *Kernott* [2010] EWCA Civ 578 at [19] and [19(31)].

⁷ *Kernott* [2010] EWCA Civ 578 at [19].

⁸ *Jones* [2010] 1 All ER 947.

⁹ The claim by S. Gardner and K. M. Davidson, ‘The future of *Stack v Dowden*’, [2011] LQR 13 at 14, that it was “a difference in view over the meaning of ‘common intention’” which caused the Court of Appeal to reach a different decision from the lower courts is incorrect.

¹⁰ *Kernott* [2010] EWCA Civ 578 at [83].

¹¹ *Kernott* [2010] EWCA Civ 578 at [82].

To spell out the significance of this pair of facts, the point is that, taken together, they are equivocal. They could of course mean a tacit deal that Mr Kernott would give up ownership altogether, and thus both its rights and its responsibilities. Yet they could also mean a tacit deal that his ownership would continue but, for the time being, his compensation for receiving no benefit from the property was that he would not have to pay for any of the burden.

So far, so good. The Court of Appeal's decision gives us, first, a new category of case in this area and, second, a simple legal test. We now have '*Kernott* cases' alongside '*Oxley* cases' and '*Stack* cases', the '*Kernott* case' being one where: a) the property is in joint names, b) there is at some point a common intention as to the size of the shares, and c) one party asserts that the common intention subsequently changed. The test is first of all whether there is sufficient evidence from which to infer that the parties' intention really had changed.¹²

What *Kernott* doesn't do: part one

It has been suggested that the decision of the Court of Appeal in *Kernott* does much, much more:

“The majority in *Jones v Kernott* therefore endorses and adopts the view of Lord Neuberger in *Stack v Dowden*, in the sense that imputation of intentions, and fairness as a self-standing criterion for quantification of beneficial entitlement, are both within the forbidden territories, and therefore outside the purview of the court. This is a helpful clarification for ... trial judges ...”¹³

This is, I think, wrong: it is conducive to misunderstanding of the stage in the analysis of *Kernott* or any similar case at which Lord Neuberger's critique is relevant, and it mischaracterises the position of Wall P.

In *Kernott* in the Court of Appeal, there does not appear to have been any dispute between their Lordships as to the stages of analysis actually followed by HHJ Dedman.¹⁴ As already summarised, the judge expressly found, first, that he could infer a changed

¹² *Kernott* [2010] EWCA Civ 578 per Rimer LJ at [78] and [83], and see Wall P at [32] and Jacob LJ at [106].

¹³ S. Bridge, '*Jones v Kernott*: fairness in the shared home—the forbidden territory or the promised land?', [2010] Conv 324 at 328.

¹⁴ *Kernott* [2010] EWCA Civ 578 at [19] and [92]-[99].

common intention, that the beneficial interest should not be held 50-50; and, second, that a fair distribution in light of the whole course of dealing between the parties would be 90-10.

On its own, there would be some problems with this; but it is clear that the judge was taking another couple of analytical steps inbetween. For one thing, the judge considered and rejected Ms Jones's pleaded case that there was a new common intention that she have 100% of the beneficial interest.¹⁵ For another, in HHJ Dedman's judgment, his statement of his conclusions immediately follows discussion of *Stack*.¹⁶

HHJ Dedman's analysis can therefore be said to have consisted of four stages, each being a question and answer:

1. Q: Can one infer from these facts that the parties had a common intention, or can one find an express agreement, that their beneficial interests should no longer be equal?
A: Yes.
2. Q: If 'yes', can one infer from these facts a common intention, or find an express agreement, as to the size of the parties' shares?
A: No.
3. Q: If 'no', can one infer or impute a common intention that the size of the parties' shares be assessed in terms of what is fair having regard to the whole course of dealing between them in relation to the property?
A: Yes.
4. Q: If 'yes', what on these facts is the result?
A: 90% to Ms Jones, 10% to Mr Kernott.

These are essentially the same questions and answers as those posed and given by the majority in *Stack*. Obviously, Answer 4 was different; more substantively, Question 1 in *Stack* was 'Can one infer from these facts that the parties had a common intention, or can one find an express agreement, that their beneficial interests should not be held as a joint

¹⁵ *Jones* [2010] 1 All ER 947 at 962h, [48].

¹⁶ *Kernott* [2010] EWCA Civ 578 at [97].

tenancy?’ For present purposes, though, there is no material difference between the *Kernott* and *Stack* versions of Question 1.

In *Stack*, Lord Neuberger’s discussion of imputation and fairness was entirely directed at Question 3 and, famously, constituted a lengthy and resounding ‘No’. ‘Imputing’ rather than ‘inferring’ an intention was in his view impermissible on authority and objectionable in principle; and he appeared to say that the court should not consider what was fair in arriving at a result in these cases, going so far as to describe both “imputed intention and fairness” as “forbidden territories”.¹⁷

Lord Neuberger did not, however, have any dispute with Question 1, or with the same answer with regard to the case at hand, ‘Yes’, as that given by the majority. His dissenting analysis was that, where, as in *Stack*, the property was in joint names but the contributions to the purchase price were unequal, this second fact would, in the absence of any other relevant evidence, itself dictate the answer ‘Yes’ to Question 1—and quantification on the basis of a resulting trust.¹⁸

It cannot therefore be said that the majority in *Kernott* applied Lord Neuberger’s (apparent) analysis in *Stack* regarding imputation and fairness, because both Wall P and Rimer LJ decided the matter at Stage 1, by finding the answer to be ‘No’—whereupon all of the following questions fell away. If they did not apply it, it is not ratio; and it is therefore unlikely to be helpful to trial judges.¹⁹

Further, it cannot be said that “the majority” in *Kernott* “endorses” Lord Neuberger’s views on imputation and fairness, because Wall P doesn’t. Wall P does say “there is considerable force in Lord Neuberger’s analysis” but goes on to emphasise that it was a minority view.²⁰ Wall P also goes out of his way to stress, in his conclusions on the case before him, his approval of *Oxley*—when *Oxley* was the main target of Lord Neuberger’s

¹⁷ *Stack* [2007] 2 AC 432 at 477D, [145].

