One step forward, one step back: Jones v Kernott

Alexander Chandler, barrister, 1 King's Bench Walk analyses the Supreme Court judgment in Jones v Kernott and evaluates the extent to which it clarifies the law applicable to the determination of cohabitation disputes.

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Decision
In Jones v Kernott, the Supreme Court unanimously allowed Ms Patricia Jones' appeal and declared that she was entitled to a 90% share of the property she jointly owned with Mr Leonard Kernott in Thundersley, Essex.

That a dispute over a property worth £245,000 with relatively few factual issues can involve three reported appeals (***Jones v Kernott* [2009] EWHC 1713**; ***Kernott v Jones* [2010] EWHC Civ 578**; ***Jones v Kernott* [2011] UKSC 53**) and significant dissenting judgments at both the Court of Appeal and Supreme Court, speaks volumes about the current state of law in the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") .

While the Supreme Court agreed that Ms Jones' appeal should succeed, they did not speak with one voice and the Justices divided 3:2 on the question of whether the court was inferring the parties' intentions or imputing what it objectively considered fair:

> "[69] The areas of disagreement appear to be these: (a) is there sufficient evidence in the present case from which the parties' intentions can be inferred? (b) is the difference between inferring and

imputing an intention likely to be great as a matter of general practice?", per Lord Kerr

Lord Walker and Lady Hale inferred that the parties' intentions had changed on separation whereby '…the logical inference' was that Mr Kernott's share crystallised at that point para [48]. Lord Collins concurred with this reasoning para [55].

By contrast, Lords Kerr and Wilson concluded that it was in fact "…impossible to infer that the parties intended that their shares in the property be apportioned as the judge considered they should be but that such an intention should be imputed to them" (Lord Kerr, para [77]).

Facts

Leonard Kernott and Patricia Jones met in 1980 and formed a relationship. In 1985 they bought a bungalow in Badger Hall Avenue, Thundersley, Essex in joint names. The conveyance did not contain a declaration of trust and neither party sought or was offered advice as to the implications of buying a property jointly.

The parties and their two children (born in 1984 and 1986) lived at the property as their family home from 1985 until their separation in 1993 when Mr Kernott vacated the property. At that time, a joint insurance policy was surrendered and the proceeds divided equally, enabling Mr Kernott to put down a deposit on a new property in his sole name.

Having left, Mr Kernott made no further financial contribution to the household and bought his own home. Ms Jones took responsibility for the mortgage, the endowment policy premiums, all of the household bills and supported the children with little or no financial support from her former partner. In May 2006, more than twelve years after their separation, Mr Kernott sought to realise his half share of the bungalow, which remained in the parties' joint ownership and in March 2008 he purported to sever the joint tenancy.

It is worth interjecting at that point that, if the parties had signed a declaration of trust (which since 1998 is provided for in the standard Land Registry Form TR1), such a declaration would have conclusively declared their shares save in the event of fraud or mistake (*Pettitt v Pettitt* [1970] AC 777; *Goodman v Gallant* [1985] EWCA Civ 15). Their original financial contributions and issues of subsequent common intention constructive trust would have been irrelevant. Had Ms Jones and Mr Kernott signed up to an express declaration, it is suggested that the court's powers to declare that their interests were other than equal could only have arisen from conducting an account in accordance with sections 12 to 15 of TOLATA (see ***Murphy v Gooch* [2007] EWCA Civ 603**).

