Cambridge Law Journal, **82(2)**, July 2023, pp. 212–215 © The Author(s), 2023. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge.

STACK v Dowden [2007] UKHL 17, [2007] 2 A.C. 432, is a controversial case for many reasons and its legacy is still being debated. But one aspect of the law concerning co-ownership of the family home that most commentators thought remained unaffected by *Stack* was the need for detrimental reliance in order to establish a common intention constructive trust. The High Court decision in *Hudson v Hathway* [2022] EWHC 631 (QB), on appeal from H.H.J. Ralton, therefore was something of a surprise, and an appeal to the Court of Appeal was inevitable. The appeal in *Hudson v Hathway* [2022] EWCA Civ 1648 was streamed live and watched with anticipation by practitioners and academics alike because it could have changed the landscape of constructive trusts dramatically. It resulted in a Court of Appeal judgment that explained both when common intention constructive trusts can operate to allocate shares in property when there is no form of written instrument, and why they do so.

Mr. Hudson and Ms. Hathway were joint registered proprietors of their family home, holding on trust for themselves but with no written declaration of trust. This was therefore similar to *Stack* and the later *Jones v Kernott* [2011] UKSC 53, [2012] 1 A.C. 776: it was an "enlargement" case where the dispute was about the size of the existing owners' shares rather than an "acquisition" claim where one person was claiming a share of the equity for the first time. When the parties' relationship broke down, discussions ensued about who owned the house or, more accurately, the proceeds of sale if it were to be sold. Sale of the house proved difficult, but discussions persisted and resulted in Mr. Hudson expressly agreeing in email correspondence that Ms. Hathway could take 100 per cent of the equitable interest as part of a comprehensive approach to disentangling their financial affairs. However, this agreement was never formalised and eventually Mr. Hudson made an application under the Trusts of Land and Appointment of Trustees Act 1996 for an order for sale and an equal division of the proceeds. Unsurprisingly, Ms. Hathway contested this division (though not the sale), alleging that there was a common intention constructive trust operating in her favour, based on express agreement and detrimental reliance. The trial judge found in favour of Ms. Hathway, but in a surprise (and perplexingly unnecessary) finding, Kerr J. on an appeal from the trial judge determined that *Stack* and *Kernott* had removed any need for a claimant to show detrimental reliance to support a constructive trust, at least where the common intention was express. He also found, in agreement with the trial judge, that Ms. Hathway had in any event engaged in detrimental reliance.

https://doi.org/10.1017/S0008197323000272 Published online by Cambridge University Press

It is not clear why Kerr J. felt it necessary on these facts to abandon detrimental reliance as a key component in establishing a constructive trust, save perhaps that he differed from the trial judge as to the extent of Ms. Hathway's detrimental reliance and was "covering all bases". But abandon it he did, drawing gasps of incomprehension from all who read the decision. There is, of course, no absolute certainty in litigation, but it would have been the most remarkable result if the Court of Appeal had confirmed Kerr J.'s departure from precedent and principle. It did not, and orthodoxy was restored. In so doing, Lewison L.J. gave a "masterly exposition" (per Nugee L.J. at [183]; Andrews L.J. also in full agreement) of the law relating to dispositions of equitable interests in land and their relation to common intention constructive trusts.