¹⁸ *Stack* [2007] 2 AC 432 at 468E-H, [109]-[110]. This last sentence is a significant oversimplification, as Lord Neuberger introduces modifications to a strict resulting-trust analysis which bring him very close to *Oxley*. Moreover, he does not state his justification for these modifications, and the only imaginable justification for the sort of modifications he makes is for the sake of fairness. Further discussion of his proposed alternative—with the substance of which I have, with the greatest respect, a great deal of sympathy—is however outside the scope of this article.

¹⁹ Of course, even if Stage 3 had been at issue, Lord Neuberger’s analysis could not have been applied by the Court of Appeal unless they could either completely distinguish Stage 3 in *Kernott* from Stage 3 in *Stack*—which would be difficult—or present Lord Neuberger’s view as having actually been the majority view in *Stack*—which might seem impossible, but stranger things have happened: *Barlow Clowes v Eurotrust International Ltd* [2006] 1 WLR 1476.

²⁰ *Kernott* [2010] EWCA Civ 578 at [50].

disapproval.²¹ Above all, Wall P takes care expressly to define the issue before him as being what can be inferred in these circumstances—rather than being a dispute about inference versus imputation—and to quote HHJ Dedman as having directed himself “to infer”.²²

It has been said that readers of Wall P’s judgment can infer a covert approval of Lord Neuberger’s analysis from the fact that, at paragraphs 54 and 57 to 59, Wall P “uses the terms ‘infer’ and ‘inference’ to the total exclusion of ‘impute’ and ‘imputation’”.²³ These are however the paragraphs in which Wall P is foreshadowing and then stating his conclusion, on an issue which he has defined, and shown the first-instance judge to have defined, as purely about inference. Further, his conclusion is, as above, entirely focused on Stage 1. At Stage 1 in *Kernott*, the question was whether the previous agreed common intention had been overridden by something else. No one has ever suggested, in this area of law, that an imputation by the court could override an express or inferred common intention; the *Oxley* test, whether it involves inference or imputation, by definition only applies where there would otherwise be a vacuum. In fact, Wall P cites *Oxley* to this effect in his conclusion.²⁴

Finally, it must be noted that Nicholas Strauss QC did have a reason to consider Stage 3, as his answers to Questions 1 and 2 were the same as HHJ Dedman’s.²⁵ Given that the deputy judge did have some interesting things to say,²⁶ and given the general interest in this area, it is understandable that their Lordships in the Court of Appeal were lured down the same path. However, in an area bedevilled by wild geese,²⁷ it would with respect have been better to resist being drawn into a wild-goose chase and instead have given judgment to the well-known tune of: ‘The appeal having succeeded on consideration of Stage 1, it is not necessary to consider the deputy judge’s [‘erudite’/‘interesting’/ ‘problematic’—delete as desired] discussion of Stage 3.’

What *Kernott* doesn’t do: part two

²¹ *Kernott* [2010] EWCA Civ 578 at [55]-[59]; *Stack* [2007] 2 AC 432 at 476G-477A, [144].

²² *Kernott* [2010] EWCA Civ 578 at [6] and [19].

²³ *Bridge*, [2010] Conv 324 at 328.

²⁴ *Kernott* [2010] EWCA Civ 578 at [59].

²⁵ *Jones* [2010] 1 All ER 947 at 962c-963a, [47]-[48].

²⁶ With some of which I agree, as will be indicated in the next section.

²⁷ Not to mention chickens of destiny: *Cooke v New River Company* (1888) 38 ChD 56, per Bowen LJ at 70-71.

All that said, Rimer LJ does conduct a critique of *Stack*, and its potential usefulness needs to be considered.

He makes surprisingly plain just how dim his view is of the majority's decision and reasoning in *Stack*:

"I suspect that *Stack* may be regarded by trial judges as presenting something of a challenge. I am not sure, with respect, what is to be made of the emphasis by Baroness Hale and Lord Walker that *Stack* was an exceptional case."²⁸

"Taking the facts of *Stack* itself, it may not perhaps be obvious to everyone how the facts described by Baroness Hale justified the inference of an unspoken intention that the beneficial shares were to be held in the declared proportions."²⁹

He is particularly concerned about a single use by Lady Hale of the word 'imputed', namely in her statement at the end of paragraph 60, "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":

"As for Baroness Hale's statement in [60] that the court must or can also look for the parties' imputed intention, I do not, with the greatest respect, understand what she meant. It is possible that she was using it as a synonym for inferred ... in which case it adds nothing. If not, it is possible that she was suggesting that the facts in any case might enable the court to ascribe to the parties an intention that they neither expressed nor inferentially had: in other words, that the court can invent an intention for them. That, however, appears unlikely, since it is inconsistent with Baroness Hale's repeated reference to the fact that the goal is to find the parties' intentions, which must mean their real intentions. Further, the court could and would presumably only consider so imputing an intention to them if it had drawn a blank in its search for an express or an inferred intention but wanted to impose upon the parties its own assessment of what would be a fair resolution of their differences. But Baroness Hale's rejection of that as an option at paragraph [61] must logically exclude that explanation."³⁰

As shown above, this analysis is purely obiter; but is it nonetheless useful? From the point of view of a practitioner, someone obliged to work with authority, the answer is no.

²⁸ *Kernott* [2010] EWCA Civ 578 at [75].

