

Imputation, Fairness and the Family Home

Graham-York v York [2015] EWCA Civ 72

The recent Court of Appeal ruling in *Graham-York v York*¹ makes for interesting reading. The parties cohabited for over 33 years until the male partner's death, during which time the female claimant (Miss Graham-York) brought up the couple's daughter, made financial contributions to the household expenditure and a small contribution to the payment of the mortgage debt on the property. Despite this, Tomlinson LJ (with whom King and Moore-Bick LJ agreed) declined to impute to the parties a common intention of equal beneficial ownership preferring instead to focus on financial contributions as governing the assessment of the claimant's interest in the family home. The result was only a modest award of a 25 per cent share in the net proceeds of sale after discharge of the mortgage debt affecting the property.

Imputing intention

It is, as we know, open to a court to assess the proportions in which the parties hold the property by reference to what the parties expressly agreed or, failing that by a process of inference or imputation from the parties' dealings. In *Jones v Kernott*,² the Supreme Court unanimously accepted the notion of imputing an intention of what the parties must have intended by reference to a yardstick of fairness in the absence of express agreement and where there is nothing in the parties' conduct from which to infer the quantum of their respective beneficial shares. Fairness *per se* is not, however, the criterion in assessing entitlement – on the contrary, the task of the court is to deduce what the parties' "intentions as reasonable and just people would have been had they thought about it at the time".³ The function of imputation, therefore, is not to disregard the parties' actual intentions (deduced objectively from their own words or conduct) by imposing the court's own sense of fairness, but to achieve a fair and just result by filling in the missing gaps where the court cannot deduce what shares were intended. So how was this process of imputation applied in *Graham-York*?

Facts

The claimant, Miss Graham-York, had lived with the deceased, Mr Norton Brian York, for 33 years from 1975 until the latter's death in 2009. They never married but had two children together, one of whom lived with them. From 1985 until 2009, they lived together at 17 Marlborough Road, London, W4, which was registered in the sole name of the deceased and mortgaged to a building society. There were no discussions between the parties as to the beneficial interests in the property.

¹ [2015] EWCA Civ 72.

² [2011] UKSC 53.

³ *Jones v Kernott* [2011] UKSC 53, at [47], *per* Lord Walker and Lady Hale.

Following the deceased's death in 2009, the claimant continued to live in the property accruing substantial mortgage arrears as she had no significant income. The building society duly obtained an order for possession of the house with outstanding mortgage arrears of £449,722. The claimant resisted the claim, arguing that she had a beneficial interest in the property arising out of a constructive trust and (coupled with her actual occupation) that this constituted an overriding interest which took priority over the building society mortgage.

At first instance, the trial judge awarded the claimant a 25 per cent beneficial interest in the property characterising this as "a fair reflection" of the claimant's financial and non-financial contributions during the relevant period of cohabitation. In particular, it was apparent that from 1976 to 1985, the claimant had made a contribution from her earnings as a singer towards the initial acquisition of the property (which had "materially assisted" in its purchase) and to the joint expenditure of the home. From 1985 onwards, the claimant had embarked upon several business enterprises generating an income of £30,000 which was used towards the joint household expenses. She also cooked the family meals and, jointly with the deceased, looked after and brought her daughter (her son being brought up by his grandmother). Overall, the trial judge's assessment was that the claimant's financial contribution during the parties' cohabitation "[did] not amount to much".

Court of Appeal ruling

On appeal, the trial judge's finding that the claimant was entitled to a beneficial interest in the property was not challenged. The issue was whether the share of 25 per cent awarded by the judge was indeed a "fair reflection of [her] contributions financial and non-financial over the years."⁴ The claimant's primary contention was that, as a matter of fairness, she was entitled to an equal beneficial share in the property by virtue of her financial contribution to the purchase of the property (including a one-off mortgage payment of £4,000), the length of cohabitation, her contribution by way of joint bringing up of her daughter and the financial contribution to the general household expenditure. In addition, she claimed that there was no evidence as to the extent of Mr York's contribution to the purchase of the property and to household expenditure.