First, the Court of Appeal considered a decisive point not raised before either the trial judge or Kerr J. As we know, in order to be effective, dispositions of an interest in land must be in writing within the meaning of section 53(1) of the Law of Property Act 1925 (LPA), the exception being when there is a resulting or constructive trust (section 53(2)). Furthermore, as Lewison L.J. is at pains to point out, whether such writing exists is logically prior to considering whether there is a constructive trust: if there is a valid disposition in writing, there is no need to rely on a constructive trust. As he also reminds us, and it is too easily forgotten, "[w]e are concerned in this appeal with property rights in land, not with discretionary adjustments to property rights. The creation and transfer of property rights in land must, as a general rule, comply with statutory formalities. Such formalities are necessary in order that property rights in land should be certain" (at [32]). In the result, the Court of Appeal determined that Mr. Hudson's email correspondence with Ms. Hathway, which he signed with his name, amounted to disposition of his equitable interest in land in writing sufficient to comply with section 53. This is not a surprising conclusion, as demonstrated by the case law cited by Lewison L.J., and the answer would have been the same had section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (contracts concerning land) been in play instead of section 53 LPA 1925. It represents a timely confirmation that a "written" instrument does not need paper, and a timely caution to think carefully before dashing off an email. In this case, it was clear from the surrounding evidence that Mr. Hudson was serious in his intention to dispose of his equitable interest to Ms. Hathway and that the email could be interpreted as an immediate disposition rather than an offer to transfer on as yet unfulfilled conditions. As well as "a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature .... [I]t is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand

by a signature" (Lewison L.J. at [67]). Hence, the emails amounted to a written disposition of an equitable interest and Ms. Hathway owned 100 per cent of the equity.

Strictly, therefore, it was not necessary for the Court of Appeal to go on to consider whether detrimental reliance was needed to establish a constructive trust, but this is such an important issue that the court dealt with it authoritatively. Critically, the court notes that constructive trusts do not exist in a vacuum; they are an *exception* to the normally required formality of section 53. They are, of course, a creation of equity, but they are not a "sort of moral US fifth cavalry riding to the rescue every time a claimant is left worse off" (Lewison L.J. at [71], quoting Lord Neuberger in [2009] C.L.J. 537) and, most of all, "[e]quity cannot repeal the statute" (at [153]). The existence of a constructive trust cannot depend on mere verbal agreement, for what then would be the point of the statute requiring writing? However, they can be justified as an exception to formality for reasons well known to equity – where the person relying on the constructive trust is the victim of unconscionability. In this context, unconscionability is established through the requirement of detrimental reliance.

As a statement of principle, this is faultless. But if that is not enough, Lewison L.J. also demonstrates that case law consistently has established that detrimental reliance is key to the existence of a common intention constructive trust. He is further fortified by the fact that all the leading texts agree. To the argument that neither *Stack* nor *Kernott* talk about detrimental reliance (and so as Kerr J. assumed they must have meant to dispense with it), he is sharp and clear. His words bear repetition (at [108]).

> In my judgment it would have been astonishing if Lord Walker and Lady Hale intended to overrule a long-standing principle that detrimental reliance is necessary to crystallise a common intention constructive trust and to depart from two decisions of the House of Lords affirming that proposition without saying so … Moreover, if that had been their intention, they would have needed to explain how a mere oral agreement (without more) overcame the statutory formalities laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 53 (1) of the Law of Property Act 1925.

And that is that; detrimental reliance is needed to establish a common intention constructive trust. But there are two postscripts. First, the court agrees that Ms. Hathway in any event had detrimentally relied on the express common intention, not least in that she had forgone making a claim to Mr. Hudson's other assets. Here is confirmation that "detriment" is not limited to practical activity in relation to the property in dispute (e.g. work on it or payment for it). Second, Lewison L.J. addresses a submission that joint-name and sole-name cases should be treated differently. This is an old argument that divides commentators. While

making it clear that joint-name and sole-name cases start in different places, and thus it may be *evidentially* more difficult to prove the acquisition of a share in a sole-name case than the enlargement of an existing share in a joint-name case, Lewison L.J. says at [147] that "[t]here may have been some doubt, following *Stack v Dowden*, whether there was a substantive difference (other than the starting point) between sole name cases and joint name cases. In my judgment, that doubt was laid to rest in *Jones v Kernott*". I agree. Others do not.

MARTIN DIXON

Address for Correspondence: Queens' College, Cambridge, CB3 9ET, UK. Email: mjd1001@cam.ac.uk

https://doi.org/10.1017/S0008197323000272 Published online by Cambridge University Press