²⁹ *Kernott* [2010] EWCA Civ 578 at [76].

³⁰ *Kernott* [2010] EWCA Civ 578 at [77].

Rather, with respect, it seems more likely to confuse than to clarify and, like much of what has been written about imputation and fairness since *Stack*, to be founded on a series of misunderstandings.

As regards imputation, it must be stressed at the outset that, in the context of joint-names cases and/or in the context of considering the *Oxley* test, *Pettitt v Pettitt* [1970] AC 777 is not authority, nor is *Gissing v Gissing* [1971] AC 886, which followed it. Both were cases in which someone who was not a legal owner of a property claimed a beneficial interest, and both were concerned with Stage 1 in the analysis of this type of case, namely how the claimant could establish any beneficial interest at all.³¹ What *Pettitt* in particular is authority for is that, in such cases, the court must find an express or inferred common intention that the claimant should have a beneficial interest and is not permitted to create such an interest by imputation. As neither claimant was found to have any beneficial interest at all in the disputed property, neither *Pettitt* nor *Gissing* is authority for anything to do with the question of how to quantify such an interest if found or conceded to exist.³²

Reverting then to principle, imputation is said to be illegitimate because it involves an imposition by the court. It is generally agreed that the court should not override the parties' common intention. The *Oxley* test, however, by definition only applies if two facts have already been found: that the parties had a common intention that the beneficial interest should be shared, but they had never had any common intention as to the size of the shares.

In that case, the court cannot simply do nothing—because doing nothing would leave the legal owner with sole beneficial ownership and therefore would override the parties' common intention that the non-legal-owner should have some share. By contrast, for the court to impose a result as to the size of the shares will in the *Oxley* situation, by definition, violate no common intention. So the court must find something to fill the gap, whether by inference or by imputation. I cannot see why even an imputation in these circumstances should be said to be illegitimate, let alone why the charge of imputation

³¹ Some readers may feel I am tediously obsessive about ratio and obiter and stages of analysis. But it is in my view a matter of logic as well as law, akin to dealing with an equation of the form $2 \times (2 + 2) = X$: if you don't pay attention to the brackets, you are likely to get the wrong answer.

³² In 'The common-intention constructive trust in the House of Lords: an opportunity missed' [2007] LQR 511, reviewing *Stack*, William Swadling expressed outrage at what he took to be an illegitimate circumventing of authority, namely *Pettitt* and *Gissing*: "[W]e once again have to ask what has happened to the [1966] Practice Direction in this regard. Is it so easy for two decisions of the House of Lords to be bypassed in this way?" (at 517, and see 518) But *Pettitt* and *Gissing* decided an entirely different issue from the issue before the court in *Stack*; one might as well get outraged at the majority in *Stack* for 'bypassing' *Salomon v Salomon* [1897] AC 22.

should not equally be levelled at, for example, a resulting-trust analysis or the presumption that the beneficial interest should follow the legal interest.

The real issues behind this non-issue are as to what can actually be inferred and as to what is actually fair; and both of these can be illuminated by reading Lady Hale's famous paragraph 61 of *Stack* carefully and in context.

First, Lady Hale cites the quantification test from paragraph 69 of *Oxley*: where the parties have agreed that both should have a beneficial interest but there is no evidence that they ever even discussed the size of their shares, "each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property." She then cites the Law Commission's view, that quantification in the *Oxley* situation should involve "taking account of all conduct which throws light on the question what shares were intended." She then, crucially, states that these two formulations are "essentially the same" and contrasts it with a quantification test which she clearly rejects. This second, rejected test is said to involve the court "abandon[ing]" any consideration of the parties' intentions and "impos[ing]" a view of fairness derived from "the days before *Pettitt v Pettitt* [1970] AC 777".

So, contrary to a widely held view, Lady Hale is obviously not contrasting fairness with something else and disapproving of fairness.³³ She is, rather, contrasting different notions of fairness: one which is focused on the property and the parties' intentions, versus another which is associated with "the days before *Pettitt*".

To understand the second, the reader must refer back to Lord Walker's discussion of the development of the law in this area, to which Lady Hale had just referred at paragraph 60.³⁴ Since 1970, statute—currently sections 24-25 of the Matrimonial Causes Act 1973 ('the MCA')—has enabled judges to make sweeping redistributions of property between ex-spouses, such that the starting point, the immediately pre-existing beneficial ownership, hardly matters except in relation to third parties. Before 1970, though, it did matter; and in the mid-twentieth century some judges attempted to use a particular interpretation of s.17 of the Married Women's Property Act 1882 to grant beneficial ownership to spouses, usually wives, who had no pre-existing beneficial interest, on the sweeping basis of what seemed fair in all the circumstances. This was firmly rejected by

³³ I therefore respectfully agree with Nicholas Strauss QC in *Jones* [2010] 1 All ER 947 at 958j-959a, [29].

³⁴ See in particular *Stack* [2007] 2 AC 432 per Lord Walker at [16], and per Lady Hale at [42]-[43].

the House of Lords in *Pettitt*, as an illegitimate use of the 1882 Act—but Parliamentary intervention post-*Pettitt* enabled the same end-result to be achieved.

The idea that Lady Hale was rejecting a test of ‘fair in all the circumstances’ similar to that applying to ancillary relief on divorce as the appropriate test for quantifying the existing beneficial interests of unmarried cohabitants is confirmed by considering the submissions of counsel for the claimant in *Stack*, as well as the criticisms Lady Hale makes of the reasoning of the judge at first instance.

