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5: *Kernott v Jones* 89

[10E]

This is a decision of the newly formed Supreme Court consisting, in this instance, of two family judges, Lady Hale and Lord Wilson. It deals with the circumstances in which an intention, manifested at the outset of a cohabiting relationship, to own a house in equal shares, may change over time, particularly on breakdown and separation. The significance of the decision is the freedom with which, in contrast with older authorities, the court will infer an intention to change the beneficial interests where it would be 'fair' to do so; so much so that the legal technique almost amounts to *imputing* an intention, as Lord Wilson was quick to point out 90.

The facts

[10F]

In 1983, shortly after forming a relationship with J, K moved into her mobile home and the first child was born. In 1985, J sold the mobile home and the parties together bought a house at Badger Hall Avenue, Thundersley for £30,000. It was common ground that they intended to be joint beneficial owners. The question was whether that intention had changed over the years.

After moving into the property, the parties shared the running expenses and K carried out works of enhancement. A second child was born. Then in 1993, the relationship broke down and K moved out. From then on he made no contribution.

In 1996, the parties encashed a joint policy and, from his half share, K placed a deposit on a property at Stanley Road, Benfleet. By the date of trial, that property was worth £167,000 net, whereas the previous family home was worth £243,000 net.

Having regard to K's lack of involvement in the family home after he bought the new property, Judge Dedman at first instance inferred that the parties must have changed their minds about beneficial ownership. Although they had not discussed the matter, the court would construct a 'fair' solution whereby K's interest in the first property was crystallised at 10%; this led to a situation of near equality overall. K's appeal to the High Court (Mr N Strauss QC sitting as Deputy) 91 was dismissed.

On K's further appeal, the Court of Appeal allowed the appeal by a majority (Wall and Rimer LJJ, Jacob LJ dissenting) 92 and substituted a declaration that: (1) nothing had changed to alter the parties' original intention with regard to Badger Hall Avenue; and (2) accordingly, the property was owned in equal shares. J then appealed to the Supreme Court, which reversed the decision below and restored the judgment of the trial judge.

What it decides

[10G]

In arriving at his finding that 90:10 was 'fair', the trial judge surveyed the whole course of the relationship in a manner that is now conventional following *Oxley v Hiscock* 93. The question on



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appeal was, whether in doing so, he had fallen foul of the reasoning in *Stack v Dowden* 94 to the effect that a purchase in joint names (at any rate between a cohabiting couple) gives rise to a presumption of equal ownership. This conflict could be resolved if the court were to disapply the old principle 'once a property owner, always a property owner' and substitute a flexible technique, along *Oxley v Hiscock* lines, for identifying *changes* in the beneficial interest over the course of a relationship, in much the same way as it allows for their *creation* in the first place.

The Court of Appeal held that the trial judge had paid too little attention to *Stack v Dowden*. An equal share, once inferred by the court, can only be displaced by clear evidence of a mutual change of mind. In the present case, the evidence was simply not cogent enough, and so Mr Kernott still owned his 50% share. The apparent unfairness of this outcome was mitigated by the consideration that there must be one law applicable to all.

In restoring the trial judge's decision, the Supreme Court laid out the following principles, which apply to cohabiting couples only 95:

- (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.
- (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' 96.

- (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) have 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' 97.

In this context, 'whole course of dealing' 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 may be many other factors.

Such at any rate is the reasoning of the majority 98. The powerful view of the minority is that it is disingenuous of the law to strain every sinew to infer an intention, when a simple move to 'imputing' will suffice 99. On this basis, once the court can see its way to a solution that is



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eminently fair, the fact that the parties gave no thought to it does not inhibit the law from doing what is right. However, it is probable that a nine-judge court will be needed to resolve this philosophical dilemma 100.

6: Summary

[11]

- (1)The starting point is that equity follows the law. The beneficial interests will therefore mirror the legal title unless there is evidence to the contrary.
- (2)Where the property is purchased in the name of one party only, substantial and/or regular financial contributions by the other to the mortgage or household expenses will generally give rise to a beneficial interest, either because they are *direct* (so bringing the presumption of resulting trust into play) or *indirect* and *referable* to the acquisition (in which case the theory of common intention bridges the gap).
- (3)Where the property is in joint names, a subsequent change in the dynamics of the relationship (for example on separation, as where one party leaves and makes no further contribution) may lead to an inference that the parties intended to alter their beneficial interests, which in the absence of direct evidence of intention may be adjusted to what the court thinks is 'fair'.
- (4)Whenever the court is called upon to assess the common intentions, it will survey the whole course of the parties' dealings in order to determine what they intended with regard to property ownership. In this context the fact that the parties were married or in a long-term, committed family relationship carries considerable weight.
- (5)Equally the fact (if it be the case) that they purchased the home in joint names will generally lead to an inference of joint beneficial ownership.