



***Jones v Kernott* [2011] UKSC 53** **Joint ownership, cohabitants and imputed intentions**

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With much fanfare in the national press the Supreme Court has finally delivered its much anticipated judgment in *Jones v Kernott* some six months after the appeal was argued. Some hopelessly optimistic commentators had suggested that the Supreme Court would take the opportunity to change the landscape for unmarried cohabitants and fill the void that has been left by the government's failure to implement the Law Commission's proposals for reform (indeed, last month the government confirmed that it would not implement those proposals). Others had harboured the hope that clarity would be provided by addressing the inconsistencies and uncertainties generated by a vast body of often conflicting Court of Appeal decisions and four inconsistent House of Lords' pronouncements (i.e. *Pettitt v Pettitt*, *Gissing v Gissing*, *Lloyds Bank v Rosset* and *Stack v Dowden*). Arguably *Jones v Kernott* fails to deliver. The headline in The Times report on 10 November 2011 wasn't far short of the mark: "*Unmarried couples 'need clarity' after Supreme Court rules on house ownership*".

The facts and the issue

Jones v Kernott was concerned with a discrete but frequently recurring issue. Miss Jones and Mr. Kernott met in 1981 and had two children together. In 1985 they purchased 39 Badger Avenue for £30,000. Importantly, the property was purchased in joint names but there was no declaration of trust specifying the shares in which the property was held. In 1993 the relationship ended and Mr Kernott moved out. Shortly thereafter the parties agreed to cash in a joint life insurance policy and the proceeds were divided equally in order to allow Mr Kernott to put down a deposit on his own home (which he did in around 1995). Mr Kernott did not make any appreciable contribution in relation to the Badger Avenue property from 1993 and Miss Jones was left to service the mortgage and maintain the property on her own. Some 13 years later, however, Mr Kernott initiated correspondence with a view to claiming an interest in that property. Ultimately, that correspondence led to the Supreme Court via Southend County Court, an appeal before Mr Nicholas Strauss QC sitting as a Deputy High Court Judge and the Court of Appeal. The County Court Judge held that the value of the property should be divided 90% to Miss Jones and 10% to Mr Kernott. That decision was upheld in the first appeal but overturned by the Court of Appeal who, by a majority, held that the property should be split equally (although the possibility of equitable accounting was highlighted).

Despite the apparent iniquity of the Court of Appeal's decision, difficulty had resulted from problems in interpreting and applying the House of Lords' decision in *Stack v Dowden*. The parties had reached no express agreement as to beneficial shares and it was common ground that at the date of separation in 1993 the parties' interests would have been held equally. Absent express discussions, the majority of the Court of Appeal felt that the presumption that there was a beneficial joint tenancy (controversially established in *Stack v Dowden*) had not been overcome. In short, they held that there was nothing from which it could be inferred that the parties' *joint* intentions had changed after separation. In particular, the Court of Appeal considered that *Stack v Dowden* did not "*enable courts to find, by way of the imputation route, an intention where none was expressly uttered nor inferentially formed*".

The Supreme Court's ruling

The Supreme Court were unanimous in allowing the appeal and restoring the order of the County Court Judge, the beneficial interest was split 90/10 in favour of Miss Jones. The principles that can be deduced from the majority (Lord Walker, Baroness Hale and Lord Collins) are as follows:

- (1) The starting point is that equity follows the law. Where parties hold property in joint names with no declaration of trust there is a presumption that they are beneficial joint tenants.
- (2) There were said to be two substantial reasons why a challenge to the presumption of beneficial joint tenancy should not be lightly embarked upon. First, the purchase of a property by a couple in an intimate relationship is a strong indication of emotional and economic commitment to a joint enterprise. Secondly, there is the practical difficulty associated with trying to take an account after years of living together.



- (3) There is no place at all for the presumption of a resulting trust based on unequal contributions in joint names cases involving unmarried cohabitants. The only applicable presumption is that equity follows the law.
- (4) The presumption of a beneficial joint tenancy can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.
- (5) The parties' common intention is to be deduced objectively from their conduct: *"the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party"*.
- (6) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, the answer is that *"each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property"* (applying the test suggested by Chadwick L.J. in *Oxley v Hiscock*). For these purposes *"the whole course of dealing...in relation to the property"* should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant in ascertaining the parties' actual intentions.
- (7) Each case turns on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair.
- (8) The concept of a "common intention" constructive trust is of central importance to "joint names" as well as "single names" cases. Nevertheless the starting point was described as different because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of common intention constructive trust whereas the Claimant in a joint names case starts with the presumption of a beneficial joint tenancy.
- (9) In "single names" cases, the parties' common intention to share beneficial ownership also falls to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended (expressly or by inference) then each is entitled to what is fair. The court will not, however, impute an intention to share.