Very little is actually said in the speeches in *Stack* about the submissions of counsel for either side, but the proposition of counsel for Mr Stack, the claimant, was in essence that the rules applying to unmarried cohabitants’ property should be made similar to those applying by statute to divorcing couples; this was clear at the hearing and is indicated in the account of submissions given in the official law report.³⁵ She submitted that the court should aim at “a fair result” considering “the whole course of dealings between the parties”, full stop; a number of factors were to be considered, including “conduct” in general and “child bearing and rearing contributions”, but any factors might be relevant.³⁶ By comparison, section 24 of the MCA (as amended) creates the power to make “property adjustment orders”, and section 25(1) requires the court, when considering such an order, “to have regard to all the circumstances of the case”, without qualification; section 25(2) then lists various matters to which “the court shall in particular have regard”, including conduct and child-care contributions.

The obvious retort to this proposal is that it is plainly inappropriate for unmarried couples. Married couples (and civil partners—Schedule 5 paragraphs 20-21 of the Civil Partnership Act 2004 mirror ss.25(1)-(2) MCA) have quite literally signed up to a property regime allowing redistribution of property on the basis of what is ‘fair in all the circumstances’ in the event that the relationship breaks down.³⁷ Where a cohabiting couple have not chosen to marry or become civil partners, it is clearly *prima facie* unsafe

³⁵ The submissions are reported in *Stack* [2007] 2 AC 432 at 434F-438E. Counsel for Ms Dowden argued for a simple resulting trust; both sides presented, to my mind, surprisingly little by way of analysis of *Oxley*.

³⁶ *Stack* [2007] 2 AC 432 at 435H, 436B-C, 438E.

³⁷ The Supreme Court’s judgment in *Radmacher v Granatino* [2010] UKSC 42 does not seem to me to affect my argument, primarily because *Radmacher* does not seem to me to make any real change in the law regarding divorcing couples. None of their Lordships or her Ladyship in *Radmacher* sought to depart from *White v White* [2001] 1 AC 596 or *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618; on the contrary, the majority’s view is presented as based on these cases, and the result in fact follows from these cases, applying the MCA, far more than from the parties’ agreement.

to assume, or infer, that they nonetheless intended to be subject to the same sort of property regime.

By contrast, there is every reason to infer that couples in the *Oxley* situation actually intended the *Oxley* test to apply—as has been emphasised in two of the leading authorities in this area.³⁸

In *Gissing v Gissing* [1971] AC 886, which involved a married couple pre-MCA, Lord Diplock said this:

“There is nothing inherently improbable in their [i.e. the couple] acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date. Where this was the most likely inference from their conduct, it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share.”³⁹

In *Oxley*, Chadwick LJ (with whom Mance LJ, as he then was, and Scott Baker LJ agreed) conducted an exhaustive survey of the many authorities considering the problem of cases in which there was a clear intention that a non-legal owner should have a beneficial interest but no apparent intention as to what the size of that interest should be. In the course of his survey he quoted the above passage from *Gissing* twice.⁴⁰

In the end, Chadwick LJ found that “[t]hree strands of reasoning can be identified” in the authorities. He appeared to favour, marginally, the analysis based on proprietary estoppel rather than either of the analyses based on constructive trust; yet he emphasised that one of the latter, the *Gissing* analysis, is practically unavoidable in this type of case. The type of case he was considering was by definition the case in which there was an intention that

³⁸ And in *Jones* [2010] 1 All ER 947 at 959g-960b, [33]-[34].

³⁹ *Gissing* [1971] AC 886 at 908-9. This has been described by some authors as an absurd fiction or “sleight of hand” designed to get round the strictness of *Pettitt* and allow a “special” law to apply to the “family home”: see e.g. Etherton, ‘Constructive trusts: a new model for equity and unjust enrichment’, [2008] CLJ 265 at 274. It is nothing of the sort. It is a perfectly understandable thing for real people in real life to do, given real life’s vagaries; and, where the parties have agreed that both have a beneficial interest but have not agreed the size of the shares, it is the only inference the court can draw, and the right inference for the court to draw, whether in a domestic or a commercial setting—see my postscript, below.

⁴⁰ *Oxley* [2005] Fam 211 at [33] and [42].

both parties should have some beneficial interest but no evidence that the parties had ever discussed what size their shares should be. Given those facts,

“if it were their common intention that each should have some beneficial interest in the property—which is the hypothesis upon which it becomes necessary to answer the second question [i.e. as to the size of shares]—then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair.”⁴¹

And it is not only for lawyers that fairness means ‘fair in the light of all relevant circumstances’ and conversely requires ignoring irrelevant circumstances; and which circumstances are relevant to fairness is, as a matter of logic and commonsense, determined by the sort of activity one is engaged in. Where the activity is distributing the financial value of a property between co-owners, what is relevant is as a matter of commonsense what the co-owners have done in relation to the property, during the whole period in which they have been co-owners. Hence the *Oxley* test, that the court must assess what shares are “fair having regard to the whole course of dealing between [the co-owners] in relation to the property.”

The fact that fairness, in law and in common understanding, positively requires that irrelevant factors be excluded from consideration, and that relevance be determined by the type of decision being made, is essential. It means that, far from fairness needing to be excluded from the constructive trust in order to keep the constructive trust within proper bounds, fairness properly understood plays a central role in creating and maintaining those bounds.⁴²

Where, at the time a determination is called for, by one or both co-owners, they cannot agree on what is fair, the court steps in: not to impose on them—nor impute to them—something which was never their intention, but on the contrary precisely to carry out that intention.⁴³ If the couple are married and one of them is dissatisfied with the *Oxley* result,

⁴¹ *Oxley* [2005] Fam 211 at [71].

⁴² Compare M. Dixon, ‘Confining and defining proprietary estoppel: the role of unconscionability’ [2010] Legal Studies 408. On my analysis, the last five words of the *Oxley* test are there simply for the avoidance of doubt—and the persistence with which they are ‘deleted’ and fairness is mischaracterised suggests that doubt is not the problem.

