

In its recommendations to Parliament on aspects of the law relating to the property rights of cohabitants upon separation, the Law Commission in its report "Law Com No 307 : Cohabitation: The Financial Consequences Of Relationship Breakdown", considered that "...despite Stack v Dowden ...the need for statutory intervention remains" (2.12 at page 20)

Viewpoint on the property rights of cohabitants upon separation : "As statutory intervention has still not arisen, the best advice in circumstances where the family home is in the sole name of one of the parties, is that the other party must establish an interest under an implied trust. The case law also suggests an inclination towards the use of constructive trusts, rather than resulting trusts because the former take account of a wider range of contributions."

Critically evaluate the accuracy of the above viewpoint. What do claimants have to prove to succeed in establishing interests under resulting and constructive trusts of the family home?

Introduction

In its recommendations to Parliament on aspects of the law relating to the property rights of cohabitees upon separation, the Law Commission considered that ‘...*despite Stack v Dowden ...the need for statutory intervention remains*’.¹ This essay will critically examine the Law Commission’s view, and examine what is the best advice one can currently give to separating cohabitees where the legal title to the family home is in only one of their names.

The requirements of an implied trust

An implied trust can only arise in the absence of an express trust.² The starting position in determining the equitable ownership of any property is that equity follows the law: if one person owns 100% of the legal title, they will be presumed to own 100% of the equitable title.³ Implied trusts represent an exception. A resulting trust arises where multiple individuals have each contributed to the purchase price of the property, holding shares in proportion to their financial contribution.⁴ A constructive trust arises when the parties share a common intention that the party without legal title should have an interest in the land, which that party then detrimentally relies on.⁵ Common intention can be established by evidence of express discussions, financial payments towards the property, or from a general course of conduct.⁶

Which is More Suitable for Separating Cohabitees?

A resulting trust arises where the purchase price is contributed to only: contributions to the cost of living, the surrender of a career to look after children and so on do not count.⁷ This means

¹ Law Commission, ‘Cohabitation: The Financial Consequences of Relationship Breakdown’, (Gov.uk, July 2007), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228881/7182.pdf> accessed 20 July 2016, [2.12]

² *Goodman v Gallant* [1986] Fam 106

³ *Jones v Kernott* [2011] UKSC 53

⁴ *Tinsley v Milligan* [1993] UKHL 3

⁵ *Jones v Kernott*, (n 3)

⁶ *Ibid.*

⁷ *Lloyds Bank v Rosset* [1991] 1 AC 107

that cohabiting couples will only share the property under a resulting trust in very limited circumstances. In addition, it will often be the case (especially if the cohabittees are of unequal financial power), that the equitable shares will be unequal and this will put the poorer partner at a disadvantage regardless of what other contributions they have made.

By contrast, a constructive trust is much more useful to the disadvantaged cohabitee; the court's quantification of their share in equitable property will take into account all of their financial and non-financial contributions to the relationship when determining whether an interest arises⁸ and determining the share, as well as taking into account other factors such as whether the parties sought legal advice and the nature of their relationship (such as whether it was inherently one of sharing and joint endeavours).⁹ As of the decision in *Stack v Dowden*, the court will not normally presume a resulting trust arises where the relationship is a domestic one, preferring the constructive trust.¹⁰ This makes it easier to acquire a greater share under the latter.

This means that, while of course the creation of an express trust before the relationship breaks down would be the best advice one could give cohabittees, after such a breakdown the best advice to give a partner who has made less direct financial contributions is to seek to establish a constructive trust.

Is There a Need for Statutory Intervention?

