Jones v Kernott –
into forbidden territory without a fig leaf?

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Just when lawyers who are called on to advise cohabitants thought we knew where we were, we find ourselves wandering into forbidden territory without a fig leaf!

Following Stack v Dowden we thought we knew pretty much where we were going: If the property is in the parties joint names but there is no deed of trust then there is a presumption that the beneficial ownership follows the legal ownership. There were lots of advices written full of discouraging phrases about the 'burden of proof' and how this was 'not a task to be lightly embarked upon'. Of course, discussions of imputation and fairness were out:

"I would expect almost all of "the whole course of dealing" to be relevant only as background: it is with actions discussions and statements which relate to the parties' agreement and understanding as to the ownership of the beneficial interest in the home with which the court should, at least normally, primarily be concerned. Otherwise, the enquiry is likely to be trespassing into what I regard as the forbidden territories of imputed intention and fairness." Lord Neuberger para. 145 Stack v Dowden [2007] UKHL 17

In particular, the concept of fairness was right out:

"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* [1970] AC 777 without even the fig leaf of section 17 of the 1882 Act." Baroness Hale para. 61 Stack v Dowden

So there we had it. So far so good. Then along comes Jones v Kernott.

I was lucky enough to hear Andrew Bailey and Richard Powers, the advocates in Jones v Kernott, give a talk to the FLBA in Chester. Richard Power, who represented Ms Jones, admitted that he had not argued in favour of the ability to impute to the

parties an intention which could not be clearly inferred from all the circumstances. Hardly surprising given the strictures in Stack v Dowden which I have referred to above. Despite his reticence that is now where we are - wandering into forbidden territory without a fig leaf.

So for those tasked with advising cohabitants, what sense are we to make of this brave new world?

If advising clients who jointly own property the key principles from Jones v Kernott are as follows:

1) The starting point is that equity follows the law and they are joint tenants both in law and in equity. (On a practical note it is well worth checking what the legal interests actually are per the Land Registry because they can differ from what your client thinks they are!)
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" (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)).
6) There is a difference of view amongst the Supreme Court as to inference / imputation of intention and the extent to which this will raise difficulties has yet to be seen

In a case where the property is in the sole name of one of the parties Oxley v Hiscock is still your starting point, with the qualification given in Stack v Dowden. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again 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, the court will have to proceed as at para. (4) and (5) above.

Although strictly 'obiter dicta' there is also a very interesting comment on equitable accounting and occupation rent at para. 50 of the joint speech:
"Had their beneficial interests in the property remained the same, there would have been the possibility of cross-claims: Mr Kernott against Ms Jones for an occupation rent, and Ms Jones against Mr Kernott for his half share in the mortgage interest and endowment premiums which she had paid. It is quite likely, however, that the court would hold that there was no liability to pay an occupation rent, at least while the home was needed for the couple's children, whereas the liability to contribute towards the mortgage and endowment policy would accumulate at compound interest over the years since he ceased to contribute. This exercise has not been done."

The big unanswered questions are whether there can be a change of common intention following an express deed of trust, and to what extent the 'family' circumstance extends to relatives as well as cohabiting couples.

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