Lead judgment of Lord Walker and Lady Hale

i) Acknowledged the controversy that had arisen from **Stack v Dowden [2007] UKHL 17**, which this appeal provided an opportunity for some clarification paras [1-2]. However, the correctness of *Stack v Dowden* (which many practitioners would dispute) was not in issue:

> "…counsel have not argued that *Stack v Dowden* was wrongly decided or that this court should now depart from the principles which it laid down.

ii) While 'at a high level of generality' there is a single regime relating to family homes, there is a different starting point between jointly owned properties (presumption of equal beneficial ownership) and solely owned properties (presumption of sole beneficial ownership) para [16] – which was not simply a matter of following the mantra that '…equity follows the law'. Rather it arises for substantial reasons including

> a) the '…strong indication of emotional and economic commitment to a joint enterprise' in a jointly owned property para [19]
>
> b) the practical difficulty in many cases of unravelling the parties intentions with regards the ownership of property after a long relationship para [22]

iii) With regards the quantification of the shares of co-owners, the *Stack v Dowden* approach is confirmed, that the primary search is to ascertain the parties' actual shared intentions whether expressed or inferred from conduct:
"…we accept that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct." (para [31])

iv) However, the court may (although not on the facts of this case) be 'driven to impute an intention to the parties which they may never have had' in at least two exceptions i.e.

> a) Firstly, where domestic partners are also business partners and the classic resulting trust approach may apply. However, this will be 'rare' in a domestic context since disputes between cohabitees general involve a consideration of the common intention constructive trust;
>
> b) Secondly, where it is 'impossible to divine a common intention as to the proportions in which they are to be shared'

v) The conceptual difference between imputation and inference is clear, in that imputation involves the court declaring an intention which neither party had but which the court considers fair, whereas inference involves the court divining the parties' unexpressed intentions from conduct rather than interposing its own view. However, in practice, '…the difference in practice may not be so great' para [34]

vi) In *Kernott v Jones*, the parties' intentions changed. This was an example of what Lord Hoffman described in *Stack v Dowden* as an "ambulatory constructive trust" (para [14]). Specifically, on separation, "a new plan was formed", when the life insurance policy was cashed in and Mr Kernott bought a new property.

> "The logical inference is that they intended that his interest in [the property] should crystallise then… it is clearly the intention which reasonable people would have had had they thought about it at the time" (para [48])

vii) The property was worth £60,000 in 1993 whereby Mr Kernott's half share was then worth £30,000 or approximately 12% of its current value, a figure so close to the decision of 10% that it would be wrong of the appellate court to interfere para [49].

viii) Revisiting Stack v Dowden (also see Lord Collins at para [60]), the following checklist of factors is offered:

> "[51] In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.
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> 1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
>
> 2) That presumption 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.
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> 3) Their 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"

(Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

4) 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 that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "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 to ascertaining the parties' actual intentions.

5) Each case will turn 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 (as in case (3)) or fair (as in case (4)).

Judgment of Lord Collins

i) Lord Collins itemised three areas of controversy arising from *Stack v Dowden*

"[59] There have been at least three causes of the difficulties with *Stack v Dowden*. The first is that the previous authorities were mainly concerned with a different factual situation, namely where the property was registered in the name of only one of the parties. Second, they did not in any event speak with one voice, particularly on that part of Stack v Dowden which has caused most difficulty, namely whether in this part of the law there is any useful distinction between inferred intention and imputed intention: contrast *Gissing v Gissing* [1971] AC 886 with *Lloyds Bank v Rosset* [1991] 1 AC 107. The third reason is that (despite it being trite that it is wrong to do so) Baroness Hale's speech has been treated as if it were a statute, and ambiguities in it have been exploited or exaggerated, particularly the passage at para 60 in which she has been taken as having treated inferred intention and imputed intention as interchangeable, and the passage at para 61 in which she approved, or substantially approved, the reasoning of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69."

ii) Lord Collins interprets Baroness Hale's disapproval in Stack v Dowden of the court imposing what it considers fair as relating to the first stage of any inquiry, i.e. whether an interest can be established, rather than to the second, which quantifies the share (see para [63])

Dissenting judgment of Lord Kerr

i) Lord Kerr agreed that the appeal should be allowed but took issue with the assertion that the distinction between inference and imputation was unlikely to matter in practice: "Indeed, it seems to me that a markedly and obviously different mode of analysis will generally be required' (Lord Kerr, para [67])

ii) Generally, the court should attempt to divine the parties' actual intentions:

