In *Marr v Collie (Bahamas)* [2017] UKPC 17, a Board of the Privy Council comprising Lord Neuberger, Lady Hale, and Lords Kerr, Wilson, and Sumption has interpreted *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 in a way that many may find surprising. However, on close examination *Marr* is a clear and correct interpretation of *Stack*, dispelling misunderstandings by returning to its ratio.

The problem in *Marr* arose from the widespread belief that, where property is in joint legal ownership but there has been no express agreement regarding the beneficial interests, *Stack* and *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695 established different legal rules for “domestic” and “commercial” situations, a belief largely undisturbed by *Jones v Kernott* [2011] UKSC 53; [2012] 1 A.C. 736. For “domestic” situations, *Stack* was viewed as dictating a strong presumption that the parties intended joint legal ownership to mean joint beneficial ownership, which could not be displaced by unequal contributions to the purchase price. For “commercial” situations, on the basis of *Laskar*, the presumption of resulting trust was viewed as still applicable or, with the same effect, the presumption arising from joint names would be readily rebutted by unequal contributions to the purchase price.

Mr. Marr and Mr. Collie were a cohabiting couple from the early 1990s to 2008. Between 2000 and 2008, several properties were purchased as investments, in joint names. Mr. Marr provided the purchase monies and, when the relationship ended, claimed sole beneficial ownership. The first-instance judge held that *Stack* meant a presumption of joint beneficial ownership in joint-names cases “only in the domestic consumer context” (at [18]); where the properties were investments, *Laskar* meant that the presumption of resulting trust applied, and Mr. Collie had not rebutted this presumption. The Court of Appeal of the Bahamas held that the presumption arising from joint names did apply, and Mr. Marr had failed to rebut that presumption. Mr. Marr appealed to the Privy Council, submitting that *Laskar*, not *Stack*, applied and therefore “the governing principle for determining beneficial ownership of the investment properties was that of classic resulting trust” (at [29]).

Giving the opinion of the Board, Lord Kerr discussed *Stack* at length; “to consign the reasoning in *Stack* to the purely domestic setting would be wrong” (at [39]). In support of this conclusion, the Board emphasised the similarity between Lady Hale’s and Lord Neuberger’s approaches in *Stack*. The Board quoted Lord Neuberger in *Stack* at [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 ... will be held ... in the same proportions as the contributions to the purchase price.” (Emphasis supplied.)
This was entirely compatible with requiring consideration of additional relevant evidence if available, specifically “testimony from the parties themselves as to what their intentions were” (at [45]–[46]).

Likewise, in _Laskar_, “Lord Neuberger did not intend to draw a strict line of demarcation between, on the one hand, the purchase of a family home and, on the other, the acquisition of a so-called investment property”; the fact that a property was purchased as an investment does not mean “that the ‘resulting trust solution’ must provide the inevitable answer” (at [49]). Finally, _Kernott_ was cited as saying that the court must focus on “the parties’ actual shared intentions” and that “the classic resulting trust presumption” might apply in some circumstances (at [52], quoting _Kernott_ at [31]).

The Board summarised the proper interpretation of the authorities at [53]–[54]. They rejected the notion of one rule for “parties in a domestic relationship” and another for the “non-domestic situation”. Moreover, “save perhaps where there is no evidence from which the parties’ intentions can be identified, the answer is not to be provided by the triumph of one presumption over another”. If the evidence shows that “the unambiguous mutual wish of the parties” was that, despite unequal contributions to the purchase price, they should have joint beneficial interests, “then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership . . . the resulting trust solution may provide the answer”.

Applying this to the case before them, the Board held that both courts below had erred by misusing a presumption to such an extent that “[n]o proper examination of the actual intentions of the parties has taken place” (at [60]). The Board was silent regarding the fact that the courts below had evidently not considered e.g. whether the parties had separate bank accounts. The Board’s criticism was that direct evidence of the parties’ intentions regarding the properties had been ignored or wholly inadequately considered. Mr. Marr’s evidence was that he put the properties in joint names because Mr. Collie repeatedly made assurances that he would contribute funds to develop the properties, which had not happened; this evidence was ignored by both courts below, despite its obvious relevance. Conversely, the Court of Appeal had placed some reliance on an email from Mr. Marr to a bank which had not been discussed at either hearing. The case was therefore remitted for consideration of these points.

