

1. This Seminar is intended to provide an update of the rules which have developed relating to resulting and constructive trusts of land since the landmark decision of the House of Lords in *Stack v Dowden*¹. Despite their Lordships hopes that this decision would lead to greater certainty in the law, the decision has thrown up a considerable number of new points which the Courts have been dealing with ever since.

2. It is also intended to provide an overview of the recent cases under the Trusts of Land and Appointment of Trustees Act 1996 (“TLATA”). We can expect to see more applications made under that Act, principally applications for sale. There have been a number of cases considering the jurisdiction of the Court to order sale on the application of a secured creditor of one co-owner, but one can also expect to see cases in which property owning partnerships are dissolving. Those cases are often the result of mortgage fraud or insolvency. It is, therefore, timely for us to consider what the law governing such applications is likely to be. Further, there are a number of other things which TLATA does – such as contain provisions for the payment of compensation for occupation by one beneficial co-owner at the expense of the others – which have given rise to controversy, and which merit some consideration.

TRUSTS OF LAND

3. As is well-known, there are three kinds of trusts that arise in relation to land can be one of three kinds:

- (1) Express Trusts, which must be “manifested” in writing in compliance with the requirements of section 53(1)(b) of the Law of Property Act 1925;
- (2) Resulting Trusts, which the law implies in cases where land is acquired by one person, but using, wholly or partially, funds belonging to another

¹ [2007] 2 All ER 929

person.² Such trusts only arise where there has been some contribution to the actual purchase price or the mortgage deposit, but do not arise by reason of contribution to post-acquisition costs, such as mortgage contributions.

(3) Constructive Trusts

Express Trusts

4. The law on express trusts is at least clear. In *Goodman v Gallant*³, it was held by the Court that, where the parties had expressly regulated what their beneficial shares should be, their subsequent conduct could not be used to re-open that question.

Constructive and Resulting Trusts

Stack

5. The law relating to Constructive and Resulting Trusts has been overhauled by the decision in *Stack v Dowden* at least in the context of shared ownership of property by co-habiting couples or other domestic arrangements.

6. The problem re-visited in *Stack* is how to determine the shares in which the beneficial interest in property is to be divided where the parties have not made an express agreement as to those shares. There are two classic situations. The first is where the property is registered in the sole name of one party and another claims to be entitled to a beneficial share which is not recognised on the title or otherwise expressly agreed. The second is where property is registered in the joint name of two individuals but there is a dispute as to whether the beneficial ownership should be split 50/50.

² We do not consider cases of presumed gifts in this seminar, which are rare in practice in the land context.

³ [1986] 2 WLR 236, CA

The Facts in Stack v Dowden

7. Mr S and Ms D began a relationship in 1975. D bought a house in her sole name in 1983 using money from a mortgage also in D's sole name. D and S lived in the house with their children. D earned more money, and paid all of the mortgage installments and outgoings. They also did extensive DIY and trebled the value of that house. They then sold the first property and bought a replacement home, which they had conveyed into their joint names. D provided 65% of the purchase money from her own building society account, which included monies realised from the sale of the earlier property. The balance of the purchase price was provided by a loan secured by a mortgage in the parties' joint names and two endowment policies, one in S and D's joint names and one in the D's sole name. S paid the mortgage interest and the premiums due under the endowment policy in their joint names and the defendant paid the premiums due under the endowment policy in her sole name.

8. Other than this, the parties kept their savings and investments separate. Over time the mortgage loan was repaid in lump sums, with a series of lump sum payments of which D provided just less than 60%. The parties separated in 2002. At first instance, S secured a declaration that they held the property in equal shares, which the Court of Appeal reversed, finding that the beneficial interest was held in a proportion of 65:35 in favour of D.

The Decision

9. The House of Lords upheld the Court of Appeal. Lords Hoffmann, Hope and Walker agreed with Baroness Hale, Lord Neuberger dissented as to reasoning. It must be appreciated that, in *Stack*, the Courts were considering the question of what test ought to be applied in the event that two persons decide to register themselves as joint legal owners without any express agreement as to their respective beneficial shares. It must

also be appreciated that what is said generally by the majority rests on a distinction, which the Courts had as a rule generally rejected prior to *Stack*, between a “family” and a “commercial” context, or what Baroness Hale described as a “consumer” context (at paragraphs [54] and [57], in the latter referring to *Malayan Credit Ltd v Jack Chia MPH Ltd* [1986] A.C. 549).

10. The key test is stated by Baroness Hale at paragraph [56] (endorsed by Lord Hope at [4] – [5]; Lord Walker at [33] – [36]):

“Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.”

11. She went on to amplify upon this as follows (at paragraphs [58] and [59]):

“The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a *prime facie* case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated, at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

The question is, how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties’ financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have had a contrary intention? Or is it that the contrary can be proved by looking at all the relevant circumstances in order to discern the parties’ common intention?”

12. Baroness Hale concludes that the latter question is the correct one, and that one does not start from a resulting trust, but, rather, by looking at all the circumstances surrounding the case (see, e.g., at [60]). This leads her to state the approach to be taken as follows (at [68] – [70]):

“The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual. Nor may disputes be confined to the parties themselves. People with an interest in the deceased’s estate may well wish to assert that he had a beneficial tenancy in common. It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase.

In law, “context is everything” and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the

inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has enhanced (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then."

13. It is notable that their Lordships took the view that this approach ought to cut out some of the legal uncertainty which was perceived to exist in the law. For example, at [27] Lord Hope said:

"Lady Hale's opinion points the way to making the outcome of this type of case more predictable, so that parties can be advised with more confidence as to the appropriate terms of settlement."

14. That uncertainty seems, in part, to have been a result of the Courts diluting the restrictive – but clear – approach taken by Lord Bridge in the seminal case of *Lloyd's Bank v Rosset*⁴. In that case, Lord Bridge took the view that in order to vary the basic position that beneficial ownership mirrors legal ownership an "agreement, arrangement of understanding" between the parties must "be based on evidence of express discussions between the partners..." His Lordship continued⁵:

⁴ [1990] 1 All ER 1111, HL

⁵ At p. 1119

“[In the absence of evidence of an agreement to share] direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do”

15. The approach in *Rosset* – express agreement or contribution to purchase price only – must now be regarded as dead and buried by the cases beginning with *Stack*, although the process of withdrawing from that position had begun earlier.⁶

16. Whether *Stack* can claim to have brought certainty to the law is a matter to which we will return later on, when considering the dissent of Lord Neuberger, who reached the same result but for different reasons.

The Result

17. Having recounted the facts – and made specific reference to the fact that the finances of the parties were kept strictly separate apart from the joint ownership of the property – Baroness Hale concluded that the evidence was sufficient to rebut the presumption of joint (i.e. 50/50) ownership of the beneficial interest and decided that the appropriate split was 65/35 in favour of D. At [86] -

“The starting point is that it is for Ms Dowden to show that the common intention, when taking a conveyance of the house into their joint names or thereafter, was that they should hold the property otherwise than as beneficial joint tenants...

[87] In some, perhaps many, cases of real domestic partnership, there would be nothing to indicate that a contrary inference should be drawn. However, there are many factors to which Ms Dowden can point to indicate that these parties did have a different common intention. The first, of course, is that on any view she contributed far more to the acquisition of [the property] than did Mr Stack...

[91] There are other aspects to their financial relationship which tell against joint ownership. Chatsworth Road was, of course, to be a home for the parties and their

⁶ See, for example, *Oxley v Hiscock*, [2004] 3 WLR 715.

four children. But they undertook separate responsibility for that part of the expenditure which each had agreed to pay. The only regular expenditure to which it is clear that Mr Stack committed himself was the interest and premiums on Chatsworth Road. All other regular commitments in both houses were undertaken by Ms Dowden. Had it been clear that he had undertaken to pay for consumables and child minding, it might have been possible to deduce some sort of commitment that each would do what they could. But Mr Stack's evidence did not even go as far as that.

[92] This is, therefore, a very unusual case. There cannot be many unmarried couples who have lived together for as long as this, who have had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal (still less that they intended a beneficial joint tenancy with the right of survivorship should one of them die before it was severed). Before the Court of Appeal, Ms Dowden contended for a 65% share and in my view she has made good her case for that.”

Lord Neuberger's dissenting judgment

18. Lord Neuberger reached the same result as to the appropriate division of the beneficial interest in the property, but adopted different reasoning. Firstly, his Lordship disagreed that a different approach should be adopted in a domestic as opposed to a commercial context. The same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship [para. 107]

19. As to how the proportions should be determined, Lord Neuberger took as his starting point actual contributions to the purchase price:

“[110] Where the only additional relevant evidence to the fact that the property has been acquired in joint names is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held, in my view, in the same proportions as the contributions to the purchase price. That is the resulting trust solution. The only realistic alternative in such a case would

be to adhere to the joint ownership solution. There is an argument to support the view that equal shares should still be the rule in cohabitation cases, on the basis that it may be what many parties may expect if they purchase a home in joint names, even with different contributions. However, I consider that the resulting trust solution is correct in such circumstances...