In particular, it was argued that the trial judge ought to have regarded the claimant as having contributed "as much to the household as she reasonably could" from which a finding of equal beneficial ownership ought to have followed. This argument derived from Lady Hale's observations in *Stack v Dowden*,⁵ where her Ladyship said that an arithmetical calculation of how much was paid by each party was viewed as being "likely to be less important"; that the court could reasonably draw the inference that the intention of the parties was that each had contributed what they reasonably could to the household, and that the parties would share the benefits and burdens equally.⁶ The Court of Appeal in *Graham York* rejected this on the grounds that Lady Hale was referring to the court's approach to disputes over beneficial shares in joint legal ownership cases. It also rejected the suggestion that "equality of interests" was the only fair solution. Indeed, this aspect of the claim was characterised by

⁴ [2015] EWCA Civ 72, at [9], *per* Tomlinson LJ.

⁵ [2007] UKHL 17, at [69].

⁶ [2007] UKHL 17, at [69].

Tomlinson LJ as being “quite hopeless”.⁷ In single (as opposed to joint) ownership cases, there is no presumed starting point of equality of beneficial ownership and the focus (it seems) is far more on financial contributions than on broader aspects of the parties’ cohabitation.

In relation to the second issue in the case, the Court rejected the argument that the claimant’s share should come out of the proceeds of sale before discharge of the mortgage indebtedness. The Court acknowledged that consideration of this did fall within its review of the “whole course of dealings of the parties” but its conclusion was that the claimant “shared the benefit of the deceased’s business ventures and it would be unconscionable that she should do so without sharing the burden of the mortgage.”⁸ This reasonable conclusion further reduced the claimant’s eventual award.

Commentary

Introduction

The Court of Appeal identified the instant case as falling within the second of Lord Walker and Lady Hale’s exceptions identified in *Jones*: a case in which “it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared.”⁹ In this case, it is for the court to “impute an intention to the parties which they may never have had.”¹⁰

What is clear from the identification of the case as falling into the second exception in *Jones* is that, in the absence of a clear common intention, the court must impute an intention to the parties, which it will do from considering the whole course of dealings of the parties, guided but not limited by the so-called *Stack* factors described by Lady Hale in *Stack v Dowden*.¹¹ Since *Stack* and its clarification in *Jones*, the courts have struggled with the practical application of the non-exhaustive list of factors suggested by Lady Hale. Usually, with the exception of some early decisions concerning joint legal ownership such as *Fowler v Barron*,¹² courts have retreated to the comfort and security of factors such as financial contributions to the purchase price of the property.¹³ It is worthy of note that in the eight years since that decision, no “new” factors appear to have been identified or even suggested - although Lady Hale left that path open for courts depending on the individual circumstances of each case.¹⁴

⁷ [2015] EWCA Civ 72, at [25], *per* Tomlinson LJ.

⁸ [2015] EWCA Civ 72, at [34].

⁹ *Jones v Kernott* [2011] UKSC 53, at [31].

¹⁰ *Jones v Kernott* [2011] UKSC 53, at [31].

¹¹ [2007] UKHL 17.

¹² [2008] EWCA Civ 377, CA.

¹³ But See, M. Dixon, “The Still Not Ended, Never-ending Story”, [2012] Conv. 83, at 84, who suggests that the size of the beneficial share may now no longer be related just to the payment of money.

¹⁴ Reference may be made to *Holman v Howes* [2007] EWCA Civ 877, at [31-32], where the Court of Appeal refused to consider a number of peripheral non-financial factors (including an allegation of undue influence, a

More worryingly, the courts seem unwilling to explore some of the more subjective but crucially important issues raised by Lady Hale, such as the nature of the parties' relationship, and the "parties' individual personalities and characters" which may also be "a factor in identifying where their true intentions lay".¹⁵ This is, perhaps, not surprising. Financial contributions are usually reasonably easy to identify, measure and quantify. They offer the court a neat, if partial, means by which to extrapolate a picture of the parties' intentions in respect of the property. In *Graham-York*, the Court of Appeal has continued this trend and in its reluctance to engage in the messy reality of the daily compromises of a long-term relationship has once again led to a decision in which a female claimant is at a disadvantage before the courts.