In *Stack v Dowden* Lord Neuberger had been at pains to draw a distinction between the inference and imputation of intention. As he pointed out, an inferred intention is one which is objectively deduced to be the subjective actual intention of the parties (in light of their actions and statements). An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend. The difficulty with Baroness Hale's opinion in *Stack v Dowden* was that there were internally inconsistent passages which left the propriety of imputation unclear. Indeed, as Lord Wilson pointed out when dissecting that opinion, Baroness Hale had in terms stated that the search was for what the parties must be taken to have intended such that *"it does not enable the court to abandon that search in favour of the result which the court considers fair"*. In *Jones v Kernott*, however, the possibility of imputation has been embraced. The search is now "primarily" to ascertain the parties' actual shared intention, whether expressed or inferred from conduct but if *"it is impossible to divine a common intention as to the proportions in which they are to be shared...the court is driven to impute an intention which the parties may never have had"*.

Lord Collins was of the view that the difference between inference and imputation *"will hardly ever matter"* pointing out that it would be difficult to imagine a scenario involving circumstances from which, in the absence of express agreement, the court will infer a shared or common intention which is unfair.



This is, perhaps, just as well because the Supreme Court could not agree whether, even on the instant facts, it was possible to infer an intention to share the beneficial interest otherwise than 50/50.

There are, moreover, practical problems. First, is there any practical value in the presumption of a beneficial joint tenancy (previously said to be a strong presumption) if that can be displaced where there is no actual evidence from which to conclude that there was an intention to hold in different shares? Secondly, there is the problem of knowing when to treat the beneficial interests as fixed and when, instead, to apply equitable accounting.

The Supreme Court determined that Mr Kernott's interest should be taken to have crystallised in 1995 (when he purchased another property for himself). At that time Badger Avenue was worth £70,000. If Mr. Kernott was entitled to half (i.e. £35,000) then that was to be treated as fixed at that time. By 2008 the Property was worth £245,000 and so the court determined that he should take £35,000 and Miss Jones £210,000. That produced a 14/86 split which was so close to the 10/90 split as to make interference with the County Court judge's determination unsupportable.

This is a novel approach which gave Mr Kernott none of the benefit of house price inflation and no other return on his investment. It also makes it difficult to know when, if at all, equitable accounting should apply. Bizarrely the Supreme Court commended the parties for not having undertaken the exercise of taking an account. Nonetheless in *Wilcox v Tait* the Court of Appeal had stressed the need to keep the determination of the parties' respective beneficial interests analytically separate from any account. Broadly, the dividing line was said to be the breakdown of the parties' relationship. At that point the common intention underpinning (and regulating) the trust comes to an end and so an equitable account is generally appropriate. Since everything that Miss Jones relied upon as varying the beneficial interests post-dated separation, there is a compelling basis for saying that the Court of Appeal were correct to suggest that the appropriate remedy lay in an account.

In practical terms this may make advising on quantum problematic. When should the Court impute an intention to vary beneficial interests and when is the fair result to be found in simply carrying out an account?

In the final analysis, it must surely be the case that post-*Jones v Kernott* the presumption of a beneficial joint tenancy must be regarded as extremely weak if not altogether illusory. Further, the precise dividing line between quantifying beneficial interests and taking accounts between co-owners in cohabitation cases is unclear but will differ from case to case. In *Jones v Kernott*, for example, the duration of the separation was clearly material as was the fact that the majority felt able to infer an intention that the interest should be crystallised in 1995. In pure imputation cases that analysis may not always be easy to apply.

By way of post-script, Mr Kernott was reported this week to be dismayed at his portrayal as an "ogre" in the press and after the judgment said that "*I never wanted 50 per cent*". That is probably just as well since he got 10% and the litigation was no doubt ruinous. Practitioners would do well to remember that "costs protection" is not available to publicly funded clients in disputes of this kind.

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November 2011