[114] There is also an important point about consistency of approach with a case where the purchase of a home is in the name of one of the parties. As Baroness Hale observes, where there is no evidence of contributions, joint legal ownership is reflected in a presumption of joint beneficial ownership just as sole legal ownership is reflected in a presumption of sole beneficial ownership. Where there is evidence of the parties' respective contributions to the purchase price (and no other relevant evidence) and one of the parties has contributed X%, the fact that the purchase is in the sole name of the other does not prevent the former owning X% of the beneficial interest on a resulting trust basis. Indeed, it is because of the resulting trust presumption that such ownership arises. It seems to me that consistency suggests that the party who contributed X% of the purchase price should be entitled to X% (no more and no less) of the beneficial interest in the same way if he is a co-purchaser. The resulting trust presumption arises because it is assumed that neither party intended a gift of any part of his own contribution to the other party. That would seem to me to apply to contributions irrespective of the name or names in which the property concerned is acquired and held, as a matter of both principle and logic."

20. His Lordship's approach, was not, however, as strict as that adopted by Lord Bridge in *Rosset*. At para. [123] his Lordship emphasised that the contribution to purchase price resulting trust analysis was no more than a presumption "albeit an important one". His Lordship continued:

"[124] In many cases, there will, in addition to the contributions, be other relevant evidence as at the time of acquisition. Such evidence would often enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held. Such an intention may be express (although not complying with the requisite formalities) or inferred, and must normally be supported by some detriment, to justify intervention by equity. It would be in this way that the resulting trust would become rebutted and replaced, or (conceivably) supplemented, by a constructive trust."

21. In contrast to the majority of the House, Lord Neuberger did not consider that the court should set much store by the fact that the parties had or had not chosen to keep their

general financial affairs separate. He emphasised the difference between ownership of a home and other financial affairs [paras 132-134].

22. Another significant difference in Lord Neuberger's approach is the significance to be attached to dealings between the parties after the date of the acquisition of the property in question. As we have seen, Baroness Hale considered that the general management of the parties' financial affairs both at the time of the acquisition of the property is all important. By contrast, Lord Neuberger, whilst accepting that beneficial interests in a home could be altered after the date of acquisition, took the view that the subsequent day-to-day handling of financial affairs would not generally be sufficient to justify a conclusion that the shares had been varied.

“[138] The fact that the ownership of the beneficial interest in a home is determined at the date of acquisition does not mean that it cannot alter thereafter. My noble and learned friend Lord Hoffmann suggested during argument that the trust which arises at the date of acquisition, whether resulting or constructive, is of an ambulatory nature. That elegant characterisation does not justify a departure from the application of established legal principles any more than such a departure is justified at the time of acquisition. It seems to me that 'compelling evidence', to use Lord Hope's expression (in [11], above), is required before one can infer that, subsequent to the acquisition of the home, the parties intended a change in the shares in which the beneficial ownership is held. Such evidence would normally involve discussions, statements or actions, subsequent to the acquisition, from which an agreement or common understanding as to such a change can properly be inferred...

[141] Consistently with what has already been discussed, I am unconvinced that the original ownership of the beneficial interest could normally be altered merely by the way in which the parties conduct their personal and day-to-day financial affairs. I do not see how the facts that they have lived together for a long time, have been in a loving relationship, have children, operated a joint bank account, and shared the outgoings of the household, including in respect of use and occupation of the home, can, of themselves, indicate an intention to equalise their originally unequal shares any more than they would indicate an intention to equalise their shares on acquisition, as discussed earlier. So, too, the facts that they both earn and share the home-making, or that one party has a well-paid job and the other is the home-maker, seem to me to be irrelevant at least on their own.

Even the fact that one party pays all the outgoings and the other does nothing would not seem to me to justify any adjustment to the original ownership of the beneficial interest (subject to the possible exception of mortgage repayments)...

[146] In other words, where the resulting trust presumption (or indeed any other basis of apportionment) applies at the date of acquisition, I am unpersuaded that (save perhaps in a most unusual case) anything other than subsequent discussions, statements or actions, which can fairly be said to imply a positive intention to depart from that apportionment, will do to justify a change in the way in which the beneficial interest is owned. To say that factors such as a long relationship, children, a joint bank account, and sharing daily outgoings of themselves are enough, or even of potential central importance, appears to me not merely wrong in principle, but a recipe for uncertainty, subjectivity, and a long and expensive examination of facts. It could also be said to be arbitrary, as, if such factors of themselves justify a departure from the original apportionment, I find it hard to see how it could be to anything other than equality. If a departure from the original apportionment was solely based on such factors, it seems to me that the judge would almost always have to reach an 'all or nothing' decision. Thus, in this case, he would have to ask whether, viewed in the round, the personal and financial characteristics of the relationship between Mr Stack and Ms Dowden, after they acquired the house, justified a change in ownership of the beneficial interest from 35-65 to 50-50, even though nothing they did or said related to the ownership of that interest (save, perhaps, the repayments of the mortgage). In my view, that involves approaching the question in the wrong way. Subject, perhaps, to exceptional cases, whose possibility it would be unrealistic not to acknowledge, an argument for an alteration in the way in which the beneficial interest is held cannot, in my opinion, succeed, unless it can be shown that there was a discussion, statement or action which, viewed in its context, namely the parties' relationship, implied an actual agreement or understanding to effect such an alteration. [Underlining added]

Subsequent cases

23. Perhaps unsurprisingly, there have been a significant number of cases since the decision in *Stack* seeking to apply the principles set down by the majority⁷. We will focus on just two of those cases to illustrate the potential continuing difficulties notwithstanding the restatement in *Stack*.

⁷ In addition to the cases dealt with in this paper see *Abbott v Abbott* [2007] UKPC 53, *Kali v Chawla* [2007] EWHC 2357 (Ch), *Qayyum v Hameed* [2009] EWCA Civ 352.

Laskar

24. In *Laskar v Laskar*⁸ a mother exercised her right to buy local authority property. She was unable to afford to do so by herself and so her daughter agreed to share in the purchase. The purchase price was £50,085 and was funded by a joint mortgage of £43,000. The daughter paid £3,400 and the mother the outstanding sum. The parties intended to (and did) let the property and apply the rental income to service the mortgage. The mother was responsible for letting and managing the property, kept the rent, paid for repairs and met the mortgage payments. The daughter applied for a declaration as to the extent of her interest. The judge at first instance calculated her interest by reference to her contribution to the purchase price and found her share to be only 4.28%.

25. The Court of Appeal allowed the daughter's appeal in part. It was held that the resulting trust presumption should be applied so that, in the absence of any relevant discussions between the parties, their respective beneficial shares reflected the size of their contribution to the purchase price. However, the daughter's share was held to be 33% on the basis that she was to be given credit for one half of the mortgage and £3,400 paid towards the purchase. The mother received credit for the fact that a discount was applied under the right to buy provisions which was attributable solely to her former secure tenancy.

26. The most interesting aspect of the decision from the point of view of assessing the impact of the decision in *Stack* is that the approach of the majority in *Stack* was not applied on the basis that the property was purchased primarily as an investment and not as a home for the parties involved. Lord Neuberger, the dissenting voice in *Stack*, gave the only reasoned judgment in *Laskar*. His Lordship distinguished the majority approach in *Stack* as follows:

⁸ [2008] 2 EGLR 70

“[15] The appellant contends that the reasoning of the majority [in *Stack*] compels a finding in the present case that the beneficial ownership of the property was held in equal shares by the parties... In *Stack*, the two parties who purchased the house in question were living together in a long-term sexual relationship and had children when they purchased the house, which they intended to be, and indeed was occupied as their family home. It is by no means clear to me that the approach laid down by Baroness Hale of Richmond in that case was intended to apply in a case such as this. In this case, although the parties were mother and daughter and not in that sense in an arm’s length commercial relationship, they had independent lives, and, as I have already indicated, the purchase of the property was not really for the purpose of providing a home for them. The daughter hardly lived there at the time it was purchased, and did not live there much, if at all, afterwards, and the mother did not live there for long. The property was purchased primarily as an investment...”

[17]... To my mind, it would not be right to apply the reasoning in *Stack* to a case such as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a familial one.”

27. His Lordship went on to hold that if the presumption in *Stack* applied, it would have been rebutted on the evidence because it was clear that the parties had not intended that the property should be owned in equal shares [para 19].

