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The Application of Stack v Dowden

Introduction

“Cohabiting partners must it seems to me contemplate and address the unthinkable namely that their relationship will break down and that they will fall out over what they do and do not own”. So concluded Wall P in *Kernott v Jones* [2010] EWCA Civ 578, a TLATA application which considered the parties’ interests in a property that had been registered in their joint names.

This article will analyse the Court’s decision in this case which is among the first to emerge since *Stack v Dowden*.

The Facts

The parties purchased a property in May 1985. The purchase price of £30,000 was financed by a lump sum payment from Ms Jones (J) of £6,000 and an endowment mortgage raised by the parties.

During the relationship Mr Kernott (K) contributed by making regular financial payments to J which she applied to their living expenses which included the instalments on the mortgage interest and endowment policy. He also built an extension to the property which increased its value by about £15,000.

The parties separated in 1993 and upon separation K no longer made contributions to J’s finances. In 1996 K bought another property the deposit for which was paid from the proceeds of an endowment policy which was divided equally between the parties.

In 2006 K sought to agree his interest in the property at fifty per cent. In the absence of agreement he issues a TLATA application in 2007. At trial the judge declared that K held a 10% beneficial interest and J 90%. K appealed, but the decision was upheld. The Court of Appeal by a 2-1 majority varied the order and declared that the parties held the property in equal shares.



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Analysis

The disputes often seen in these cases were not present in this case. The property had been registered in joint names at the time of purchase and it had been conceded by J that at the date of separation K was equally entitled to the property.

The Court of Appeal helpfully reviewed the requirements of the Court in Stack, namely that in deciding whether a jointly owned property is held other than equally the Court must ascertain the parties' shared intentions, actual, inferred or imputed in the light of the whole course of conduct in relation to it.

Rimer LJ wrestled with the speech of Baroness Hale and summarised the difficult task of the Courts thus at [76]:

"The key feature of Stack is... that of searching for the parties' shared intentions – 'actual, inferred or imputed' – with respect to the property [and] to investigate whether there is any basis for inferring an intention that their shares were to be of particular proportions... In most cases such a quest may well be elusive, because if the parties actually had any such intention, they would have voiced it; and if they did not voice it, that will probably be because they did not have one, with the consequence that there will be no basis for inferring otherwise. There will therefore in many cases perhaps be a degree of artificiality in the search for an intention that the parties did not utter but could have done."

The issue in this case therefore was whether the way in which the parties dealt with the property post-1993 enabled the

Court to find a joint intention to depart from equal interests.

The trial judge relied upon K's conduct as demonstrating "that he had no intention until recently of availing himself of the beneficial ownership of this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated."

Neither Wall P nor Rimer LJ considered that this evidence was sufficient to demonstrate that the parties by this conduct jointly intended that J's share should increase. Both judges no doubt had in mind the "considerable" burden identified by Lord Walker and Baroness Hale in Stack upon the party seeking to prove that the equitable interests did not follow those in law.

Conclusion

It is perhaps an irony of our times that as divorcing couples seek to enforce agreements which intend to govern the division of their assets; co-habitees seek to depart from them. The position for the former group of clients may become clearer post-Radmacher, but for the latter it is not: the House of Lords was not entirely unanimous in Stack and the Court of Appeal in this case strained at the House of Lords' decision.

What is clear is that the Courts will be expected adhere to Baroness Hale's comments in Stack that a departure in equity from equal ownership in law will be rare. A client wishing to succeed where J failed will need to have very precise evidence regarding joint intentions in respect of a property which goes beyond a record of the parties' respective contributions to it.