⁴³ As in *Herbert v Doyle and anor* [2010] EWCA Civ 1095, where the parties had orally agreed in principle to swap some property, and the judge had found a constructive trust. (at [27]) The defendants were supposed to get a parking space, but the parties had not agreed which; so the judge picked one. (at [29]) On appeal, Mr Herbert argued that it was “not open to the judge to fill the gap” in the parties’

he or she can file for divorce and apply to the court to have a redistribution on the much broader basis of what is fair in all the circumstances concerning the couple; but then, if the couple are married, they agreed to this possibility when they signed the register.

Only the above analysis can make sense of Lady Hale's paragraph 61, let alone link it to the core ratio and decision in *Stack*. That core ratio is contained in Lady Hale's paragraphs 71 to 92, and in particular paragraphs 71 and 86: The judge at first instance went wrong by failing to follow *Oxley*,⁴⁴ by ignoring the last five words of Chadwick LJ's famous test; he "addressed himself to 'looking at the parties' entire course of conduct together' ... at their relationship rather than the matters which were particularly relevant to their intentions about this property."⁴⁵ Lady Hale proceeded to apply *Oxley* correctly, considering the facts of the parties' dealings "in relation to the property" and arrived thus at her result, which was that Ms Dowden should have the 65% she asked for.

It must be emphasised that this result was not, pace Rimer LJ at paragraph 76 of *Kernott*, arrived at by inferring a common intention, at the time of acquiring the property or ever, that the shares be 65-35. Rather, there was an inferred common intention as to the way in which the size of the shares should be determined if such a determination were ever called for; and the court simply carried out that intention.⁴⁶

We probably should just go ahead and call the *Oxley* test a presumption, as it fits the bill for what William Swadling has called "'true' presumptions"—it arises in response to a 'primary fact' if, but only if, there would otherwise be an evidential gap, and it does so "even though 'the court might not believe that the fact was in accordance with the presumption'".⁴⁷ The 'primary fact' in the *Oxley* situation is that the parties intended that the non-legal-owner should have a beneficial interest (a fact still determined in accordance with *Lloyds Bank plc v Rosset* [1991] 1 AC 107—see my conclusion, below), and the 'primary fact' in the *Stack* situation is that the parties did not intend that the

agreement; Arden LJ, with whom Jackson LJ and Morgan J agreed, rejected this argument, holding that the gap could and should be filled by a series of "necessary implication[s]" and that the judge's result was right. (at [69]-[72] and [87])

⁴⁴ *Stack* [2007] 2 AC 432 at [71].

⁴⁵ *Stack* [2007] 2 AC 432 at [86].

⁴⁶ Of course, it is not uncommon for parties to agree a formula and then, in the circumstances which actually happen, for one or both to deny ever having intended the result—as any number of contract cases testify. An interesting comparator, as it involved the salary formula in a 33-year-old contract of employment between a family company and a member of the family, is *Parham v F Parham Ltd and anor* [2006] EWCA Civ 181.

⁴⁷ W. Swadling, 'Explaining resulting trusts' [2008] LQR 72 at 74, 78-79, 98.

beneficial interest should be held as a joint tenancy; in either case, the *Oxley* test applies only if no (other) common intention as to the size of the shares can be proven.

What opponents of the *Oxley* test, whether from the resulting-trust camp or the MCA camp, generally appear to mean is that all those who have believed that, in the absence of any other indicators, it can be inferred that the parties intended this mechanism of quantification are wrong. If opponents want to say that, they should be obliged to attempt to produce a sound argument as to why either a) it can more readily be inferred that the parties intended either a resulting-trust mechanism or an MCA-style mechanism than the *Oxley* mechanism or b) it would be more legitimate to impose on the parties either a resulting-trust or an MCA-style result than an *Oxley* result. And this would reveal the difficulty that there are no arguments either for inferring or for imposing one of these alternatives which are, in terms of evidence and logic, obviously better than those in favour of the other or in favour of *Oxley/Stack*.

Everyone would then have to admit that the dispute about (and within) *Stack* is overwhelmingly primarily a dispute about different conceptions of fairness. Such disputes are of course well worth having—but only if they are had openly.⁴⁸ It would then become clear that there is no serious technical-legal problem with the law as laid down in *Oxley* or *Stack*, and practitioners and the public would no longer be led to believe, wrongly, that the law as laid down in *Oxley* and *Stack* is difficult to understand.

Finally, there is yet another reason why the notion of ‘fairness is forbidden territory’ in this area of law cannot possibly be right: namely that considerations of fairness are required for a constructive trust to exist at all. A common intention to share a beneficial

⁴⁸ Open debate about fairness in this area has, I think, been inhibited partly by the legacy of legal positivism (which is another story) and partly by a false gender-political assumption. The MCA camp have been surprisingly successful in presenting themselves as sole champions of fairness and realism and women and children; others may well feel reluctant to argue the fairness of their own positions, for fear of being attacked as sexist, heartless, and divorced from reality. But, first, the needs of unmarried mothers and children have already been dealt with by Parliament, notably in Schedule 1 of the Children Act 1989. Second, there is an alternative view of reality and gender politics. There can be nothing unfair in women bearing the consequences of their own choices. The MCA approach to cohabitation requires the premise that women are incapable of making choices within close relationships but rather simply compulsively do what their partners want; only this premise can turn a woman’s gifts, however unwise, into injustices for which her partner must be called to account. This premise is, incidentally, incompatible with the law on undue influence; far more importantly, it is untrue, and deeply damaging to women. In particular, it reinforces the main prejudice underlying the gender pay gap and the ‘glass ceiling’—that women can never really be relied upon in the workplace—which harms women throughout society, whether struggling to survive or aspiring e.g. to sit in the Supreme Court, or both. Taking account of the full spectrum of views, it is at least far from self-evidently bad for women that English legal principles provide no basis for the MCA approach to cohabitation and that it therefore (*contra* Gardner and Davidson [2011] LQR 13) could only be made law by Parliament.