28. This decision leaves the scope of the decision in *Stack* open to some uncertainty. It will not always be obvious whether a property should be treated as falling within the category of domestic ownership so that the presumption of an equal division of the beneficial ownership laid down in *Stack* should apply. Difficulties must arise in cases where, for example, married (or unmarried) couples purchase property as an investment as well as a second home or where the purpose of the ownership changes. Are the applicable principles determined at the time of the acquisition or can those, along with the beneficial shares, change over time? A couple might purchase a property to live in and then, later, decide to let it out and apply the rental income to a mortgage. It is not clear whether the resulting trust or equal beneficial ownership presumption should apply.

Laskar appears to leave open the possibility of Lord Neuberger's dissenting view in *Stack* applying in such scenarios.

Fowler v Barron

29. It might be thought that the difference in theoretical approach between the majority and Lord Neuberger in *Stack* will make little practical difference in the outcome of cases. Baroness Hale starts with the presumption of equality and then looks to see if the evidence justifies a departure from that presumption. Lord Neuberger started with the resulting trust presumption of contribution to purchase price and then turned to the evidence to see if that presumption is rebutted, whilst adopting a stricter approach to what will be sufficient to rebut the presumption, general management of financial affairs being in his view insufficient.

30. However, another case subsequent to *Stack*, *Fowler v Barron*⁹ illustrates the possibility of these different approaches producing quite different outcomes. In that case Ms F and Mr B had a 23 year unmarried relationship beginning in 1983. In 1987 they had a son and purchased a house. They made a conscious decision to put the property into their joint names, but there was no discussion or agreement between them as to what shares the property should be held in. The purchase price was £64,950. B paid the deposit. A mortgage of £35,000 was taken out in the parties joint names, the balance of the purchase price was paid by B and met the mortgage instalments, council tax and utilities bills, F paid for occasional expenditure such as clothing and holidays. The relationship broke down and in 2006 the property was valued at £150,000. The judge at first instance (in a decision given before the judgment of the House of Lords in *Stack*), held that F was not entitled to any beneficial interest whatsoever as the resulting trust presumption applied and F had not made any contribution to the purchase price.

⁹ [2008] EWCA Civ 377

31. The Court of Appeal, in a decision after *Stack*, overturned the judge's conclusion and ordered that F had a 50% beneficial share in the property. Lady Justice Arden gave the leading judgment. After setting out the facts and reasoning of the majority in *Stack*, her Ladyship summarised that decision as follows:

[24]... the important points decided by the House for the purpose of this appeal were as follows. The legal technique that the court will use to ascertain whether both joint owners who had been co-habitees had a beneficial interest is that of the common intention constructive test, rather than that of resulting trust. This will enable the court to take a holistic view of the whole of the parties' conduct so far as it illumines their shared intentions about the ownership of the property. The court will not impose any particular allocation of property on the parties. It is not a question of the court deciding what is *fair* as regards the division of ownership but of determining what the co-owners' shared intentions were as regards beneficial ownership. Where, as here, a house is transferred into the joint names of two individuals as their home, without any declaraiotn of trust the transfer will indicate that the parties intended to own the house in equal shares and thus the onus will be on the one (here, Mr Barron) who asserts that property is owned by them in other than equal shares to show that they had a shared intention to own the property in some other shares. The conduct that the court will take into account will include, but is not limited to, the financial contributions that they made towards the acquisition of the property or repayment of any loan raised for such purpose. The onus will not be easy for that person to discharge.

32. Applying those principles, the court found that the presumption of joint beneficial ownership had not been rebutted by B.

[41]... the decision in *Stack* shows that the critical factor is not necessarily the amount of the parties' contributions: the court has to have regard to all the circumstances which may throw light on the parties' intentions as respects ownership of the property....

[46]... unlike the parties in *Stack*, there is no evidence that Mr Barron and Miss Fowler had any substantial assets apart from their income and their interest if any in the property, and Miss Fowler made no direct contribution to paying for the property. I do not think that it is reasonable to infer that the parties intended that Miss Fowler should have no share of the house if the relationship broke down. That might leave Miss Fowler dependent on state benefits and housing for

support. The way that she used her own income indicates that the parties largely treated their incomes and assets as one pool from which household expenses will be paid. There is also important evidence about their wills. Moreover there is no logical reason why Miss Fowler's interest should be equal to a one half-share of the proportion that the mortgage loan bore to the total acquisition cost to the property since the parties cannot have expected her actually to contribute to that amount. In those circumstances, I do not consider that the presumption of equal beneficial interests can be successfully rebutted.

[47] This result can be criticised because it may leave Miss Fowler better off than the case of a cohabitee who contributes (say) 20% of the purchase price. But that would only be the case where the court found that the parties' shared intention was that they should share the beneficial interest in their home in proportion to the amount of their financial contributions to the cost. But the reason why the result in that case may be different is because that is what the court infers to be the parties' intention. It would have been open to them to agree to divide the ownership in any other way. The basis, on which *Stack* proceeds is that the court's jurisdiction is based on the parties' common intention, expressed or inferred. The parties autonomy to devise a solution suitable for their circumstances is preserved. Accordingly, subject always to the strength of the presumption arising from legal ownership in joint names, the result may depending on the facts be different in different cases."

33. The outcome in *Fowler* starkly illustrates the potential difference between the approach of the majority and minority in *Stack*. The judge at first instance shared Lord Neuberger's view that the starting point was the resulting trust presumption and contribution to purchase price. As F did not contribute anything to the purchase price and the presumption was not rebutted, she received no share at all. Following *Stack* the starting point is a presumption of an equal share. So in *Fowler*, the Court of Appeal found the presumption was not rebutted and awarded F a 50% share.

Conclusions

34. It would appear that their Lordships hopes in *Stack* that the approach adopted in joint ownership cases would be more consistent and predictable are unlikely to be realised. The difficulty in any case lies in identifying which factors the court will give

weight to in deciding whether or not the presumption of equality has been rebutted. As Baroness Hale was at pains to point out, the list of factors she identified was by no means exhaustive. Particular factors of any given case are likely to influence particular judges more strongly than others, making it difficult to predict an outcome with any real certainty.

35. There is certainly an impression on reading Lady Justice Arden's judgment in *Fowler* that the court is returning to an assessment of ownership on the basis of a criterion of fairness, though couched in terms of what it is reasonable for the court to infer as being the parties' intentions. It is hard to see how the consequences of the breakdown of the relationship and the fact one party might be forced to rely on state benefits can have any bearing on the situation in the face of an express finding of fact that there was no discussion as to the extent of each party's ownership.

36. There would appear to be very little difference between the court determining what is "fair" and the court determining what it would have been reasonable for the parties to agree. Applying either criterion it will be difficult for practitioners to give conclusive advice as to the likely outcome of such cases.

37. Further, the scope of the presumption of equality is far from clear. It would appear to apply only in the "domestic" context, but as illustrated by *Laskar* that could prove to be an elusive categorisation.

"TRUSTS OF LAND" AND THE 1996 ACT

38. Whatever the origin of the trust in question, if the trust's subject matter is, or includes, land, it is a "trust of land" covered by the regime contained in the Trusts of Land and Appointment of Trustees Act 1996 ("TLATA"). TLATA applies equally to express, resulting, implied or constructive trusts (section 1(2)(a)). TLATA does not differentiate between domestic or commercial relationships, and (subject to what follows)

in principle, the regime contained in TLATA applies equally to both situations, unless it has been expressly varied in by the terms of the instrument. Powers can be excluded, or made subject to consent requirements.

39. TLATA is an important tool-kit for practitioners. Broadly, it is structured as follows:

- (1) It gives trustees very wide powers, including
 - a. A power of buying land for investment purposes (section 6(3)).
 - b. In section 7, it provides a power for trustees of land where the beneficial interest is held by tenants in common to partition the land;
 - c. In section 9, it gives trustees power of delegation in certain circumstances prescribed by statute;
 - d. In section 12, it confers on certain beneficiaries rights to occupy in appropriate circumstances, though this right is subject to section 13. The latter section provides a statutory compensation mechanism to other beneficiaries who are not permitted to occupy the land (section 13(6)).
- (2) It contains rules regarding the resolution of disputes surrounding trusts of land (see section 14), which can be initiated on the application of a person who is a trustee or has an interest in property subject to a trust of land (which would exclude a settlor who retains no further interest):
 - a. Under section 14(2)(a), an application can be made in respect of the exercise by trustees of any of their functions. This provision allows trustees to have their decisions validated by the Court, and for others falling within section 14(1) to challenge those decisions. Frequently,

this section is invoked to secure a sale of the land which is held on trust;

- b. Under section 14(2)(b), an application can be made for a declaration as to the nature or extent of a person's interest in property subject to a trust of land (such as, commonly, whether a person has a beneficial interest, and, if so, what its extent is).

Generally, the Court must exercise its powers under section 14 by having regard to the non-exhaustive list of factors contained in section 15(1). Additionally, when the application concerns the rights of occupation by beneficiaries and the rights of trustees to impose conditions under section 13, the special factors in section 15(2) must be considered. For all other matters (excluding the power to transfer the trust property to beneficiaries under section 6(2)), the additional facts in section 15(3) are applicable.