Tim Parker



Family team welcomes James Dove



James Dove

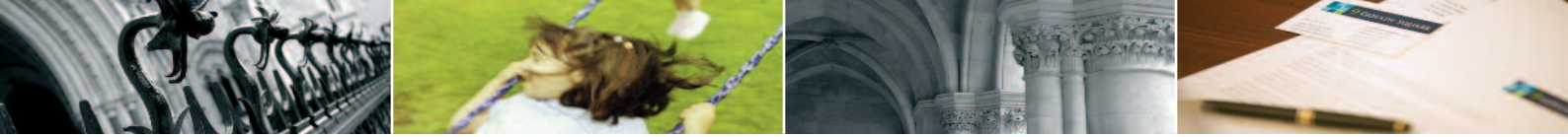
The Family Team is delighted to welcome, James Francis Dove (formerly of Clarendon Chambers, Temple) as a new member of Chambers. The Family Team was keen to build on a particularly successful year and increase Team numbers to meet growing demand and Family Law workload.

James was called to the bar in 2006 (Lincoln's Inn) and although has had a mixed legal practice, James's main area of expertise is in Children Act cases, particularly care proceedings. He is instructed regularly by Local Authorities in care proceedings, which range in complexity and include issues such as neglect, sexual abuse and domestic violence. He also acts for parents and children. James has appeared in the High Court, County Court and Family Proceedings Courts, in both private and public Children Act matters.

In 2008 - 2009 James spent six months on secondment to a London Borough and so has sound knowledge of working within a local authority. James acted as an in-house lawyer, gaining an extensive understanding of local authority procedures regarding child protection.

James recently successfully appealed the decision of the Family Proceedings Court to separate two boys aged 8 and 12 from their family. He was granted an immediate stay on the Interim Care Orders by the High Court pending an appeal; however, the Local Authority changed its care plan on the day of the appeal making the latter unnecessary. The local authority finally sought leave to withdraw the proceedings and the boys remain in the care of their parents.

James is a member of the Family Law Bar Association, South Eastern Circuit and of the Bar Pro Bono Unit Panel.



Lessons to be drawn from Re S

In *Re S* [2010] EWCA Civ 421 Lord Justice Wilson and Mrs Justice Baron considered whether the removal of two children into short-term foster care was lawful. The Court of Appeal concluded that the removal of the two children was a clear infringement of the rights of the children and their mother under Articles 6 and 8 of the ECHR. Lord Justice Wilson drew his concerns into seven propositions that practitioners could usefully bear in mind when faced with an urgent change of care plan at an interim stage of care proceedings.

The facts are that the two children were subject to a series of interim care orders made upon plans that they should continue to live with their mother. The children were at risk of serious abuse from their father, from whom the mother had separated. An injunction had been made excluding the father from the matrimonial home and prohibiting contact with the children; it was extended on the mother's request to prohibit the father from contacting her. The mother had agreed to move into a refuge with the children. The mother did not settle in the refuge, which she thought unsuitable, so, with local authority help, she moved back home on 17 December. On 23 December a hearing was listed to consider directions on the application for the father's committal for breach of the various injunctions. In the court corridor before that hearing, the mother was heard to express a wish to relax the injunctions so that she could communicate with the father. The local authority was concerned that the mother was unwilling or unable to exclude the father from her life. At the hearing the local authority put before the judge amended interim care plans for the immediate removal of the children from the mother. The mother then withdrew her aspiration to persuade the judge to relax the injunction against the father, but the judge nevertheless endorsed the local authority's amended care plans and the children were removed from the mother. The mother appealed the removal.

The lessons that can be drawn from the judgment are as follows:

1. Adequate notice of removal should always be given. Wilson LJ accepted that there are rare circumstances in which the welfare of the children demands removal without notice; however they did not exist in this case. The amended care plans should have been drawn and the mother's counsel should have had the opportunity to cross-examine the social worker or team manager.

2. The grounds for changing interim care plans to ones for separation of children from their parents must demonstrate that the safety of the children demand immediate separation: see *Re LA (Care Chronic Neglect)* [2009] EWCA Civ 822, [2010] 1 FLR 80, per Thorpe LJ at [7].

3. Local authorities and the Court should be careful not to make misrepresentations to parents by saying if they follow a particular course of action then their children will not be removed from their care. The local authority and the Court had stated that the mother should not seek to pursue her relaxation of the restrictions on the father communicating with her; if she wanted the children to remain in her care. When she complied with this the children were still removed.

