Articles

QUANTIFYING SHARES IN JOINTLY OWNED PROPERTY: *STACK v DOWDEN* AND *KERNOTT v JONES*

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Compared with ancillary relief, a TOLATA claim is not so much a different country as one inspired by the works of Lewis Carroll. Whereas the court exercises a broad discretion to achieve a fair outcome upon divorce, in claims between unmarried couples the position is, as Tweedledee would say, 'contrariwise'. Through the TOLATA looking-glass, the court has no discretion to create an interest in land in favour of a cohabitee, however 'fair' it might seem. Existing rights are declared according to the law of trusts. As Lord Scott of Foscote observed in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55:

'… under the present law of England . . . proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion . . . subjective views about which party "ought to win" . . . and the "formless void of individual moral opinion" …' (para [17], citing Deane J in *Muschinski v Dodds* (1985) 160 CLR 583))

But how should the court quantify the shares of co-owners? Where an unmarried couple separates and one party takes on sole responsibility for the mortgage and other outgoings, does s/he acquire a greater share in the property or will his/her interest remain unchanged? In what circumstances will a court infer that the parties have agreed to adjust their shares in a property and is it open to the court to 'impute' an intention that neither party in reality held?

THE FACTS IN *KERNOTT v JONES*

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. 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 12 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.

DECISION AT FIRST INSTANCE

In October 2007, Ms Jones issued a claim at Southend County Court seeking a declaration that she was the sole beneficial owner of the bungalow. It was admitted that the parties' interests in the bungalow were equal at the time of separation (October 1993). Ms Jones asserted that her investment over the intervening years without support from Mr Kernott entitled

her to its sole beneficial ownership. In the alternative, Ms Jones asserted that if Mr Kernott retained an interest in the bungalow, she sought an interest in his property (although this aspect of her claim was later conceded).

At trial, His Honour Judge Dedman referred to the majority opinions in *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 and directed himself to '… look at the whole course of dealings between the parties to infer what the agreement between them was'. The judge found that a result of Mr Kernott having completely ignored the property both as regards investment and as regards maintenance or repair, while concentrating on his own property, that it could be inferred that the parties' intentions had changed and it was 'fair and just' to declare that Ms Jones was entitled to a 90% share in the bungalow. At that stage, the equity in the bungalow was £218,000 and a jointly-owned endowment policy was worth £25,000.

THE FIRST APPEAL

Mr Kernott appealed, contending that the trial judge had misdirected himself in law and had based his decision on '… the impermissible question of what the court considers fair' (per Lloyd LJ in *Holman v Howes* [2007] EWCA Civ 877, [2008] 1 FLR 1217, at para [32]). In the Chancery Division, Nicholas Strauss QC (sitting as a deputy High Court judge) undertook a detailed analysis of the Court of Appeal decision in *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 2 FLR 669 and *Stack v Dowden* (above) but noted:

> 'Quite surprisingly, since the factual situation in the present case must be a common one, there is little authority on whether in such a case the court should infer that the parties' intentions as regards their respective beneficial interests have changed, or impute such a change to them, or if so, how the amount of such a change should be ascertained.' (para [3])

The deputy judge concluded that while the court should not override the parties' intentions of what it considered fair, the court was free to impute a common intention which the parties had not communicated but which reflected their changing circumstances, adopting Lord Hoffman's use in *Stack v Dowden* of the term 'ambulatory':

> 'In my view, despite the absence of any communication by either party to the other of any actual intention, the judge was right to impute to the parties an intention that their beneficial interests should be altered to take account of changes in the circumstances from how they stood at the time that they parted, and that, in the absence of any indication by words or conduct as to how they should be altered, the appropriate criterion was what he considered to be fair and just. The parties' interests were "ambulatory" …
>
> Since the parties had no discernible intentions as to the amount of the adjustment, they must be taken to have intended that it should be whatever was fair and reasonable, as the judge held. In so holding, he did not override any different intention which, from their words or conduct, could reasonably have been attributed to them. Therefore, in my opinion, his approach can be justified as being in accordance with the common intention of the parties. Alternatively, if this is to be regarded as a fiction, it can be justified as the only option available to the court on quantification, once he had rightly decided that the parties intended their respective beneficial interests to change.' (para [49])

Mr Kernott's appeal was dismissed and the parties' interests in the bungalow confirmed as 90:10. Mr Kernott subsequently appealed to the Court of Appeal.