40. TLATA does not, therefore, simply regulate the relationship between trustees and beneficiaries, setting out the default rules under which the trust operates, but also confers on the Court the power to force a sale of the land forming the subject matter of the trust. This is an important, and powerful, weapon in the arsenal of secured creditors and those who wish to wind up a property partnership. Nothing in TLATA affects the operation of section 335A of the Insolvency Act 1986, governing the right of trustees in bankruptcy to force a sale of trust property. In many cases, it will be appropriate to consider whether to go down the Insolvency Act or TLATA route. In such a case, an application should be made to the Court which had jurisdiction over the bankruptcy under section 14 TLATA.

41. Although many aspects of TLATA have now been considered on a number of occasions by Courts of all instances, this part of the paper will look at two specific and

related areas which are likely to be of most interest to practitioners in the present climate. The first is the regulation of powers of sale by the Court, and a consideration of how TLATA might overlap with the regime contained within the Insolvency Act 1986. The second is the law relating to payments for occupation and equitable compensation by the occupying co-owner. The law has been thrown into some confusion by the decision in *Stack*, which, on this question, would appear to have been wrongly decided.

Applications for Sale

Some Background

42. As already discussed, trusts of land can arise either expressly, or implied (i.e. as resulting or constructive trusts). In the latter category of trusts, there might be some uncertainty on the part of a potential beneficiary as to whether he or she has a beneficial interest at all, and the extent of that beneficial interest. In such circumstances, the Court can be asked to make a declaration as to the extent of any interest under section 14 TLATA.

43. More common, however, is the problem of a dispute as to what is to happen to the land held on trust. A relationship breakdown, or ending of a business relationship, can mean that the departing party wishes to access the capital locked up in the land, whereas the other party wishes to retain the land as a home, or as business premises. Previously, such disputes were dealt with under the old “trust for sale” regime, which TLATA replaced with a more flexible regime for the resolution of disputes. Under the old regime, the Courts lent strongly in favour of sale unless there was some continuing reason (a “subsisting collateral purpose”) for refusing sale. This would furnish a reason for refusing sale. This was viewed as too inflexible, and lent too much in favour of sale. Therefore, the older “trust for sale” regime was replaced with the “trust of land”, the change in title signalling a shift in focus of that trust (for a fuller account of the policy differences, see the informative judgment of Neuberger J (as he then was) in *The Mortgage Corporation v Shaire*, to which we will return below, at paragraphs 57 and following).

44. The classic cases in which TLATA will need to be considered are one of two cases:

- (1) Disputes between two co-owners, where one wishes to retain the property and the other wishes to sell it;
- (2) Disputes between a co-owner, A, and a mortgagee of the other co-owner's, B's, beneficial interest. In such a case, the mortgagee commonly only has a security over the other co-owner's beneficial interest because the mortgage has been obtained by B practicing a fraud on A, or by there being some other reason for the mortgage being set aside against A only.

45. These need to be considered against the context of the different regime under the Insolvency Act 1986, regulating applications for sale by an owner's trustee in bankruptcy, under which the test for securing a sale is different, and under which there is a twelve-month moratorium on sale. The reason why the insolvency rules need to be considered is that, often in cases falling within (2) above, the fraudster co-owner has disappeared or is "effectively insolvent". Therefore, on the facts, a mortgagee has the choice of whether to pursue either a TLATA or an Insolvency Act application. There is nothing to prevent him from doing either, and there are sound reasons in favour of each. The basis for this right to choose is that the remedies of a mortgagee are cumulative, and he can, if the mortgage so provides, sue on the personal covenant for all monies due to bankrupt the mortgagor, thereby securing access to the Insolvency Act regime. If this strikes the reader as harsh, then he or she is not the only one. The district judge in *Alliance and Leicester v Slayford* [2001] 1 All E.R. (Comm) 1, when confronted with this course of action, is reported by the Court of Appeal to have reacted as follows:

"I have to say I find the approach of the [Bank] disgusting beyond belief and I shall say so. Right, and I do not care who knows it and I do not

care whether you are right as a matter of law or not it is disgusting to try and obtain possession by the back door [...] is revolting beyond belief.”

The TLATA Regime

46. As already indicated, the matters which the Court takes into account on an application for sale under section 14 TLATA, outside the bankruptcy context, are dealt with (non-exhaustively) by section 15.

“(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

- (a) the intentions of the person or persons (if any) who created the trust,
- (b) the purposes for which the property subject to the trust is held,
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary.

[...]

(3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).”

Co-Owner Disputes

47. There are surprisingly few reported cases of “pure” disputes between co-owners.¹⁰ From what cases there are, it would appear that, in general, where two co-owners fall out, the Courts will treat sale as something close to a last resort, unless it is

¹⁰ In this context, reference is still made to the “classic” authorities, such as *re Buchanan-Wollaston’s Conveyance* [1939] Ch 738, though it is thought by most commentators that these cases would still furnish a guide as to how the Court might apply section 15(1)(a) and possibly (b).

agreed to by the parties (as happened in *Collier v Tugwell*, 22 January 1999, unreported). In the decidedly strange case of *Dear v Robinson* [2001] E.W.C.A. Civ 1543, for instance, the Court of Appeal attached a great deal of weight to the fact that the majority of beneficiaries wished to postpone sale on appeal (though, somewhat bizarrely, they had asked for that very order below. It seems that both sides had a change of heart between the trial and the appeal, and the parties effectively swapped sides on appeal).¹¹

48. *Rodway v Landy* [2001] Ch 703 is also an unusual case, in that it related to commercial premises, namely a doctors' surgery, which had been acquired by R and L for the purposes of launching a practice partnership, which went sour soon afterwards. They had bought the property with a joint mortgage and then developed the site to suit their purposes. L thereafter terminated the partnership. R sought an order for sale of the property, claiming that it was a partnership asset. L instead wished for the property to be partitioned or to have the occupation of one or other of them restricted in some manner. It seemed probable that, if there were an order for sale, this would mean the practice would be sold to R (because she was a willing buyer, apparently had finance, and this would have been the only way to avoid an early redemption penalty). An obstacle to this proposal was that the first instance Judge, and the Court of Appeal, found that it would be an unlawful transaction under legislation preventing the sale of medical practices and goodwill. Additionally, the Court of Appeal also found that a sale should not be ordered on an alternative basis, taking into account factors under section 15 of TLATA. In particular, it was noted that sale would make it impractical for both doctors to keep practicing. L would stand to lose his patients, and there were serious question marks as to whether it would be possible to set up another practice in the locality. The Court of Appeal was not attracted by the argument that it was intended for the practice to be run as a unified, "one stop shop" whole, noting that this was no longer the intention at the time

¹¹ See too *White v White* [2004] 2 F.L.R. 321, in which some consideration is given to section 15, though this case seems unusually harsh in its outcome as there it resulted in a house having to be downsized.

of the hearing. The Court of Appeal emphasised that sections 15(1)(a) and (b) needed to be kept separate.

49. It was, therefore, easier to apply Solomon's justice, and provide that the property should be divided (which it could be), and for both to continue to occupy and run their surgeries separately. The Court also emphasised that it would take into account all subsisting purposes at the time of the hearing which are to be considered under section 15(1)(b).¹² the solution was doubtless made simpler by the fact that R was not far from retirement. *Rodway* is an interesting case, as it shows that the Courts can be quite creative under TLATA, and have a broad range of orders which they can deploy to resolve disputes. This is what the Law Commission envisaged in their working paper which preceded the draft bill of what was, after very significant revisions, to become TLATA. Further, the availability of compromise orders is intended to ensure that matters can be resolved out of Court.¹³ As an aside, therefore, it is sensible for those involved in disputes under TLATA (as, of course, in all other cases) to consider appropriate terms of compromise.

50. Agreements between co-owners as to what was to happen with the home may also carry a great deal of weight. In *Holman v Howes* (2008) 1 F.L.R. 1217, a husband and wife had divorced, but later, with joint funds, acquired a home with a view to reconciling. The house was in the husband's name alone. The husband had, however, indicated in terms that, by way of assurance, the wife would not be evicted without her consent. The Court of Appeal decided that this meant that no order for sale under TLATA could be made without the consent of the wife.

¹² This is in contrast to the purposes existing when the trust was set up, which are to be considered under section 15(1)(a).

¹³ See Law Commission, Trusts of Land Working Paper No 94, paragraph 10.9, and Report, Law Com 181, para 12.3.

51. It would, therefore, seem that in a case between co-owners, the Court will look at a number of factors, including the subsisting purposes, any assurances made between the parties and the view of the majority. As we shall see, however, such cases ought to be strictly distinguished from cases in which the fight is not between two co-owners, but between a co-owner and a secured creditor of the other co-owner, commonly a bank.