The parties' relationship

What then of the parties' relationship and their personalities? It was a relationship which lasted 33 years, continuing until the male partner's death. The Court of Appeal described it as "dysfunctional" and "abusive in every sense of that word";¹⁶ the deceased was described as "abusive" and "controlling" towards the claimant throughout the period of their cohabitation. He had a "proclivity for violence" and "Miss Graham-York was under his control and would have done whatever he wanted her to do."¹⁷ The claimant herself was described as "intelligent but vulnerable, suffering symptoms of both Asperger's syndrome and post-traumatic stress disorder."¹⁸ The work that the claimant had undertaken as a singer, which constituted her primary source of income, was all largely linked to her partner, both in its performance and in the financial reward. The trial judge found as fact that "whatever Miss Graham-York earned would have been handed to Norton York had he demanded it and that she would have allowed him to collect fees on her behalf."¹⁹

The difficulty of disentangling intention from personality and the nature of the relationship becomes apparent as the Court tries to identify the deceased's intention and concludes: "it is not easy to reconcile the judge's findings as to [the deceased's] controlling and threatening nature with the suggestion of a ready inference of a common intention as to equality of interests".²⁰ In other words, given the deceased's propensity to greed and his obsession for money, it was highly unlikely that he would have intended sharing ownership of the property with the claimant.

The Court was also mindful to point out that, in deciding what shares are fair, it was not concerned with engaging in some form of redistributive justice between the parties. In the words of Tomlinson LJ:²¹

failure to pursue child maintenance and a lack of contribution towards the maintenance of the property) in determining the quantum of the parties' beneficial shares.

¹⁵ *Stack v Dowden* [2007] UKHL 17, at [69].

¹⁶ [2015] EWCA Civ 72, at [19].

¹⁷ [2015] EWCA Civ 72, at [10].

¹⁸ [2015] EWCA Civ 72, at [10].

¹⁹ [2015] EWCA Civ 72, at [10].

²⁰ [2015] EWCA Civ 72, at [16].

²¹ [2015] EWCA Civ 72, at [22].

“ . . . it is irrelevant that it may be thought a ‘fair’ outcome for a woman who has endured years of abusive conduct by her partner to be allotted a substantial interest in his property on his death. The plight of Miss Graham-York attracts sympathy, but it does not enable the court to redistribute property interest in a manner which right-minded people might think amounts to appropriate compensation. Miss Graham-York is ‘entitled to that share which court considers fair having regard to the whole course of dealing between them *in relation to the property*. It is these last words, which I have emphasised, which supply the confines of the enquiry as to fairness.”

It is, of course, true that the courts have repeatedly characterised the relevant inquiry as being one of deducing the parties’ intentions by reference to their whole course of dealing in relation to the property.²² But Lord Walker and Lady Hale in *Jones* also felt that the phrase “the whole course of dealing” should be given a broad meaning allowing for a range of factors to be taken into account. Thus, according to their joint judgment, financial contributions continued to be very relevant but “many other factors” may enable the court to decide on the appropriate shares when reaching a fair result.²³ So, why was the nature of the relationship in *Graham-York* discounted so out of hand?

One explanation may lie in the trial judge’s recognition that in some respects, the parties were unreliable witnesses – this would, perhaps, account for the extreme claims on both sides being side-lined in favour of a more traditional monetary analysis.²⁴ However, the Court of Appeal accepted that the relationship was “plainly” abusive, that Miss Graham-York had “endured years of abusive conduct by her partner”;²⁵ that Ms Graham-York was “vulnerable”²⁶ and that the deceased was “controlling”. These are highly significant findings of fact about the dynamics of this 33 year relationship and the impact of these factors on the parties’ dealings in relation to the property are surely equally highly significant in the Court’s assessment in relation to shares. Even if one accepts that the Court’s consideration of the whole course of dealings centres primarily on the direct financial contributions of the parties, then surely it is significant that in this abusive, controlling relationship, Ms Graham-York essentially surrendered control of her finances to the deceased.

Secondly, the obvious desire not to stray into the territory of redistributive discretion²⁷ may have encouraged the Court to avoid any reliance on relationship dynamics in assessing the quantum of the parties’ shares. The danger of such a reluctance is that in a case such as this, it may lead the Court to ignore highly relevant factors, such as those discussed above.

Finally, there is the general point that the whole exercise of quantifying shares in the context of a lengthy relationship is inevitably going to produce “somewhat arbitrary”²⁸ results with

²² *Jones v Kernott* [2011] UKSC 53, at [33].

²³ *Jones v Kernott* [2011] UKSC 53, at [51].