> "There is a natural inclination to prefer inferring an intention to imputing one… but the conscientious quest to discover the parties' actual intention should cease when it becomes clear either that this is simply not deducible from the evidence of that no common intention exists' (Lord Kerr, para [72])

iii) The bare facts of Mr Kernott's departure in 1993 and his acquisition of another property '…are a slender foundation on which to conclude that he had entirely abandoned whatever stake he had in the previously shared property' (Lord Kerr, para [76])

iv) Lord Kerr prefers to allow the appeal on the basis that this intention cannot be inferred but should be imputed (para [77]).

Dissenting judgment of Lord Wilson

i) Lord Wilson began by recalling the refusal by legislators to follow the recommendations of the Law Commission, noting the "…continued failure of Parliament to confer upon the court limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship" (para [78]).

ii) Lord Wilson heralded the "…development of the law of equity, spear-headed by Lady Hale and Lord Walker in their speeches in *Stack v Dowden*… that the common intention which impresses a constructive trust upon the legal ownership of the family home can be imputed to the parties to the relationship" (para [79]).

iii) The court's power to 'impute' an intention derived from *Pettitt v Pettitt* [1970] AC 777 (per Lord Diplock at 823) and had been re-asserted by Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546, albeit:

> "…its preference is always to collect from the evidence an expressed or inferred intention, common to the parties, about the proportions in which their shares are to be held, equity will, if collection of it proves impossible, impute to them the requisite intention.

iv) However, this approach, and the fall-back position whereby a court could impute a 'fair' intention had been called into doubt in Lady Hale's judgment in Stack v Dowden at para. [61], i.e.

> "…we believe that there is much to be said for adopting what has been called a "holistic approach" to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.'
>
> That may be the preferable way of expressing what is essentially the same thought, for two reasons. First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair" (my underlining)

v) Lord Wilson disagrees with this last sentence (para [88]) and confirms that where it is not possible to infer an intention, the court will impute an intention to the parties which involves a consideration of what the court considers fair (see para [68]). (It might be argued that Baroness Hale's opinion in Jones v Kernott also withdraws from the position stated in Stack v Dowden (see Jones at para [33])

vi) On the facts of Jones, Lord Wilson prefers the approach taken at the first appeal by Mr Strauss QC sitting as a Deputy High Court judge ([2009] EWHC 1713):

> "[89] … I regard it, as did Mr Strauss at [48] and [49] of his judgment, as more realistic, in the light of the evidence before the judge, to conclude that inference is impossible but to proceed to impute to the parties the intention that it should be held on a basis which equates to those proportions"

Conclusion

i) In law, as in mathematics, it is often easier to state the result than to 'show your workings' and explain how the outcome was reached.

ii) While all of the five Justices of the Supreme Court agreed to restore the decision of the trial judge, the reasoning of the majority

was significantly different from the minority.

iii) There seems to be consensus in the Supreme Court that, where the intentions of the parties cannot be divined, the court can legitimately 'impute' an intention which did not exist. This is interesting for a number of reasons: firstly, it is at variance with Baroness Hale's expressed view in *Stack v Dowden* at para [61]; secondly, the minority opinion of Lord Neuberger in *Stack v Dowden* sets out the contrary view at para [127], that it is wrong in principle and departs from established principle;

iv) It is, however, noteworthy that the Supreme Court reached such different conclusions on the facts of this case, i.e. three Justices found the events around the parties separation provided 'clear' evidence of a changed common intention; whereas Lords Kerr and Wilson considered these 'a slender foundation' and preferred to impute an objective view of what seemed fair.

v) While some points have been clarified (imputation, approval of *Oxley v Hiscock* approach to quantification), in other respects serious doubt remains, in particular as to how the court should 'infer' or 'impute' common intention. One step forward; one step back.