Disputes Between a Co-Owner and a Secured Creditor

52. Imagine the following case:

A and B are legal and beneficial co-owners of a house. B fraudulently obtains A's signature on a mortgage application to Bank C. B pockets the money, and then disappears. Bank C, not receiving any payment issues mortgage possession proceedings, and is met with the defence that A does not know about the mortgage.

53. In such a case, the mortgage would bind the beneficial interest of B only. It is established law¹⁴ that the effect of such a fraud would be that the mortgagee, C, would not be entitled to possession as it is a mortgagee of a beneficial interest only, and not of the legal estate. Therefore, the mortgagee's first option is to bring an application for sale under TLATA, section 14.

54. Under the old law, under section 30 of the Law of Property Act 1925, the mortgagee in this case was in as strong a position as the trustee in bankruptcy was under the Insolvency Act 1986. The two were equated, so that the mortgagee would prevail unless there were exceptional circumstances in the narrow sense which is required in the cases under section 335A of that Act. In other words, under the old law, it was for A to demonstrate that there were exceptional circumstances – which are very hard to prove

¹⁴ See, for instance, the discussion of the law contained in *Achampong*, below, and *First National Securities v Hegarty* [1985] Q.B. 850, 854.

(see below) – to defeat an application and secure a postponement of the sale. The interests of the chargee or mortgagee were therefore privileged.

55. As indicated above, it was thought that TLATA would change the balance of power between such classes of litigants. In a way it has. For instance, under section 15 the interest of a secured creditor are not paramount, but merely one of a series of factors to be taken into account (as a factor alongside the others in section 15(1)(d)). Nonetheless, it is incorrect to say that this had handed the innocent co-owner a substantial lifeline. In practice, it is suggested that, unless a sensible buy-out of the mortgagee's interest can be arranged, an application for sale may be postponed for wide-ranging reasons, but will not be readily refused.

56. The primacy of the interests of the mortgagee was apparently reaffirmed in the first publicised case under the TLATA regime, which was *TSB v Marshall* (1998) 2 F.L.R. 769, though this was a case with some odd facts flowing not from a fraud practiced on the bank and the “innocent” co-owner, but from a conveyancing error, which robbed the defending co-owner of much of her merit. The facts appear to have been these. D2 and D3 were a married couple with joint legal and equitable shares in the family home. On divorce, D3 moved out, and D2 married D1 instead. D3 transferred the whole beneficial title to D2, but retained joint legal ownership with her. D2 and D1 thereafter entered into a further deed, in the mistaken belief that they had legal title, and mortgaged the property to the TSB. D1 and D2 then divorced, and D2 became solely entitled to the property in equity. She could not afford the repayments. Unsurprisingly on those facts, where the TSB would, but for the conveyancing hiccup, have been a legal mortgagee, the Court had little sympathy with D”, and it was felt that to seek to hide behind a conveyancing “error” was a “gross injustice”.

57. Next came *The Mortgage Corporation v Shaire* [2000] 1 F.L.R. 973 (also [2001] Ch. 743, but a less full report). Mr and Mrs Shaire, who were beneficial joint tenants of

the matrimonial home subject to a mortgage in favour of Abbey National, were divorced in 1987. As part of the divorce settlement, Mr Shaire agreed to sell his share in the property equally to Mrs Shaire and her new partner, Mr Fox. Mr Fox had moved in by that point. As a result, the house was beneficially held 75% by Mr Shaire, and 25% by Mr Fox. Mr Fox then forged Mrs Shaire's signature on two mortgages, the second of which was used to redeem the first. Mr Fox took the remaining money advanced for himself. Mr Fox then died. He (or his estate) was "effectively insolvent".

58. The case is important because Neuberger J, for the first time, had to consider whether there had in fact been a change in the law, leading in it re-weighting towards defending co-owners. If there had been a departure from the old cases, the question was how far this had gone. In broad terms, he found that a change had occurred. The general policy points made to support that conclusion need not detain us here. What is interesting is how Neuberger J then applied TLATA to the facts, and weighed up the competing factors. First, it was important to note that the cases often turned on balancing the interests of two equally innocent parties who were the victims of fraud. Therefore, in the ordinary run of these cases, the defending co-owner will be as innocent as the bank. As neither side can therefore claim to have the edge on merit, other factors need to be considered. In *Shaire*, Neuberger J identified the fact that the bank, which in reality had had its security reduced to 25%, would want a quick sale or would face being kept out of its money. On the other side of the scales, Mrs Shaire simply wanted to retain her home. As against that, the bank pointed out that Mrs Shaire's 75% could buy her alternative accommodation. It also appeared that Mr Shaire was willing to assist her financially.

59. Neuberger J's solution was ingenious. He recognised that a postponement of sale was likely to place an unreasonable commercial burden on the bank, which was a money lender, and not in the business of investing in shares in houses and waiting for its capital money to be realised in the future. Therefore, he proposed that the bank should cut its losses by negotiating a loan, valued at a quarter share of the house. Mrs Shaire could then

service that loan, so that the bank would be bought out. It is not recorded whether this resulted in a consent order being made. It is clear that the bank would not be forced into an uncommercial order, however.

60. *Shaire* was not well-received by banks. They perceived that this was a move towards making it more difficult for them to realise their shares in cases where they had fallen victim to a mortgage fraud. Their first reaction, therefore, was to seek refuge in the more generous insolvency procedures (and see the *Slayford* case, above). Need they have worried about *Shaire*? The answer is “probably not”.

61. The reason for this is that there remains more than a trace of the old, pro-bank philosophy even under TLATA. First and foremost, *Shaire* itself merits a careful reading. There was one feature of *Shaire* which is unusual. Mrs Shaire could afford to make payments to the bank, and therefore rather than a third party sale, a buy out of the bank’s interest was on the cards. In the ordinary run of the cases, this will not be so. It is a depressingly common feature of these cases that usually, the entire household is strapped for cash, so that a third party sale remains the only viable option. Therefore, it seems likely that the actual protection offered by *Shaire* is quite modest.

62. That this is so appears to have been confirmed again in subsequent decisions, in which judicial attitudes noticeably hardened. *Bank of Ireland v Bell* [2001] 2 F.L.R. 809, was another case of a wife’s forged signature on the mortgage documents. The wife had only a small (10%) beneficial share. There was no real prospect of the wife acquiring the other share, as she neither had money, nor access to it. The trial judge, taking into account what were later decided to be irrelevant considerations (such as the welfare of Mrs Bell), refused an order for sale. The Court of Appeal set that decision aside and remitted the case to the County Court for decision. While we do not know the actual outcome, on the basis of the Court of Appeal’s reasoning it is safe to assume that some sort of order for sale ought to have been made.

63. In *Bell*, Peter Gibson L.J. stated at para. 31 that:

“The 1996 Act, by requiring the court to have regard to the particular matters specified in section 15, appears to me to have given scope for some change in the court’s practice. Nevertheless, a powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue”.

64. Mrs Bell lived in the property with her son (who was 17 at the date of trial), and was in ill health. The Court of Appeal found that the fact that the son was soon to be 18 robbed the first point of much force, and, as to the second, that this was a reason for, at most, postponing and not refusing sale.

65. A similar, but perhaps even firmer, stance appears to have been taken in *First National Bank v Achampong* [2004] 1 F.C.R. 18. This was again a case in which it was suggested there may have been a fraud. Mr and Mrs Achampong agreed to charge their jointly owned family home as security for a bank loan of £51,500. At the time, Mr and Mrs Achampong lived in the house with their grown-up children (one of them mentally handicapped), and some grandchildren. The loan was not, however, for their own use. Rather the loan was intended to fund the business of a Mr Owusu-Ansah, a cousin of Mrs Achampong.

66. Relevant paperwork was sent out. This was returned signed by Mr and Mrs Achampong, and Mr and Mrs Owusu-Ansah (even though the latter does not appear to have been in the country at the time, or, indeed, ever), accompanied by the details of the solicitor acting for them, and a legal charge to be executed in the solicitor’s presence. The loan was advanced, and immediately paid to Mr Owusu-Ansah. It was Mr Owusu-Ansah who factually bore the responsibility for repayment of the loan.

67. Mr Achampong left his wife shortly after the charge was executed and the loan

secured and returned to Ghana (though Blackburne J notes this “may be no more than coincidence”). Mrs Achampong’s agreement to the loan was found to have been procured by undue influence. Mr Owusu-Ansah, already back in Ghana, did not keep up the instalments on the insurance a few years later. The Bank then mishandled its issuing and conduct of proceedings, so that the whole matter was allowed to drag on the best part of seven years. In the meantime, the outstanding debt had mounted up to £180,000 by the time of trial.