interest in land can only be made effective in one of two ways: under s.53(1) Law of Property Act 1925, by signed writing or, under s.53(2), by a constructive trust. A common-intention constructive trust can only be found if ‘detrimental reliance’ demands it, and what this means is that the court must find that “it would be inequitable”, i.e. unfair, to allow one party to deny the other a beneficial interest if the other had relied to his or her detriment on the common intention.⁴⁹

A number of commentators have noted the tendency in recent cases in this area for detrimental reliance to drop out of view.⁵⁰ The reason for this is, I think, that it is rare for the court to find the answer ‘Yes, but not an agreement in writing and signed’ at Stage 2. In that case, the court would have to consider detrimental reliance in its own right as Stage 3. More commonly, though, if the Stage 1 hurdle is got over at all, the Stage 2 answer is ‘No’, the court is obliged to proceed to the *Oxley* test at Stage 3, and the *Oxley* test kills two birds with one stone: for the purpose of quantification, it applies the same sort of considerations of fairness and examines the same sort of evidence as would be required to establish detrimental reliance.

So, far from being ‘forbidden territory’, fairness is an integral part of the working mechanism in the technical law of this area, as in many other areas; and Chadwick LJ’s formulation in *Oxley* is not only conducive to practical justice, and technically correct, but a particularly technically elegant solution.

Conclusion

But, some readers will ask, what about ‘the fact’ that the ratios in *Oxley* and *Stack* are very difficult to apply?

There is no such fact. Both *Oxley* and *Stack*, and indeed *Kernott*, are very easy to apply, provided that the parties’ lawyers and the judge keep in mind, first, that the case at hand may not fall within this line of authority at all; second, that, if it does, there are other

⁴⁹ *Gissing* [1971] AC 886 at 905; see generally *Megarry and Wade*, 7th ed (2008), para 11-026.

⁵⁰ See for example S. Gardner, ‘Family property today’ [2008] LQR 422, who notes (at 424) that detrimental reliance “attracts no discussion at all in *Stack v Dowden*” and takes this as evidence of the doctrine’s “demise”; and Etherton, ‘Constructive trusts and proprietary estoppel: the search for clarity and principle’ [2009] Conv 104 at 124, and see also 110 and 115.

relevant tests in these cases which need to be considered before one leaps to the *Oxley* test; and, third, that the last five words of the *Oxley* test are crucial.⁵¹

With regard to the first: Just because the matter involves a dispute between people who are or have been in a close relationship and concerns property does not mean that this line of authority applies: there are other analyses which may be far more appropriate, such as proprietary estoppel or a non-common-intention constructive trust. For a striking misapplication, see *De Bruyne v De Bruyne and ors* [2010] EWCA Civ 519.

With regard to the second: For example, in cases where someone who is not a legal owner of the property asserts a beneficial interest, Question 1 is whether the claimant can be held to have a beneficial interest at all, and the test for this is contained not in *Oxley* but in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132-3. Failure to recall that one cannot leap straight to the *Oxley* test will only end in tears: see e.g. *Thomson v Humphrey* [2010] 2 FLR 107.

Although this is just one example, it is a particularly important one. Some commentators appear to believe that Lady Hale's remarks in *Abbott v Abbott* [2008] 1 FLR 1451 at paragraphs 3, 5, and 6, suggesting that *Rosset* should be departed from and that a "holistic approach"⁵² should apply to establishing a beneficial interest, are now law. This is incorrect. What is said on this subject in *Abbott* can only be obiter twice over, given that the legal owner conceded that his wife had a beneficial interest, and that the wife would (almost certainly) have cleared the *Rosset* hurdle anyway; in addition, obviously, the Privy Council, at least in a normal five-judge Board, cannot overrule the House of Lords (or, presumably, the Supreme Court).⁵³

⁵¹ Clearly, I believe that this last point cannot be repeated too often; some readers may disagree, but omitting these words does seem to be a particularly common error in practice.

⁵² *Abbott* [2008] 1 FLR 1451 at [6].

⁵³ See *Abbott* [2008] 1 FLR 1451 at [8], [17], and [19], and *R v James* [2006] 2 WLR 887. I am therefore obliged to disagree with, amongst others, *Megarry and Wade*, 7th ed (2008), at para 11-025 and S. Gardner, 'Family property today' [2008] LQR 422 at 424-426. Mr Gardner states (at 427 fn 37), "The more recent decisions in *Holman v Howes* [2007] EWCA Civ 877, [2007] BPIR 1085; *Kali and Burlay v Chawla* [2007] EWHC 2357 (Ch); *James v Thomas* [2007] EWCA Civ 1212, [2007] 3 FCR 696; *Laskar v Laskar* [2008] EWCA Civ 347 and *Morris v Morris* [2008] EWCA Civ 257 all seem to assume that the 'holistic approach' applies across the board", i.e. that *Rosset* is no longer the test for establishing whether a non-legal-owner has a beneficial interest. Not one of these cases seems to me to do any such thing. *Kali* and *Laskar* were joint-names cases; in *Holman*, it was "not in dispute that the claimant ... has a beneficial interest" (at [2]); in *James*, the appeal and the claim were dismissed, specifically relying (at [30]) on *Oxley* at [68], which cites *Rosset*; and in *Morris* the appeal was allowed and the claim dismissed expressly on the ground that the "holistic approach" mentioned in *Stack* could only apply to quantification and not to the establishment of a beneficial interest in the first place (at [19]-[23]). I have been unable to find any case to date in which the issue of establishing a beneficial

This is not to say that the Supreme Court could not someday be persuaded to declare a departure from *Rosset* as ratio; but I would not advise any client to bet on it. Fully explaining why would require another article; but, to give just one reason (of many): The Supreme Court would not even begin to consider departing from *Rosset* unless fairness required it, and it doesn't.