²⁴ Unsurprisingly, this often poses problems for courts in cases of this nature: see, for example, *Curran v Collins* [2015] EWCA Civ 404.

²⁵ *Graham-York v York* [2015] EWCA Civ 72, at [22].

²⁶ *Graham-York v York* [2015] EWCA Civ 72, at [10].

²⁷ A redistributive discretionary jurisdiction has been consistently rejected in the constructive trust context by the English courts, although the *Stack* factors cannot do anything other than introduce re-distributive concerns back into the court’s inquiry: see, A.J. Cloherty and D.M. Fox, “Proving a Trust of a Shared Home”, (2007) 66 C.L.J. 517, at 519.

²⁸ *Aspden v Elvy* [2012] EWHC 1387 (Ch), at [128], *per* HHJ Behrens.

differing views as to how precisely the percentages should be apportioned between the parties. Indeed, the appellate court's reluctance to interfere with the trial judge's figures is highlighted in the following passage from *Graham-York* itself:²⁹

“The judge in the present case, with the advantage of having heard argument and evidence over five days, regarded her evaluation of a 25% interest as ‘generous’. . . I can discern no principled basis upon which this court can regard her evaluation as falling outside the ambit of reasonable decision making. Had the judge evaluated Miss Graham-York's interest at, say, 33%, her decision would I consider have been equally unassailable, but for this court now to evaluate the interest in that way would be unprincipled, would rightly be castigated as what is in another context described as ‘tinkering’, and would simply encourage appeals, raising false expectations and leading to the further erosion of modest estates.”

Whilst accepting the desirability of certainty and the minimisation of legal costs, the Court's unwillingness to engage in a reasonable assessment of all of the *Stack* factors in a case such as this is regrettable.

The length of the cohabitation

There was also the length of the cohabitation which lasted for 33 years. Again, this was largely rejected in *Graham-York*. The Court of Appeal, anxious not to be “led astray by the length of the cohabitation”,³⁰ preferred to focus on the claimant's relatively modest financial contribution which, as we have seen, warranted no more than a 25 per cent share in the property. Although mindful not to read too much into the estimates made by judges in other cases, Tomlinson LJ derived some assistance from HH Judge Behrens' decision in *Webster v Webster*,³¹ another single ownership case, where the cohabitation had lasted for 27 years. Despite this, the learned judge assessed the claimant's share at between 33 per cent and 40 per cent in that case. This, therefore, supported a modest award in the instant appeal, especially as in *Webster* the female partner's financial contribution was significantly greater. Although admittedly there is some acknowledgment that “in the normal case the non-financial contribution is likely to be proportionately greater the longer the cohabitation”,³² this clearly did not count for much in *Graham-York* given the absence of any significant financial contributions towards the purchase of the property.

A necessarily broad brush analysis of the mathematics of the decision in this case is telling. The property was estimated to be valued at between £1.2m and £1.75m. Assuming a mid-point of £1.5m, and reducing that by the outstanding mortgage debt and costs of £633,000, the residual interest in the property amounted to around £867,000. The claimant was awarded a 25 per cent share of that, which gives a total award of around £217,000. This is the Court's estimation of a sum that is a “fair reflection” of the claimant's financial and non-financial contributions during the 33 year period of cohabitation.

²⁹ *Graham-York v York* [2015] EWCA Civ 72, at [28], per Tomlinson LJ.

³⁰ *Graham-York v York* [2015] EWCA Civ 72, at [26], per Tomlinson LJ.

³¹ [2008] EWHC 31 (Ch).

³² *Graham-York v York* [2015] EWCA Civ 72, at [26], per Tomlinson LJ.