The law of property is concerned with '*what each party actually owns, not what they ought to own*'.¹¹ This is in contrast to the position where there is a legal marriage or civil partnership;

⁸ *Ullah v Ullah*, (n 6)

⁹ *Stack v Dowden* [2007] UKHL 17, [69]-[70]

¹⁰ *Ibid.*

¹¹ Ben McFarlane, Nicholas Hopkins, Sarah Nield, *Land Law: Text, Cases, and Materials*, (Oxford University Press, 2015), 521

in those cases the court has enormous discretion to make ‘property adjustment orders’ allocating property between the former partners.¹² Where the family home is concerned, the property law position will frequently lead to unfairness. The contributions of the less financially endowed partner (normally female¹³) can be systematically undervalued, even where they are quasi-financial in nature (such as paying bills, looking after children to obviate the need to pay someone else to, or otherwise freeing up the other partner to pay for the home).

While *Stack v Dowden* represents an attempt to loosen this approach in order to ‘accommodate the specific needs of family members’¹⁴ by preferring the use of a constructive trust, as well as an active policy decision to single out the family home as an item of property requiring special legal rules¹⁵, it primarily benefits parties who have joint legal ownership of the family home, as it acts to make it difficult for richer partners from taking more than half of the share where the partners have pooled their resources. Establishing a trust, especially of any significant value, where there is sole legal ownership remains an uphill struggle¹⁶ as the contributions of the one partner are devalued as normal domestic activity.¹⁷

In addition, the decision in *Stack v Dowden* creates uncertainty. For example, it is possible that the scope of *Stack v Dowden* has been narrowed by *Jones v Kernott*, which stated that there was to be no presumption of resulting trust where the family home was bought ‘*in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage*’¹⁸, rather than wherever the case was domestic *simpliciter*. Meanwhile, whether the

¹² Matrimonial Causes Act 1973, s.23; Civil Partnership Act 2004, Sch 5, para. 2

¹³ Sandra Clarke, *Land Law Directions*, (Oxford University Press, 2012), 250

¹⁴ John Dewar, *Land Law: Themes and Perspectives*, (Oxford University Press, 1998), 328

¹⁵ Nicholas Hopkins, “Regulating Trusts of the Home: Private Law and Social Policy”, [2009] 125 LQR 310, 333

¹⁶ Miranda Allardice, “Cohabitants and constructive trusts in 2015”, [2015] P.C.B. 105

¹⁷ Sarah Greer, “Imputation, fairness and the family home”, [2015] Conv. 512

¹⁸ *Jones v Kernott* [2011] 3 WLR 1121, [25]

broad range of considerations used in *Stack v Dowden* to assess the quantum of shares (such as domestic contribution) can be used to *establish* the existence of a share also remains unclear.¹⁹

Finally, as a matter of principle the rules of property law should not be distorted in order to make up for the lack of a statutorily imposed family law or equitable scheme.²⁰ Since cohabitation arrangements are usually informal, the parties rarely cast their minds to issues of property, and to speak of trusts arising is confusing and misleading (which is one of the reasons that establishing a constructive trust can be difficult).²¹ This is because trusts are legal constructs which are meant to put into effect what the parties intended, whereas in these domestic cases there is no real intention at all. Given that there are good policy reasons to treat the family home differently from other forms of property, it would be much more coherent to have a separate statutory regime. An independent statutory regime would also have the advantage of greater remedial flexibility.²²

Conclusion

In conclusion, it would be advantageous for there to be statutory intervention creating a scheme which more fairly regulates the rights of cohabitants in the family home on separation. At the moment there is a lot of uncertainty surrounding the attempts to fit reform into the common law property rules, and the result is an unprincipled distortion. In the interim, the best advice for cohabitants of a sole-ownership home would be to establish an express trust before the relationship breaks down; failing that, a constructive trust is usually the most advantageous implied trust for the non-title owning partner.

¹⁹ Contrast *Ullah v Ullah* [2013] EWHC 296 with *Bhura v Bhura (No.2)* [2014] EWHC 727

²⁰ Martin Dixon, "Editor's notebook: the still not ended, never-ending story", [2012] Conv. 83, 86

²¹ Law Commission, 'Eighth Program of Law Reform', (*LawCom.Gov.uk*, 22 October 2001)

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²² Law Commission, (n 1), [2.14]

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