MAJORITY JUDGMENTS OF THE COURT OF APPEAL

By a majority of 2:1, the Court of Appeal in *Kernott v Jones* [2010] EWCA Civ 578, [2010] 2 FLR (forthcoming), found in favour of Mr Kernott and declared that the parties' shares in the bungalow were equal. The judgment of Lord Justice Wall (as he then was) recalled that the ratio of the majority of their Lordships in *Stack v Dowden*:

(1)the starting point where there is joint legal ownership is joint beneficial ownership (*Stack*, per Baroness Hale, at para [56]);

(2)the burden on the party who seeks an unequal share will be a 'heavy one' (Lord Walker at para [33]); and

(3)in order for a common intention to change (ie to be 'ambulatory') at any one time their interests must be the same for all purposes (Baroness Hale, at para [62]).

From para [45] of his judgment, Wall LJ reviewed the minority opinion of Lord Neuberger's minority opinion in *Stack* and, in particular the distinction drawn between an 'inferred' and an 'imputed' intention. In *Stack*, Lord Neuberger explained that, whereas the court can legitimately 'infer' a common intention from the actions and behaviour of co-owners (eg it can be inferred from equal financial contributions to a deposit and mortgage payments that parties intend to hold a property in equal shares), to 'impute' an intention is to attribute to the parties something which cannot be deduced from their statements or actions. 'Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend' (*Stack*, at para [126]). This, Lord Neuberger held, was contrary to the principles laid down in the leading decisions (the 'twin peaks') of *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.

Wall LJ concluded by quoting Francis Bacon, that the office of the judge is '… *jus dicere and not jus dare*' (to interpret what the legislature enacts and not to make new law) and held that there was no evidence that would support the inference that the parties common intention changed from holding the property in equal shares to 90%:10%.

> 'The critical question is whether or not I can properly infer from the parties' conduct since separation a joint intention that, over time, the 50–50 split would be varied so that the property is currently held 90% by the respondent and 10% by the appellant …
>
> … at the end of the day I simply cannot infer such an intention from the parties' conduct. In my judgment, the conveyance into joint names, following *Stack v Dowden* created joint beneficial interests, and the parties agreed that when they separated they had equal

> interests. There has to be something to displace those interests, and I have come to the conclusion that the passage of time is insufficient to do so, even if, in the meantime, the appellant has acquired alternative accommodation, and the respondent has paid all the outgoings. In my judgment, the appellant has a 50% interest in the property, and both the judge and the deputy judge were wrong to conclude otherwise.' (paras [57], [58]).

Lord Justice Rimer concurred with Lord Justice Wall that Mr Kernott was entitled to an equal share in the property:

> 'I am conscious that Ms Jones may perhaps question the fairness of an outcome which leaves her with the same 50% share she had in 1993. But its fairness can only be assessed by reference to the principles governing such disputes as these. The decision in *Stack* requires claimants such as Ms Jones to surmount a high evidential hurdle in making good their case, which she failed to do.' (para [84])

Rimer LJ proceeded to critique the majority opinions in *Stack v Dowden* ('I suspect that *Stack* may be regarded by trial judges as presenting something of a challenge' (para [75])):

(1) The presumption of equal beneficial ownership and the 'heavy burden' required to discharge it meant that: '… a bid by a joint purchaser to establish a greater beneficial interest than a joint interest will involve the steepest of climbs, usually resulting in a failure to attain the summit.' (para [72])
(2) However in *Stack* unequal shares were declared (65:35) on the basis that it was on its facts an 'exceptional' case: the parties kept their financial affairs separate and Ms Dowden made the greater financial contributions. Rimer LJ questioned how these facts made *Stack* exceptional:

> 'The unequal contributions to the purchase in that case would not, I would think, be unusual and it was that fact that appears to have influenced Lord Hope. The "context" to which Baroness Hale referred may be unusual, I do not know, but the facts in every case will be different and each case has to be decided on its own facts.' (para [75])