It is then interesting to identify the claimant's known financial contributions during this period. This should all be viewed in the light of the trial judge's finding as fact that the claimant was controlled by the deceased and would have handed over her income if he demanded it, and that the deceased collected fees on her behalf. The Court found that the claimant had contributed a one-off sum of £4,000 towards the mortgage repayments, and that during the post 1985 period, her business enterprise/s contributed income of around £30,000. During the 1976-1985 period, the court was unable to quantify the claimant's financial contributions, but found that her "earnings from performances with Norton York's band and on her own account would have *materially* assisted in the purchase of the property,"³³ (emphasis added). Leaving aside that material contribution and just using the known sums, a very conservative estimate of the claimant's financial contribution is £34,000. This would mean that the Court's estimate of her non-financial contributions over the 33 year period was around £183,000. This translates over the relevant period to an annual valuation of her non-financial contribution of £5,500, or a weekly figure of £107 – the equivalent of just over 16 hours per week at the current National Minimum Wage Rate of £6.50 per hour. Even if this is only applied to the Court's acceptance that throughout the relationship, Miss Graham-York "cooked the family meals and, jointly with Norton York, looked after and brought up their daughter,"³⁴ this is hardly a fair and just recompense for her labour, especially in the context of her other contributions, including an unquantifiable but "material" financial contribution during 1976/1985. Is this the value of "women's work" in the home? This is also in a context in which the Court explicitly excludes the usual easy way out of attributing her work to "natural love and affection"; "this is also not a case in which natural love and affection can be said to have been to the forefront of the relationship . . . mercenary considerations do appear to have been to the fore."³⁵ Having found that, should the Court, perhaps, have been more willing to recognise the monetary value of the claimant's non-financial contributions in quantifying her beneficial share of the family home?

A holistic approach

Graham-York exemplifies the difficulties of requiring the court to pin its findings to an imagined intention of the parties. The reality of most human situations is that, as Lady Hale suggested in *Stack*, intention does not exist in a vacuum: it is intimately connected to the nature of the parties' relationship and their personalities. Any attempt to derive the parties' intention in a long term relationship from a mathematical consideration of who paid for what will almost certainly lead to unfairness, and that will almost certainly (particularly in the cases dating back to relationships starting in the seventies, eighties and earlier) disadvantage the female claimant.

The court needs to apply common sense around lengthy cohabitation cases, especially those in which there is a very traditional sharing of roles and responsibilities, leading to the (usually) male partner working outside the home and bringing home the bacon, and the (usually) female partner working largely within the home and cooking it. In a relationship such as the Yorks', as depicted by the Court, the possibility of the claimant ever making a

³³ *Graham-York v York* [2015] EWCA Civ 72, at [10 (7)].

³⁴ *Graham-York v York* [2015] EWCA Civ 72, at [10 (9)].

³⁵ *Graham-York v York* [2015] EWCA Civ 72, at [16].

significant contribution to the acquisition of the property or even household expenses was remote. For most courts, the reality is that the non-financial contributions provided by a homemaker/carer of children still counts for less than actually paying the bills. It is telling that in *Stack*, Lord Walker expressed the wish that the court's consideration of the "whole course of dealings between the parties" should specifically include "contributions in kind by way of manual labour, provided that they are significant."³⁶ Other than the Herculean activities of the claimant in *Eves v Eves*,³⁷ this is, perhaps, unlikely to assist a great many female claimants in these cases, short of a recognition by the courts that labour such as housework and caring for children very easily falls into this category.³⁸

In some ways, the basis of Miss Graham-York's appeal may be compared with that of Mrs Burns' claim in the well-known case of *Burns v Burns*.³⁹ Here, the female partner had made no financial contributions towards purchase or mortgage payments but had contributed to housekeeping, children's expenses and general domestic expenditure including the purchase of several domestic appliances. Although the couple had lived together for 19 years and had two children together, the Court of Appeal rejected Mrs Burns' claim to an interest in the house based solely on her domestic contributions as homemaker since such conduct did not manifest an intention of assisting the purchase of the house and, therefore, with the aim of acquiring some interest in the property. This stance was, of course, reaffirmed in *Stack*, where Lord Neuberger⁴⁰ made clear that mere payments towards household bills and outgoings, or merely living together for a long time, or having children would not by themselves support an intention to *alter* beneficial entitlement where the parties had purchased the property in joint names. Such matters, in his view, were only relevant as "part of the vital background" in the sense of providing the context by reference to which any discussions or actions, subsequent to purchase, fell to be assessed by the court. The same approach, no doubt, continues to apply to single ownership cases so that *Burns* remains good law in the context of a non-owning claimant who seeks to claim a beneficial share based solely on homemaker contributions where there is no formal declaration of trust or evidence of any express discussions between the parties as to beneficial ownership.