4. The Court should balance the pros and cons of leaving children in the care of their parents. The Court had failed to take into account all the relevant factors when considering the removal of the children including one of the children being only five months old; that the physical care of the children by the mother had never been questioned; that both children were well and happy; that the elder child was progressing well at school; the close bond between the mother and the children; and that neither child had spent a night away from their mother.

5. The Court should consider alternative options to removal. The option of the mother returning to the refuge should have been considered.

6. Contact arrangements are a crucial feature of a care plan of separation of parents and children that the Court must carefully consider. In this case Wilson LJ stated it was wrong for the judge to leave contact to the discretion of the local authority and wrong for the Guardian to remain silent in that regard.

7. If removal is necessary in a summary manner then the matter should be listed for a full hearing at the earliest opportunity. At the full hearing the local authority should put their case properly, the parents should have a fair opportunity to challenge it, and the judge, should himself have time to properly consider the merits and demerits of the altered care plans.

Re S provides a useful checklist for practitioners to ensure that when there is the prospect of an urgent change of care plan to one of separation of children from their parents, the rights of the children and the parents are protected and the risk of an appeal and criticism later is minimised.



James Dove

Special Advocates

Re T (Wardship: Impact of Police Intelligence) [2009] EWHC 2440 (Fam)

In this case Mr Justice McFarlane was charged with mapping new ground in disclosure procedure in the family courts by using special advocates to facilitate difficult disclosure issues. It is unlikely that the specific circumstances of this case are going to present themselves in the family courts on a regular basis but the using of special advocates in cases where the Police make broad refusals of disclosure of sensitive material may prove a useful procedural tool. .

Disputes about disclosure can cause profound delays within family proceedings with parties becoming very suspicious about substance of withheld information and concerns that consideration of the issues without full information is potentially an artificial exercise. The procedure of using special advocates will not serve to satisfy all suspicions but will ensure that more careful consideration will be given to the nature and extent to which information can justifiably be withheld without those with an interest in disclosure being largely excluded from the process.

In short, this case concerned a child that had been made a ward of court following an abduction attempt by his father. The child was traced by the authorities and the father was charged with child abduction and remanded in custody. The child was returned to its mother. At the first hearing in the wardship proceedings the Metropolitan Police Service informed the Judge and Guardian that they had received credible intelligence suggesting that the father had taken out a contract on the Mother's life. The Mother and child were placed under police protection. Whilst the MPS never became a party to proceedings their interest in the case was plain given that they had an obligation to protect the Mother and child and any court order as to contact would have a direct impact on their ability to do so effectively. The MPS objected specifically to any direct contact between the child and his paternal family even after the decision was taken not to proceed with at the criminal prosecution, in support of this position the MPS disclosed information to the Court but refused to disclose it to the parties on the grounds of public interest immunity. This

left those who were applying for direct contact in a difficult position. Any proper determination of the contact applications was thwarted insofar as the applicants were in no position to challenge the assertions of the MPS. For that reason the bold decision was taken by Mr Justice McFarlane to apply to the Attorney General for appointment of special advocates. Special advocates were appointed to "represent the interests" of the father and paternal grandparents.

Special advocates represent the interests of parties rather than the parties themselves and are tasked with ensuring that the party is given as full disclosure as is possible. In this case the Special Advocates received briefings from the parties prior to receiving full disclosure of open and closed information. Following this the special advocate represents the interests of their client in closed hearings. Closed hearings provide the opportunity for evidence to be tested under cross examination and for informed submissions made on behalf of the party.

In his Judgment Mr Justice McFarlane provided 14 points of guidance which the President of the Family Division has advised should be followed disclosure issues arise. The emphasis of this guidance is on fostering co-operation between the Police and the family courts. Whilst I do not intend to recite Mr Justice McFarlane's guidance here, his Judgment in this case must be considered the first port of call for practitioners and Judges faced with disclosure issues that appear likely to frustrate family proceedings.



Kate Lamont