68. The trial judge ordered sale. Mrs Achampong appealed, citing a number of grounds as to why the judge erred. Many of them are not compelling, but it is notable that Mrs Achampong had much more a share in the home than Mrs Bell did. She also had a handicapped child and grandchildren present. It is notable, however, that the Court of Appeal took a very strict line on whether those sorts of considerations were to be taken into account at all. In particular, while there seemed no dispute that Mrs Achampong’s handicapped child and her other grandchildren were in the house, the Court of Appeal noted that there was no evidence of what impact, if any, a sale would have on them. Absent evidence of how a sale would affect those children, the Court of Appeal expressed the view that no real weight could be attached to such factors. Notably, the Court did not consider the possibility of a buy out. As we shall see below, that reasoning bears a little resemblance to the approach taken by the Courts under section 335A.

69. It is not all bad news for co-owners. On the other side of the line is *Edwards v Lloyd’s TSB* [2004] E.W.C.H. 1745. In that case, E, was once more the victim of a fraud. Although she had divorced from her husband and taken his beneficial interest, she did not know that her husband had previously mortgaged the family home. Again, it was common ground that the mortgage bound only her former husband’s share. The bank applied for sale. Park J ordered that sale should be postponed for five years. His decision was informed by a series of factors which he considered the more flexible *Shaire* approach allowed him to take into account. In particular, he noted that on sale E would

not be able to afford another home (unlike *Shaire*). Secondly, he noted that, unusually, in this case the debt was less than the security, to that the bank was not faced with the certainty of a loss. The equity on which the outstanding loan (£15,000 plus interest and costs) was secured was £70,000. This would allow E's youngest child to reach the age of 18, though he also noted that, when the time came, the competing interests of the parties may need to be considered afresh.

70. In *Pritchard Englefield v Steinberg* [2004] E.W.C.H. 1908 (Ch), an application was made by P to enforce a charging order against the beneficial interest of D1, which secured damages and costs which P had won against him. Unusually, this is not a mortgage fraud case. An order for sale was secured, but D2 appealed. She alleged that she had a life interest to occupy under a constructive trust in relation to the property in question. She was the mother of D1. Peter Smith J found this to be the case. He found, however, that this did not mean that this interest took precedence. Despite finding that D2, an elderly lady, enjoyed such a right, he stated as follows (at [60]):

“It seems to me that it is appropriate to order a sale. There are a number of reasons which justify such a conclusion. First, the Claimants have a substantial sum which otherwise would be irrecoverable. Whilst the former paramouncy of a creditor no longer exists, it is a factor, which requires consideration. If a sale is not ordered they will be substantially out of pocket.”

71. Amongst other reasons, it is clear once again that the rights of creditors will, where there is no other opportunity to secure payment, be given great weight.

Cases under the TLATA Regime: A Brief Overview and Summary

Case	Section 14 Factors	Other Factors	Outcome
<i>Sale Application by Co-owner</i>			
<i>Collier v Tugwell</i> (1999, CA)	None, a case in which the Claimant asked for an order to		

	buy out the other co-owner and the other co-owner agreed to this course of action		
Rodway v Landy (2001, CA)	<p>(1) at the time of trial, the intention had changed to allow occupation of the property as a medical practice, even beyond the dissolution of the partnership</p> <p>(2) the fact that one original purpose – to provide a “one-stop” medical shop, no longer obtained was but one factor to be taken into account under section 15(1)(a)</p>	<p>(1) A sale to Dr R by Dr L could not be achieved without breaching certain statutory provisions relating to the sale of premises used for a medical practice</p> <p>(2) L would, if he were to move out, find it difficult to relocate</p> <p>(3) Dr R was due to retire in a comparatively short period</p> <p>(4) A partitioning of the property was possible so that both could run their practices separately.</p>	Partition ordered, without sale, so that both could continue practising separately.
Holman v Howes (2005)	Assurance made to the wife that sale would only sought with her consent. This was the sweetener to encourage a post-divorce reconciliation		Sale could only be ordered if the wife agreed
<i>Sale Application by Secured Creditor of One Co-owner</i>			
TSB v Marshall (CC, 1998)	(1) There was no realistic prospect of the mortgage being repaid in this case	The reason why the bank did not have a legal charge was not a fraud, but a n	Sale ordered

	(2) the children in the home were 18 at the time of the hearing	inadvertent conveyancing error of which the other co-owner was seeking to take advantage	
The Mortgage Corporation v Shaire (2000)	(1) The majority of the beneficial interest belonged to a person who did not want to sell (2) The bank needed to get its money out (3) There were no minor children in the house	(1) Remaining co-owner able to meet payments	Unknown, though it appears that a deal was done for the co-owner to buy out the bank by the bank having the value of its share in the house converted into a loan at a commercial rate (or thereabouts)
Bank of Ireland v Bell (2001)	(1) It was not a good reason, where a relationship had broken up, that the property was bought as a home (2) The fact that a son is 17 years old, and almost 18, means that little weight should be attached to the presence of a minor	(1) An imminent operation is a reason for postponing, and not refusing, sale. (2) It can be relevant that the remaining co-owner would not be able to afford other housing (3) Unrealistic prospects of repayment lean strongly in favour of an order for sale.	Order refusing sale set aside and case remitted to County Court.
First National Bank v Achampong (2003)	(1) There were children in the house, as well as a handicapped adult. There was, however, no evidence of what the effect would be on sale, and this could not therefore be taken into account		Sale ordered

	(2) The equitable interest of the co-owner was not taken into account.		
Edwards v Lloyds TSB Bank (2004)	(1) There were children, the youngest being 13; (2) The interests of the secured creditor could be safeguarded as beneficial interest which was secured against was well in excess of the debt, principal and interest, and costs.		Sale delayed for five years, with the right to have the matter reconsidered then.
Pritchard Englefield v Steinberg (2004, HC)	(1) Although there was no rule of primacy of creditors any more, it was still a factor	(1) It seemed clear that other creditors would be making similar applications, and that it might well be that the life interest enjoyed by the innocent co-owner would eventually be lost by some other proceedings.	Sale ordered, but the co-owner to be given a chance to secure sale with her remaining on-site (which seemed unlikely to the Judge), such time limited to two months.

Disputes Between Co-Owners and Trustees in Bankruptcy

72. Section 335A of the Insolvency Act 1986 provides that

(1) Any application by a trustee of a bankrupt's estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy.

(2) On such an application the court shall make such order as it thinks just and reasonable having regard to--

(a) the interests of the bankrupt's creditors,

(b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt's spouse or civil partner or former spouse or former civil partner--

(i) the conduct of the [spouse, civil partner, former spouse or former civil partner], so far as contributing to the bankruptcy,

(ii) the needs and financial resources of the [spouse, civil partner, former spouse or former civil partner], and

(iii) the needs of any children; and

(c) all the circumstances of the case other than the needs of the bankrupt.

(3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt's estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.

(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this section.

73. This is, therefore, a special regime applicable to applications by trustees in bankruptcy. Subsection (3) is the lethal weapon, as, after 12 months, the strength of an application for sale under section 335A becomes more or less irresistible. The difficulty of overcoming such a hurdle is often noted. It is to be noted that the hardship for a non-owning spouse is also a relevant factor, so that co-ownership is not a precondition.

“Exceptional Circumstances”

74. The classic *dictum* is that of Nourse L.J. in *re Citro*, [1991] Ch 142, at 157, noting that re-housing, disruption of schooling and other such hardships “...cannot be described as exceptional. They are the melancholy consequence of debt and improvidence with which every civilised society has been familiar”. In *Hosking v Michaelides* [2004] All E.R. (D) 147, Paul Morgan Q.C. (then sitting as a Deputy Judge of the High Court) indicated that what the Court had to find, before it could exercise its discretionary jurisdiction under section 335A, was something “out of the ordinary course,

or unusual, or special, or uncommon”. ”Distressing” or “sad” does not equate with “exceptional”.

75. In practice, and in the reported cases, applications for sale are usually made more than one year after the bankruptcy order has been made against the co-owner, so, under section 335A(3) it is usually the case that the interests of the creditors assume primacy. There are few examples of circumstances sufficiently exceptional to justify any further postponement of sale after the one year period.

76. The general line taken in *re Citro* has been reaffirmed in subsequent cases. In *Dean v Stout* [2006] 1 F.L.R. 725, Lawrence Collins J (as he was then) re-affirms the old approach and sets out the following helpful principles:

“6. The principles which can be derived from the authorities may be summarised as follows. First, the presence of exceptional circumstances is a necessary condition to displace the presumption that the interests of the creditors outweigh all other considerations, but the presence of exceptional circumstances does not debar the court from making an order for sale.

7. Second, typically the exceptional circumstances in the modern cases relate to the personal circumstances of one of the joint owners, such as a medical or mental condition.

8. Third, the categories of exceptional circumstances are not to be categorised or defined and the court makes a value judgment after looking at all the circumstances.