The test encapsulated by *Rosset* says that—unless the claim is that the legal owner has done some (other) particular wrong to the non-legal-owner, which would be an entirely different matter, subject to other rules of law and requiring to be proven—the only ground on which it is fair to find that the non-legal-owner has a beneficial interest in the property is that both parties intended this. *Rosset* says further that this must be a verbally expressed common intention, save where the non-legal-owner has made and the legal owner has accepted a direct contribution to the purchase price, in which case, exceptionally, the necessary common intention may be inferred.⁵⁴ The possibility that some other type of conduct could suffice for such an inference is, out of excess of caution, left open in *Rosset* but viewed extremely sceptically.⁵⁵

To depart from *Rosset* in the sense of widening this 'second limb', the Supreme Court would have to be persuaded that one could reasonably infer from some other particular sort of conduct a common intention that the non-legal-owner should have a beneficial interest. I do not believe the Supreme Court will ever be so persuaded, save perhaps with regard to one small extension.⁵⁶ It is difficult enough to believe that it is reasonable to infer such an intention even from a direct contribution to the purchase price; this is not so much a limb as a twig, which survives primarily due to a very long-standing presumption.

To depart from *Rosset* in the sense of abandoning the requirement for common intention, the Supreme Court would have to be persuaded that there were any circumstances in

interest has been decided, as ratio, on the basis of *Abbott* (or the dicta in *Stack* which it cites) rather than *Rosset*.

⁵⁴ And only 'may': see *Lightfoot v Lightfoot-Brown* [2005] EWCA Civ 201, per Arden LJ at [23]-[32]. Although the facts of this case were unusual, it is, I think, important in underlining that even a very large direct contribution is only relevant if it and its acceptance can reasonably be said to manifest a common intention as to beneficial ownership.

⁵⁵ "[I]t is at least extremely doubtful whether anything less will do": per Lord Bridge in *Rosset* [1991] 1 AC 107 at 133.

⁵⁶ I.e. to cover direct contributions to major improvements to the property, where the latter significantly increase its market value: this could be justified as logically equivalent to a direct contribution to the purchase price of the property and as appropriately clear and limited. See *Stack* [2007] 2 AC 432 per Lord Neuberger at 475F, [139], and *Megarry and Wade*, 7th ed (2008), at para 11-025(iii). And, technically, this wouldn't even be a departure from *Rosset*, as *Rosset* did not decide this point.

which it could be fair to deprive the legal owner of some of his or her property without his or her consent, without him or her having been shown to have committed any wrong, and without the sanction of statute. It seems to me to be practically inconceivable that the Supreme Court could ever be so persuaded.

With regard to the third thing for practitioners to keep in mind, when considering the *Oxley* test where it does apply: claimants' legal advisers must assess every fact brought to them by their (often, in the circumstances, angry and/or distressed) clients in terms of whether any serious argument can really be made that the fact in question constitutes conduct "in relation to the property". Of course there may be creative arguments to be made as to whether something constituted an indirect contribution; but parties' lawyers should always look at such arguments as sceptically as many judges will and consider whether the argument is really tenable.

Finally, it must be emphasised that no tolerable statutory provision could provide any more or less clarity or certainty. Simply by virtue of the nature of the beast, any statutory provision which was not prone to intolerably unjust results would have to be in the same sort of form as is taken both by the common law in this area and by s.25 of the MCA—first making a general statement and then giving a non-exclusive list of factors to be considered.⁵⁷ This form of test necessarily requires the accumulation of a body of case-law as to its application to illuminate it.

What will lead to greater certainty in this area is for judges in the superior courts to take great care to explain, clearly and in detail, how they have reached their actual results—which factors they find irrelevant and which relevant and why, what sort of weighting they give to different relevant factors and why—and to avoid extensive obiter discussion; and for advocates to assist them in this.⁵⁸

Postscript

While this article was in the final stages of writing, in another part of the forest Briggs J handed down judgment in *Pearson and ors v Lehman Brothers Finance SA and ors* [2010] EWHC 2914 (Ch), on yet another issue arising in the administration of Lehman Brothers International (Europe) ('LBIE'). One of LBIE's main functions was to acquire and deal with securities on behalf of various Lehman affiliates, and when it went into

⁵⁷ See Lord Walker in *Stack* [2007] 2 AC 432 at [27].

administration it was still holding some of these securities. Naturally, the affiliates said these securities were held on trust and the administrators said they weren't.