Of course, *Burns* differs from *Graham-York* in a number of respects, not least because the Court of Appeal in the latter case was able to infer a common intention that the parties were to have *some* share in the property based on the claimant's modest financial contribution towards the purchase of the property and subsequent mortgage payment, so the case centred on the assessment of the parties respective shares rather than establishing the necessary common intention at the initial acquisition stage of the inquiry. In both cases, however, the period of cohabitation was largely discounted – in *Burns*, as failing to give rise to any inference of a common intention constructive trust at the initial hurdle and, in *Graham-York*, in failing to qualify as a significant factor in determining the quantum of the parties' respective shares.

³⁶ [2007] UKHL 17, at [36].

³⁷ [1975] 1 WLR 1338, C.A.

³⁸ See generally, R. Probert, "Trusts and the Modern Woman – Establishing an Interest in the Family Home", (2001) 13 C.F.L.Q. 275.

³⁹ [1984] Ch. 317, C.A. See generally, R. Probert, "Equality in the Family Home?", (2007) 15 Fem. L.S. 341.

⁴⁰ [2007] UKHL 17, at [143]-[145].

What, therefore, emerges from *Graham-York* is that looking at “the whole course of dealing” does not mean looking at *everything* related to the parties’ relationship (despite the seemingly broad and non-exhaustive range of factors indicated in *Stack*), but just at what is relevant specifically “in relation to the property”.⁴¹ This means, of course, that the court’s attention is focused inevitably on financial contributions whether they be towards the initial purchase, household expenses, mortgage instalments or subsequent improvements to the property. In practical terms, therefore, the courts appear to be applying a form of mutated resulting trust in these cases and, at the same time, characterising the result as a legitimate consequence of the wider inquiry undertaken under *Stack* principles. Take, by way of contrast, the approach taken by Waite LJ in *Midland Bank plc v Cooke*,⁴² which heralded the beginning of a move away from a strict mathematical approach to determining beneficial entitlement in single ownership cases. According to his Lordship:⁴³

“. . . the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages . . . It will take into consideration all conduct which throws light on the question what shares were intended.”

Waite LJ was, therefore, able to take into account a number of factors which, strictly speaking, would fall to be ignored under orthodox resulting trust principles. Thus, the fact that Mrs Cooke had brought up three children, used her own earnings towards household bills, undertook joint and several liability in relation to a second charge, provided a home for the family and devoted time and energy towards the improvement of house and garden, were all considered relevant in assessing her beneficial share. The conclusion reached by his Lordship was that “one could hardly have a clearer example of a couple who had agreed to share everything equally”.⁴⁴ It is a shame that a similar (robust) approach to quantification was not taken up in *Graham-York*. Instead, what emerges is a desire to marginalise the various non-financial factors in *Stack* into purely background elements whilst, at the same time, focusing heavily on those matters which relate directly to the acquisition of the property.

Conclusion

Courts may well decide to treat this case as an isolated, fact-sensitive decision. This would be an easy way to ignore an unpleasant reality, which is that *Graham-York* represents a significant shift away from a holistic approach to quantification in sole legal ownership cases. The Court of Appeal has chosen to ignore factors which are relevant and compelling in the

⁴¹ It is interesting to note that a marginalising of relationship dynamics is also evident in the context of proprietary estoppel in the recent case of *Southwell v Blackburn* [2014] EWCA Civ 1347, at [20], *per* Tomlinson LJ: “the detriment to the respondent was not that she embarked upon a relationship with the appellant but that she abandoned her secure home in which she had invested and invested what little else she had in a home to which she had no legal title”.

⁴² (1995) 27 H.L.R. 733, C.A.

⁴³ (1995) 27 H.L.R. 733, C.A., at 745.

⁴⁴ (1995) 27 H.L.R. 733, C.A., at 747. See also, most recently, *Curran v Collins* [2015] EWCA Civ 404, at [44] and [50], where the Court of Appeal acknowledged the need to analyse “the facts and circumstances relating to the parties over the course of their whole relationship to see whether there was a shared intention” and concluded that the trial judge “expressly went beyond mere financial contributions”.

interests of a simple and formulaic solution. The range of relevant factors should be deployed objectively without any obvious bias against contributions of a non-financial or purely domestic nature. Otherwise, the Court is not dispensing justice to the parties. We are still some distance away from the “more practical, down-to-earth, fact-based approach”⁴⁵ advocated in *Stack* almost a decade ago.

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⁴⁵ *Stack v Dowden* [2007] UKHL 17, at [3], per Lord Hope.