

*clear | compelling | approachable*

# JONES v KERNOTT

## AN OPPORTUNITY FOR SOME CLARIFICATION

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## Jones v Kernott: An Opportunity for Some Clarification

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Four years after the decision of the House of Lords in *Stack v Dowden*<sup>1</sup>, the regulation (or lack thereof) of the proprietary rights of cohabittees upon relationship and family breakdown has hit the headlines once more. In the wake of that decision, the debate surrounding co-ownership and the potential for redistribution of beneficial shares in jointly owned property gathered speed. *Stack v Dowden* decided that where both cohabittees are registered as legal owners of a property, the default position is that a common intention trust will be inferred so that the property belongs equally to them at law and in equity. As Lord Walker and Lady Hale recognise at the outset of their leading judgment in *Jones v Kernott*<sup>2</sup>, the commentary surrounding *Stack v Dowden* has ranged “from qualified enthusiasm to almost unqualified disapprobation”<sup>3</sup>. Regardless of whether commentators agreed or took umbrage with the decision, *Stack v Dowden* may be thought of as a bold move. In the absence of legislative intervention, there is a clear necessity for those kinds of decisions to be taken, particularly in an arena in which “context is everything”<sup>4</sup>.

It is precisely due to the subject matter of this kind of case that the outcome receives considerably more media coverage than (arguably) would usually be attributed to the law of trusts. In her speech in *Stack v Dowden*, Lady Hale made considerable reference to the “domestic consumer context”<sup>5</sup> – it is within this arena that black letter property law is ill-equipped to deal with disputes without equitable assistance. Any decision involving regulation of the home, and the rights of those under its roof, has to be viewed in a so-called *context specific*<sup>6</sup> manner. This necessarily means that private law and social policy become entwined – regardless of whether the legislature chose to formally recognise it; the ‘home interest’ is being regulated by equity in a manner which is appropriate to the social climate. There are (at the point of writing) no further moves towards implementation of the Law Commissions recommendations in its report *Cohabitation: The Financial Consequences of Relationship Breakdown*<sup>7</sup>. As a result the Supreme Court has been required to revisit an area of specific sociological change and adapt “old principles to new situations”<sup>8</sup>. That change has taken place over the last 40 years or so with the increase in couples who chose to cohabit but not to marry. The outcome in *Jones v Kernott* reiterates and clarifies the position for cohabittees as to how (in the absence of an express declaration of trust) the beneficial interests in property held in their joint names will be divided after a relationship has broken down. But what exactly does that mean? What follows is an attempt to set out the judgement in a relatively accessible manner.

1 [2007] UKHL 17

2 [2011] UKSC 53

3 *Ibid* page 2, para 2

4 *Stack v Dowden* para 69, Lady Hale

5 *Ibid* para 58 onwards

6 Hopkin, LQR 2009 125 (Apr) 310–337

7 2007, Law Com No 307

8 Lord Collins, [2011] UKSC 53, page 19, para 57

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### Joint or Sole Names?

Before embarking upon an enquiry into the parties' intentions, it is necessary to address the different starting point in cases in which there is only one legal owner on the proprietorship register, as distinct from those cases of joint legal ownership. Lord Walker and Lady Hale make it clear from paragraph 16 onwards, that the 'common intention' trust is of central importance to both kinds of case. However, the starting points are different. In the case of a single legal owner, the "claimant who is not on the proprietorship register has the burden of establishing ... a common intention constructive trust"<sup>9</sup>. In contrast, those whose name is on the register start from the presumption of a beneficial joint tenancy. This may seem like an obvious point, but there has been some debate surrounding whether joint and single name cases are in fact governed by the same regime. **Jones** makes it clear that it is the **analysis** of the situations which is different, and not the rules that govern them.

### Resulting or Constructive Trust?

It is no longer the position that 'joint name' cases are analysed with reference to a resulting trust. To do so would put too much emphasis on accounting and deliberations as to who paid what, an approach which is thought of as far too narrow. When a couple set up a family home, clearly the last thing on their mind is what will happen if the relationship breaks down. It is artificial then to analyse the situation in terms of a resulting trust, which presupposes that the cohabittees have contemplated how the contributions would return to each party. Evidently, cases such as **Jones** illustrate that parties are not concerned with how the financial contributions they have made translate into economic ownership – if they had been there may not have been case in the first place. The judgment in **Jones** cites **Gardner and Davidson** who point out that the very reason that parties do not formulate agreements is because of "the parties' familial trust in one another"<sup>10</sup>. That trust requires regulation, and it makes sense that the appropriate vehicle is one which most accurately reflects the parties initial aim – a common intention trust. Reference is made to the fact that resulting trusts in this kind of case "made more sense when social and economic conditions were different, and when it was tempered by the presumption of advancement"<sup>11</sup>. The presumption of advancement is predicated on the idea that a breadwinning husband, or father, who purchased a house in their wife or daughter's name should be presumed to be making a gift to the wife or daughter. This is clearly outdated logic, and has been so at least since **Pettitt v Pettitt**<sup>12</sup> in 1970, when section 199 of the Equality Act 2010 is brought into force, the presumption of advancement will be prospectively abolished.