(3) In *Stack*, Baroness Hale described the court's approach to quantification of share as follows, 'The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it' (*Stack*, para [60]). In practice, Rimer LJ remarked, this poses a number of problems:

> 'In most cases such a quest may well be elusive, because if the parties actually had any such intention, they would have voiced it; and if they did not voice it, that will probably be because they did not have one, with the consequence that there will be no basis for inferring otherwise. There will therefore in many cases perhaps be a degree of artificiality in the search for an intention that the parties did not utter but could have done. Taking the facts of *Stack* itself, it may not perhaps be obvious to everyone how the facts described by Baroness Hale justified the inference of an unspoken intention that the beneficial shares were to be held in the declared proportions.' (para [76])

(4) Rimer LJ recalled Baroness Hale's opinion that the court must look for 'the parties' shared intentions, actual, inferred or imputed' (*Stack*, para [60]) and comments 'I do not, with the greatest respect, understand what she meant' (para [77]):

> '… it is possible that she was suggesting that the facts in any case might enable the court to ascribe to the parties an intention that they neither expressed nor inferentially had: in other words, that the court can invent an intention for them. That, however, appears unlikely, since it is inconsistent with Baroness Hale's repeated reference to the fact that the goal is to find the parties' intentions, which must mean their real intentions.'

Rimer LJ joined issue with Wall LJ in finding that the court has no jurisdiction to 'impute' an intention that the parties did not in reality have, remarking, 'In his dissenting speech [in *Stack*], Lord

Neuberger, at [125] to [127], advanced an apparently comprehensive demolition of the "imputation" theory' (para [77]).

MINORITY JUDGMENT OF LORD JUSTICE JACOB

Lord Justice Jacob upheld the original declaration of 90%:10% on the basis that the court below applied the correct legal test in the majority opinions in *Stack*. The minority opinion of Lord Neuberger could be discounted: '[it] may be an appeal to future lawmakers or to the Supreme Court to reconsider *Stack*, it is otherwise no more than a cry in the wilderness' (para [89]) Jacob LJ concluded:

> 'I do not think the judge was at this point simply abandoning *Stack*. What he is saying in context is that the parties' shared intentions must be taken to be (they can be "inferred or imputed") is that they should each have a fair and just share. That is what the deputy judge also thought.' (para [97])

CONCLUSION

In its own way, the outcome in *Kernott v Jones* is as remarkable – at least from the perspective of ancillary relief – as *Burns v Burns* [1984] Ch 317, [1984] FLR 216 was a generation ago. The declaration that Mr Kernott is entitled to an equal share of a property despite making no financial contributions and paying no child maintenance for over 15 years illustrates a number of points:

(1) First, that the court's jurisdiction in TOLTA is declaratory: the issue is the common intention of the parties rather than any objective standard of fairness;
(2) Secondly, *Kernott v Jones* is a measure of how difficult it is, post-*Stack v Dowden* to prove that a co-owner owns an unequal share of a property;
(3) Thirdly, that a number of issues are yet to be resolved from the majority opinions in *Stack v Dowden*, such as:
    (a) How exceptional must a case involving co-owned property be in order for the court to declare unequal shares? What was exceptional in the facts of *Stack*?
    (b) Whether the court can 'impute' a common intention (ie an intention which the parties did not actually have) if it has no jurisdiction power to impose its own view of what is 'fair':

    'For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* without even the fig leaf of s 17 of the 1882 Act.' (*Stack*, Baroness Hale, at para [61])

    (c) How in practice should a trial judge survey the course of dealings between the parties in order to quantify their shares?
(4) This remains a highly contentious area of law. Both *Stack v Dowden* and *Kernott v Jones* contain dissenting judgments that disagree with the majority on important issues. As Lord Justice Peter Gibson commented in *Drake v Whipp* [1996] 1 FLR 826 '… as is notorious, it is not easy to reconcile every judicial utterance in this well-travelled area of law …'.

It remains to be seen whether the Supreme Court will have the opportunity of addressing these issues by way of an appeal by Ms Jones. Ultimately, as the Law Commission recommended in 2008, the time has come ('the Walrus said') for fundamental reform, and this lies at Parliament's door (*jus dare* rather than *jus dicere*).