9. Fourth, the circumstances must be exceptional and this expression was intended to apply the same test as the pre-Insolvency Act 1986 decisions on bankruptcy (see in *Re Citro* [1991] Ch.142 at pp.159 and 160), that is to say exceptional or special circumstances which are outside the usual “melancholy consequences of debt and improvidence” (in the words of Nourse L.J.) or (in the words of Bingham L.J.) “compelling reasons not found in the ordinary run of cases”.

10. Fifthly, it is not uncommon for a wife with children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood or, indeed, elsewhere. Such circumstances, while engendering a natural sympathy, cannot be described as exceptional, and it was in that context that Nourse L.J. referred to the “melancholy consequences of debt and improvidence” with which every civilised society has been familiar (see p.157).

11. Sixthly, for the purposes of weighing the interests of the creditors, the creditors have an interest in the order for sale being made, even if the whole of the net proceeds will go towards the expenses of the bankruptcy, and the fact that they will be swallowed up in paying those expense is not an exceptional circumstance justifying the displacement of the presumption that the interests of the creditors outweigh all other considerations.”

77. This approach also appears to have been endorsed by the Court of Appeal in *Avis v Turner* [2008] 2 W.L.R. 1.

A Human Rights Challenge?

78. The strictness of the test has, from time to time, been criticised, and a new front was opened up in *Barca v Mears* [2004] E.W.H.C. 2170, where Strauss QC (sitting as a deputy High Court judge) suggested that the case law might now have to be understood subject to Article 8 of the European Convention on Human Rights (respect for the home), presumably with a view to tempering its harshness. It would appear that Article 8 arguments are making little headway in this regard. Although the Courts have left the question open in some later cases,¹⁵ generally speaking the Courts have found that the balancing exercise under section 335A did not offend the qualified right to respect for the home guaranteed by Article 8. In *re Karia* [2006] B.P.I.R. 1226, it was considered that it was permissible to balance the rights of creditors against the right guaranteed by Article 8, and that the balance favoured sale. In *Nicholls v Lan* [2007] 1 F.L.R. 744, Paul Morgan

¹⁵ *Donohoe v Ingram* [2006] B.P.I.R. 417; *Foenander v Allan* [2006] B.P.I.R. 1392.

Q.C. (as he then was) found that the *test* (as opposed to its application in a concrete case) discussed the impact of Article 8 in some detail. He stated emphasis added at 43):

“42. There have been judicial comments previously as to the impact of Article 8 on section 335A of the Insolvency Act 1986. In Jackson v. Bell [2001] EWCA Civ 387, the Court of Appeal gave permission to appeal to enable submissions to be put forward that section 335A and, in particular, the reference to exceptional circumstances in section 335A(3) should be reconsidered in the light of Article 8. In that case, the Deputy High Court Judge had held that section 335A was compatible with Article 8. There is no report of any subsequent hearing of any appeal in Jackson v. Bell, and I was told by counsel that the matter did not proceed to a hearing. In Hosking v. Michaelides [2004] All ER (D) 147, a submission was made to me that the word “exceptional” should be construed to mean “out of the ordinary course, or unusual, or special, or uncommon”. It was submitted that I should be assisted towards reaching this conclusion by a consideration of Article 8. However, I held that the words just quoted did capture the ordinary meaning of “exceptional” if one disregarded the impact of Article 8 and I went on to comment that I would not have been prepared to hold that section 335A or section 336 of the Insolvency Act 1986 construed in accordance with the approach in Re: Citro [1991] Ch. 142 would have been incompatible with Article 8. I will refer further to Re: Citro below. More recently Mr. Strauss QC sitting as a Deputy Judge of the High Court in Barca v. Mears [2004] All ER (D) 153 discussed the question of Article 8 in the context of section 335A and was inclined to reach the conclusion that there might need to be a shift in emphasis in the interpretation of section 335A to achieve compatibility with the European Convention on Human Rights. However, he recognised that his remarks were tentative and did not affect the result of that case.

43. In my judgment, the judicial discussion so far of the role of Article 8 in connection with section 335A relates to the criterion of “exceptional circumstances” in section 335A(3). [...] In these circumstances, the way in which section 335A operates in the present case is that the Court is required to perform a balancing exercise and to decide what is “just and reasonable” and amongst the circumstances which are to be taken into account are the interests of the creditors and the needs of someone like Mrs.

Nicholls. For my part, I do not see that the statutory test, leading to a balancing exercise, is inconsistent with the qualified nature of the rights enshrined in Article 8 and in Article 1 of the First Protocol. Indeed, it might be contended that section 335A precisely captures what is required by Article 8 and Article 1 of the First Protocol.

44. Article 8 speaks of respect for the home. However, the whole purpose of section 335A(2)(b) which refers to the home of the bankrupt's spouse is to identify the need to respect the home but, of course, not as an absolute objective to be guaranteed in every case but as a consideration in a balancing exercise. In this way, I have reached the conclusion that the submissions I have heard on the Human Rights Act 1998 do not take the matter any further.

45. It may be helpful to say something about the accepted approach on the part of the Court to the interests of the creditors. The statute requires that the interests of the creditors are taken into account but in an exceptional case like the present, the statute does not prescribe the weight which is to be given to those interests. What ultimately matters is what appears to the Judge to be fair and reasonable.

46. The difficulty in a case like the present is that one has to balance the interests of the creditors and the needs of the bankrupt's spouse but, in truth, the considerations are of a different character or quality. This has long been recognised: see per Goulding J. in Re: Lowrie [1981] 3 All ER 353 at 358-

79. It would seem, therefore, that Article 8 cannot be used in order somehow to seek to dilute the "exceptional circumstances" test, as that test was formulated in *re Citro*. This would appear to be the conclusion which was reached in *Donohoe v Ingram* [2006] 2 F.L.R. 1084 and *Foyle v Turner* [2007] B.P.I.R. 43.

The Test in Practice: Some Examples

80. If, as appears to be the case, the exceptional circumstances test has survived the Article 8 argument, what is its present scope? Although we are in a world of judicial discretion and balancing, there is some guidance which can be plucked from the cases.

81. As a general rule, the Court will seek to identify circumstances which are “exceptional” under the restrictive authorities cited above and digested below. If more than a year has passed between the bankruptcy order being made and the application for possession, the Court will need to be satisfied that the a person falling within section 335A(2) can show appropriate circumstances. If so, the Court must undertake the balancing exercise in section 335A(3), taking into account the fact that statute requires the greatest weight to be given to the interests of creditors. As part of that exercise, it may be possible for the Court to defer sale to address the exceptional circumstance, if that circumstance is limited in time (such as terminal illness), or if some time is required simply to ease the transition process. It may be, however, that, while the circumstances are exceptional, an immediate order is still appropriate in the right case, though it would seem that the Courts often award a period of grace in such circumstances.

Overview and Summary of Some of the s. 335A decisions

Case	Circumstances	Outcome
<i>Re Densham</i> [1975] 1 W.L.R. 1519	Stress or nervous illness of wife or child which a sale would cause	Not exceptional, order for sale within six months
<i>Re Bailey</i> [1977] 1 W.L.R. 278	One son was in full time education until the summer of 1978 and that it would be disturbing for him to have to leave the house before then.	Children were but one factor, but ought not to outweigh the interests of the creditors in this case. There was poor evidence of what the effect on them would be. No factors sufficient to delay sale here.
<i>Re Citro</i> [1981] Ch. 142	Three children, youngest was twelve, difficulties in	Not exceptional, and six months allowed. It would

	re-housing, bankrupt had lodged the petition himself	require exceptional circumstances to allow postponement for a substantial period.
<i>Re Holliday</i> [1981] Ch 405	Here it was the bankrupt had petitioned himself, and no sale was being pressed for by the creditors, thereby putting the wife's home at risk and interrupting the children's education.	Exceptional (but explained by reference to the special facts). Sale deferred for five years.
<i>Re Lowrie</i> [1981] 3 All E.R. 353	Imminent school examinations for children	Exceptional
<i>Re Raval</i> [1998] 2 F.L.R. 718	Schizophrenia	Exceptional, but delay shortened due to the fact that it was unclear whether the creditors would be paid.
<i>Judd v Brown</i> [1998] 2 F.L.R. 360	Chemotherapy requiring the avoidance of stress	Exceptional
<i>Cloughton v Charalambous</i> [1999] 1 F.L.R. 740	Home specially adapted for disabled spouse, renal failure and restricted mobility	Exceptional
<i>Re Bremner</i> [1999] 1 F.L.R. 912	Elderly co-owner caring for terminally ill bankrupt	Exceptional, but postponed for three months after bankrupt's death.
<i>Hosking v Michaelides</i>	Co-owner wife had a	Exceptional, but this case

[2004] All E.R. (D) 147	medical condition which would mean she could be a danger to herself and her children if she were to move house,	was not one in which there was a real likelihood of a change in circumstances at some future date so that this date could be used as a guide for postponing sale. Nonetheless, the co-owner and her children should have time to adapt to the making of an order.
<i>Barca v Mears</i> [2004] E.W.H.C. 2170	Special educational needs not sufficient in the absence of proof of specific harm	Not exceptional (but some doubt over the severity of the child's situation, and other evidential uncertainties).
<i>Donohoe v Ingram</i> [2006] 2 F.L.R. 1084	Delay would not prevent creditors from being paid in full	Not exceptional
<i>Nicholls v Lan</i> [2007] 1 F.L.R. 744	Mental and physical health of co-owner, long term chronic schizophrenia	Exceptional, but the interests of the creditors were still paramount and sale ordered.
<i>Re Haghighat (A Bankrupt)</i> [2009] EWHC 90 (Ch)	Three children born between 1985 and 1989 but the eldest was seriously disabled, requiring continuous care.	Exceptional, possession deferred for three years or three months after the disabled child left the home

82. It is, however, important to remember that invoking “exceptional circumstances” leads to the Court considering whether there should be a prolonged period before a sale is ordered to meet the exceptional circumstances. As *Lan* shows, the consideration of the interests of the creditors in the course of the balancing exercise may nullify the exceptional circumstances.