9 [2011] UKSC 53, page 5, para 16

10 (2001) 127 LQR 13, 15 - 16

11 [2011] UKSC 53, page 8, para 24

12 [1970] AC 777

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### The Starting Point

What then is the first step in ascertaining the beneficial shares of both parties? The starting point will always be that equity follows the law. The presumption is that there are equal shares, and a health warning is issued with regards to challenging the presumption of a beneficial joint tenancy. Firstly, the fact that a couple have purchased a house together, intending it to be their home, is “a strong indication of emotional and economic commitment to a joint enterprise”<sup>13</sup>. Secondly, it is most unlikely that throughout a relationship both parties have taken a detailed account of the financial contributions they have made to the partnership. With or without a marriage certificate, one can imagine that keeping a relationship balance sheet is impractical, unrealistic and unattractive – even in cases where the parties keep large amounts of their assets separated. Therein lays the “reason for caution before going to the law in order to displace the presumption of beneficial joint tenancy”<sup>14</sup>. If nothing else, the costs of embarking on such a task ought to be kept well in mind. Nevertheless this is the starting point.

### Displacing the Presumption

The presumption of beneficial joint tenancy can then be displaced in one of two ways. It needs to be shown that either: i) the parties had a different common intention at the time when they acquired the home, or that ii) they later formed the common intention that their respective shares would change<sup>15</sup>. The first of these causes little concern. If it is obvious that the parties never held the same intentions as to the beneficial ownership of the property, perhaps if they were also business partners, then this ought to be easy to demonstrate and the different, but shared, common intention will prevail. It is the second scenario that the court was concerned with in Jones. The primary approach should be to discover what the parties shared intentions actually were. It is the method of investigating these intentions which has caused some controversy since *Stack v Dowden*.

<sup>13</sup> [2011] UKSC 53, page 6, para 19

<sup>14</sup> *Ibid* page 7, para 22

<sup>15</sup> *Ibid* page 18, para 51(2)

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### Impute or Infer?

It may seem like it makes little difference in practice, but whether the parties' intentions are inferred or imputed has been central to the process of judicial reasoning in this area since *Gissing v Gissing*<sup>16</sup>. As a general rule, the parties' common intention is to be *objectively deduced* (i.e. inferred) from their conduct. This was explained by Lord Diplock in *Gissing* and examples of relevant evidence were set out in *Stack*. But *Jones* goes further than previous cases – in some instances it may be necessary for the Court to impute an intention to the parties. This may happen either in the situation identified above (where both parties clearly never intended a beneficial joint tenancy), or where “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”<sup>17</sup>. In *Jones* it was not necessary for an intention to be imputed to the parties, because there was sufficient evidence presented to infer that their common intention must have changed. Nevertheless the avenue is now fully open for the Court to attribute to the parties the proportions in which the beneficial interest would be divided by reasonable people at the relevant time<sup>18</sup>. In situations where there is conflicting and complicated evidence the Court needs to be able to come to some decision, and doing so on the right theoretical footing (be that by inferring or imputing an intention) is a welcome result.

### “Fairness”

It is not the case that the Court will choose to do what it believes to be fair from the outset – clearly if the parties' actual intentions can be ascertained the Court will aim to give effect to them. But in difficult cases, once the presumption of a beneficial joint tenancy is displaced, the Court will look to what is fair in the circumstances with regard to the whole course of dealing between the parties as set out by Chadwick LJ in *Oxley v Hiscock*<sup>19</sup> – “each party will be entitled to a fair share”<sup>20</sup>. The whole course of dealing is to be given a broad meaning, and rightly so if any kind of equitable outcome is to be achieved. Similarly, in ‘single name’ cases, if it can be established that a) the un-named party was to have a beneficial interest, and b) what that interest is, the Court will follow the same procedure set out here to ascertain what a fair division would be in the absence of direct evidence as to the parties' intentions.

<sup>16</sup> [1971] AC 886

<sup>17</sup> [2011] UKSC 53, page 31, para 11

<sup>18</sup> *Ibid* see page 11 para 33

<sup>19</sup> [2005] Fam 211, para 69

<sup>20</sup> [2011] UKSC 53, page 22, para 64

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Lord Walker and Lady Hale’s leading joint judgment comes with the inevitable caveat that each case will turn on its own facts<sup>21</sup>. It is the flexibility afforded by equity in this type of situation which allows for an approach that meets the social agenda. Lord Wilson’s assessment of “the continued failure of Parliament” to act in this area is illustrative of the frustration surrounding cases which require, but for one reason or another do not receive, legislative clarification. Happily, the Supreme Court continues to move with the times.

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<sup>21</sup> Ibid page 18, para 51(5)