Three, related, things stand out from the Board’s interpretation and application of _Stack_. First, the Board’s reconciliation of Lady Hale’s and Lord Neuberger’s reasoning reminds us that the presumption arising from joint names and the presumption of resulting trust are merely different starting points for the same process – namely working towards an evidence-based conclusion as to the intentions of these particular parties regarding this particular property. Similarly, in _Laskar_ at [18]–[21], Lord Neuberger
explained that starting with *Stack* yielded the same result as starting with the presumption of resulting trust. The Board made no mention of dicta in *Kernott* at [15] and [29]–[30] that the presumption of resulting trust was an imputation and was “at odds with” the presumption arising from joint names and the focus on common intention; the Board doubtless realised that the first was an unfortunate error and therefore so was the second. The presumption of resulting trust “is not imposed by law against the intentions of” the parties; it is “a presumption”, emphasis in original, about “the common intention of the parties”, “easily rebutted” by further evidence: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669, 708.

Second, the Board’s emphasis on the primary importance of the parties’ statements and their contributions to the purchase price will surprise many, but only because most writing about *Stack* has focused on its dicta and ignored its ratio. When Lady Hale came to decide the case before her in *Stack*, she began (at [86]) by reproving the judge at first instance “for looking at [the parties’] relationship rather than the matters which were particularly relevant to their intentions about this property”. The fact “that these people were in a relationship for 27 years and had four children together” was irrelevant, as was the fact that the property was the parties’ home; in the absence of any relevant statements by the parties, Lady Hale quantified their shares in the property purely by reference to their contributions to the purchase price (at [88]). *Marr* affirms *Stack*’s ratio while adding that of course, where the parties are found to have made statements regarding ownership of the disputed property, these are likely to be the best evidence of their intentions.

Finally, what of the famous paragraph [69] in *Stack*, and the insistence (at [68]–[69]) that, in joint-names cases, departure from the presumption of joint beneficial ownership would be “very unusual”? Paragraph [69] said that context was important and that many factors “may” be relevant – true throughout life and law. The incantation of “very unusual” was explicitly the product of fear of floodgates opening. A problem with Land Registry forms meant that many transfers into joint names would not have an express declaration of trust; as it was “likely that [joint] owners contributed unequally to their purchase”, highlighting the importance of such contributions raised the spectre of “hundreds of thousands, if not millions” of cases pouring into court (*Stack* at [50]–[52], [68]). As the Board will have been aware, that horse then bolted due to some of *Stack*’s dicta, which were used to encourage litigation even despite express declarations (cf. *Pankhania v Chandegra* [2012] EWCA Civ 1438; [2013] 1 P. & C. R. 16, at [28]).

The Board’s return to the ratio of *Stack* and to general principles is very much to be welcomed, and not only for restoring clarity. It reminds us that the Court of Appeal in *Stack* ([2005] EWCA Civ 857; [2006] 1 F.L.R. 254),
the majority in the House of Lords, and Lord Neuberger all got to the same result, via respectively Oxley v Hiscock [2004] EWCA Civ 546; [2005] Fam. 211, explicit focus on common intention, and the presumption of resulting trust: fairness, respect for the parties’ intentions, and orthodox property law all point in the same direction.

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COMMUNICATION TO THE PUBLIC AND ACCESSORY COPYRIGHT INFRINGEMENT

In recent judgments, the Court of Justice of the European Union (CJEU) has been developing its interpretation of the notion of “communication to the public”. This forms one of the exclusive rights of copyright holders that have been harmonised by the InfoSoc Directive (Directive 2001/29/EC (OJ 2001 L 167 p.1)). As was established in 2006 (Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles, ECLI:EU:C:2006:764, at [31]), despite the lack of an explicit definition in that directive, the notion of a “communication to the public” must be given “an autonomous and uniform interpretation” throughout the EU. This finding initially resulted in the creation of a considerable amount of uncertainty for national courts. The gradual accumulation of information through subsequent CJEU judgments has begun to bring some clarity, while also raising new questions.

The most recent of these is Stichting Brein v Ziggo (Case C-610/15, ECLI:EU:C:2017:456). The case arose in the Netherlands, where Stichting Brein, an anti-piracy organisation, applied to the Dutch courts for an injunction against Internet service providers Ziggo and XS4ALL that would order them to block access for their customers to the peer-to-peer file-indexer The Pirate Bay (TPB). When the case came before it, the Dutch Supreme Court noted that the permissibility of injunctions of this kind depends on Article 8 (3) of the InfoSoc Directive. According to that provision, Member States must ensure that copyright holders are in a position to apply for an injunction against intermediaries whose services are used by third parties to infringe copyright.

The Dutch Supreme Court questioned whether the relevant “third party” – in this case TPB – must be found to have committed an infringement itself before it may be targeted by a blocking injunction. The question before the court therefore became whether TPB engages in acts of communication to the public of protected works. The case represents the first time that the liability proper (i.e. for financial remedies, as opposed to