Accounting After Sale

83. If sale is ordered, then some further balancing payments may need to be made to achieve a fair result. For instance:

- (1) One co-owner may have left, and the other may have enjoyed the benefit of the whole house for him- or herself;
- (2) There may have been money expended on improvements;
- (3) One party may have funded more of the mortgage than the other.

84. This is usually dealt with by “equitable accounting”. It was stated by Baroness Hale in *Stack* that this process was now on a statutory footing under section 13 of TLATA (at [94]). This was considered in the decision of *Murphy v Gooch* [2007] 2 F.L.R. 934, where Lightman J (sitting in the Court of Appeal) stated as follows (paragraphs 13 – 14):

In broad summary section 12 of the 1996 Act confers on beneficiaries entitled to an interest in possession a right to occupy land available for his occupation. Section 13 confers on trustees, where there are two or more of such beneficiaries, the power (1) to exclude or restrict the entitlement to occupation of any one or more (but not all) of such beneficiaries; (2) to impose conditions on any beneficiary in relation to his entitlement to occupy, including conditions requiring him: (a) to pay outgoings and expenses in relation to the land; and (b) where the entitlement of another beneficiary to occupy land under section 12 has been excluded or restricted, to make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted and to forego any payment or other benefit to which he would otherwise be

entitled under the trust so as to benefit that beneficiary. This section is designed to confer on trustees power to regulate and set the terms for future occupation of trust land. Section 14 confers power on the court on application by trustees or others interested to make such orders as it thinks fit: (a) relating to any of the trustees' functions (which includes their functions under section 13); and (b) to declare the nature or extent of a person's interest in property subject to the trust. It must be under the latter of these two powers that the statutory jurisdiction is conferred on the court to take accounts between co-owners.

Under the previous equitable doctrine the court was concerned only with considerations relevant to achieving a just result between the parties. The statutory innovation is section 15, which requires the court in determining all applications for an order under section 14 to include amongst the other matters to which it has regard: (1) in all cases (so far as applicable) the four matters referred to by Baroness Hale; (2) in the case of applications relating to the exercise by trustees of the powers conferred by section 13 the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees would be) entitled to occupy the land under section 12; and (3) in case of any other application (other than one relating to the conveyance of land to beneficiaries absolutely entitled) the circumstances and wishes of any beneficiaries of full age entitled to an interest in possession. The wider ambit of relevant considerations means that the task of the court must now be, not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and in particular (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified."

85. The statements in *Stack* may well be wrong, however. Lord Neuberger, in his speech to the Chancery Bar Association entitled "The Conspirators, the Tax Man, The Bill of Rights and a Bit About the Lovers" given on 10 March 2008, had this to say at [22]:¹⁶

There is another criticism which can be made of the House's analysis of Mr Stack's claim for payment. Lady Hale said (para 94), and I agreed (para 150), that sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) had "replaced the old doctrines of

¹⁶ http://www.chba.org.uk/library/seminar_notes/news4

equitable accounting”. As Sir Gavin Lightman has pointed out, there may be two problems with this. First, TOLATA appears to apply only to future payments, whereas equitable accounting, of course, covers the past as well as future payments. Secondly, on a fair reading of TOLATA, the statutory provisions are not so much a replacement of, as a gloss on, the equitable doctrine, in the sense of adding or emphasizing factors to be taken into account when carrying out an equitable account.

86. Most recently, in the case of *French v Barcham* [2009] 1 All E.R. 145.¹⁷ F was a trustee in bankruptcy of the first respondent beneficiary under a trust of land. At first instance, it was found that the trustee was not entitled to any compensation for the continued occupation of the property by the second respondent, the first respondent’s wife. The dispute arose because, although F had acquired, as trustee a beneficial interest, no application for sale was made for 12 years. In that time, the wife had paid the mortgage. On sale, she sought to recover compensation for those payments from F. F counterclaimed, stating that he was entitled to set-off against that claim the fact that the wife had enjoyed a period of occupation of the house. The judge below found that F had no right to any compensation as he was not a beneficiary within section 12. On appeal, Blackburne J found that section 12 should not be read as an exhaustive regime. If it did not apply to the trustee, then this did nothing to prevent F from asking the Court to exercise its equitable jurisdiction to award compensation. He stated as follows:

“12. I do not accept that sections 12 to 15 of the 1996 Act provide an exhaustive regime for compensation for exclusion of a beneficiary from occupation of property held subject to a trust of land. An essential prerequisite of the power to award compensation under section 13(6) is the entitlement under section 12 of the beneficiary claiming the compensation to occupy land, ie the right of that beneficiary to occupy the land at any time by reason of that interest. What triggers the award of compensation is the exclusion or restriction of that right of occupation. Where, as is common ground, a person such as a trustee in bankruptcy who is entitled for the benefit of the bankrupt’s creditors to an interest in possession of land subject to such a trust has no such right of occupation

¹⁷ See too *re Byford* [2003] E.W.C.H. 1267 (Ch).

(and neither do the creditors), there is no scope for the operation of section

13. I do not therefore accept that, [the] trustee in bankruptcy has had no statutory right of occupation, [the wife] was not liable to be charged an occupation rent (or, if one prefers so to describe it, equitable compensation) for her occupation of the property from the time that [the] beneficial interest in the property vested in his trustee in bankruptcy. I do not consider that anything said by the House of Lords in *Stack v Dowden* leads to a different view of the scope of those provisions. That case was principally concerned with the criteria for the determination of the property rights of a cohabiting couple in the home which they had occupied. There was also an issue over whether Ms Dowden should be required to compensate Mr Stack for the cost to him of certain alternative accommodation following his exclusion from the property which he had been sharing with Ms Dowden and their children. In the course of dealing with that question, Baroness Hale set out (at [93]) the relevant provisions of sections 12 to 15 and stated (at [94]) that “these statutory powers replace the old doctrine of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property”. She stated that “the criteria laid down in the statute should be applied, rather than in cases decided under the old law ...”.

But it is important to note that she referred to both parties having a right of occupation. It was in that context that she was addressing her remarks. I do not understand her to have been suggesting that in cases where one of the parties has no statutory right of occupation, the statutory provisions have the effect that that party can no longer claim an occupation rent in any circumstances whatever. Lord Neuberger, who was the only other member of the House in *Stack v Dowden* to express any view on the question of compensation under section 13 referred (at [150]) to “The court’s power to order payment to a beneficiary, *excluded from property he would otherwise be entitled to occupy*, by the beneficiary who retains occupation” (emphasis added) as being governed by sections 12 to 15 of the 1996 Act. He was, in my view, careful to emphasise that the jurisdiction applies only where the beneficiary claiming the compensation has been excluded from the property that he would otherwise be entitled to occupy

Finally, I do not accept Mr Learmonth’s submission that it would make nonsense of the statutory regime contained in the 1996 Act if the regime were not exhaustive of the entitlement to compensation for exclusion

from occupation. As worded the power to award compensation under section 13(6) is only exercisable as a condition to be imposed on the occupying beneficiary in relation to his occupation of the property in question. See section 13(3). It appears to look at the matter prospectively in the context of the occupying beneficiary's continued occupation. It is not difficult, especially if that view of section 13(6) is correct, to envisage cases of exclusion where both beneficiaries had a right of occupation yet where the statutory regime would not seem to be applicable. Where the scheme applies, it must be applied. But where it plainly does not I do not see why the party who is not in occupation of the land in question should be denied any compensation at all if recourse to the court's equitable jurisdiction would justly compensate him"

87. It therefore follows that, *pace* Baroness Hale, equitable compensation remains alive and well, and has not been displaced by the TLATA regime. Even if one's client is not within the scope of section 12, it seems clear that does not preclude him from invoking the Court's inherent equitable jurisdiction.