The matter was complicated by a number of factors. There were various written agreements which were to some extent relevant, but these agreements seemed largely directed at third parties, including regulators; the actual habitual dealings of the parties, who were all members of the same corporate family, were often quite different.⁵⁹ “The result of these general features of the parties’ mutual dealings is that, as Mr Milligan [for the administrators] put it in opening, the court is being invited on this application ‘to make the best sense of what is in some respects a mess’.”⁶⁰ Moreover, the parties had been in a long-term relationship, such that evidence of the mess going back to the early 1990s had to be considered.⁶¹ Finally, none of the parties appeared ever to have thought about what would or should happen if the relationship were abruptly terminated, by one of them going bust.⁶²

For the administrators, two QCs and two juniors submitted, first, that the alleged trust was hopelessly uncertain as to subject matter due to the nature of the accounts in which the securities were held. LBIE did not separate accounts by client but by type of security, such that the securities in each account might be held on behalf of a variety of parties, including LBIE itself. Further, both the specific identity of the securities and their total volume would fluctuate. Briggs J held, with reference to a range of authorities (including a previous Lehman judgment of his own, so counsel will have been forewarned) and some academic work (on securities), that all of these problems were solved by viewing each party as having “a beneficial co-ownership share” in the relevant account.⁶³

Then the quantification issue arose, due to the nature of LBIE’s activities. All of the parties had accepted that LBIE would use these securities, daily, to lend to third parties or settle short positions. In consequence, at the end of any given day, there was likely to be a shortfall between the securities formally held by LBIE on the affiliates’ behalf and what was actually in LBIE’s depot account.⁶⁴ As the parties had never contemplated a last day, an end and winding-up of the relationship, there appeared to be no common intention as to whether or how that shortfall should be shared out. Counsel for the administrators

⁵⁸ And, of course, if academic lawyers would like to help, that would be very welcome.

⁵⁹ *Pearson* [2010] EWHC 2914 (Ch) at [105]-[109].

⁶⁰ *Pearson* [2010] EWHC 2914 (Ch) at [110].

⁶¹ *Pearson* [2010] EWHC 2914 (Ch) at [3]-[10].

⁶² *Pearson* [2010] EWHC 2914 (Ch) at [95].

⁶³ *Pearson* [2010] EWHC 2914 (Ch) at [232], and generally [227]-[239].

submitted that, as there was no common intention as to how to deal with the shortfall, the size of each party's alleged share of the beneficial interest could not be ascertained, such that the alleged trust was fatally uncertain both as to terms and (from another angle) as to subject matter.⁶⁵

Briggs J dismissed this objection relatively shortly and with no citation of authority or academic work, simply “[b]y parity of reasoning” with the law on “[t]he beneficial ownership of matrimonial and other shared homes”.⁶⁶ If the parties had a common intention to “share property beneficially”, this gave rise to a trust, even “in circumstances where the parties themselves have given no thought at all to the terms of the consequential trust”; and “[i]n all such cases the law fills the consequential gaps by implication, and by importation of generally applicable principles.”⁶⁷

Given that all the parties had a common intention that LBIE would deal with the securities in a way which was liable to give rise to day-to-day shortfalls, and given that there was no express common intention as to what should happen on a determination after a collapse, “I see no reason why ... the consequential day-to-day shortfalls ... should not be shared on a *pari passu* basis. ... I can see no reason why [the parties] should not be taken to have agreed to bear the consequences of the shortfall equally.”⁶⁸ Briggs J did not outright use Chadwick LJ's words in *Oxley* at paragraph 69; but he had just spent a couple of hundred paragraphs considering the parties' whole course of dealing in relation to the property, and it goes without saying that *pari passu* is the fair answer in these circumstances.⁶⁹

And this reasoning turns out to be ratio. In the early 1990s, LBIE had become concerned that the affiliates might have beneficial title to the securities, so it had set up a working party to address the issue and entered into discussions with the affiliates. In 1996, certain processes intended to ensure that LBIE had the beneficial interest in the securities were implemented and should have been applied to dealings between LBIE and the affiliates

⁶⁴ *Pearson* [2010] EWHC 2914 (Ch) at [227] and [234].

⁶⁵ *Pearson* [2010] EWHC 2914 (Ch) at [227] and [242].

⁶⁶ *Pearson* [2010] EWHC 2914 (Ch) at [246]-[247], and see generally [242]-[247].

⁶⁷ *Pearson* [2010] EWHC 2914 (Ch) at [245].

⁶⁸ *Pearson* [2010] EWHC 2914 (Ch) at [244].

⁶⁹ In *Bloom and ors v The Pensions Regulator and ors* [2010] EWHC 3010 (Ch), handed down not long after *Pearson* [2010] EWHC 2914 (Ch), Briggs J was driven to state the obvious because he was “driven with reluctance”, by statute, to depart from it: “The *pari passu* principle is a fundamental principle of justice, equity and fairness, with application in a wide variety of circumstances”; it is “gut-feel fair”. (at [191], [64], and [188]-[189])

from then on.⁷⁰ Briggs J concluded that, although in his view (ironically) the affiliates did not have any beneficial interest in the securities previously, the very implementation of these processes showed that “the parties’ mutual intention” after 1996 was that the affiliates would have a beneficial interest unless these processes were carried out.⁷¹ That intention not having been frustrated by the administrators’ arguments as to uncertainty, the result was that one of the affiliate respondents might, depending on further factual investigation, have a beneficial interest in one group of securities still in LBIE’s hands.⁷²

This decision is now awaiting appeal, to be heard between mid-May and mid-July 2011,⁷³ although I do not know on what grounds; and it looks as though similar points could be debated again in the Lehman litigation, in relation to “several billions of dollars” worth of other securities;⁷⁴ so watch this space. However, the moral of the story currently appears to be: when happily divorced from the ideological and emotional noise emanating from broken homes, the *Oxley* test simply stands to reason.

⁷⁰ *Pearson* [2010] EWHC 2914 (Ch) at [8]-[10].

⁷¹ *Pearson* [2010] EWHC 2914 (Ch) at [304]-[307].

⁷² *Pearson* [2010] EWHC 2914 (Ch) at [424]-[429].

⁷³ See the Court of Appeal’s online Case Tracker, http://www.hmcourts-service.gov.uk/listing_calendar/getDetail.do?case_id=20110111

⁷⁴ See the costs judgment on this application, *Pearson and ors v Lehman Brothers Finance SA and ors* [2010] EWHC 3044 (Ch), at [31]-[32].