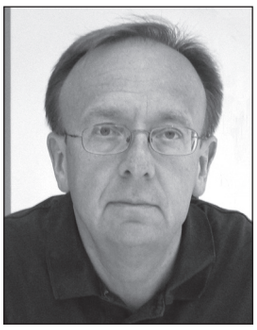
Showing interest

Mark Pawlowski considers a recent High Court ruling on the assessment of beneficial shares in the family home



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'In *Jones v Kernott*, the absence of any indication by the parties as to how shares in the family home should be altered meant that the appropriate criterion for apportioning the shares was what the court considered to be fair and just in all the circumstances.'

To what extent may the court impose its own sense of justice when determining the parties' beneficial ownership of the family home? This is a question that was recently considered by the High Court in *Jones v Kernott* [2009]. This case has confirmed that a court can attribute to co-owners of a home an intention to vary their beneficial interests that they had not actually expressed to each other, and impute to them an adjustment that would be fair and reasonable, taking into account the whole course of dealings between them.

Facts of the case

The parties (a cohabiting couple) had bought a house (39 Badger Hall Avenue) in joint names for £30,000. The parties lived in the property for 11 years, until their relationship ended. It was not in dispute that the parties had held the beneficial interest in the house in equal shares. The question for determination was whether, and if so to what extent, their respective interests had altered when Mr Kernott left, ceased to contribute to the mortgage and other outgoings, and bought his own property (114 Stanley Road), using his share of the proceeds from a life insurance policy he had held jointly with Ms Jones.

The Badger Hall Avenue property had been purchased with a deposit of £6,000 paid by Ms Jones and a mortgage, the repayments of which were initially shared. Mr Kernott subsequently built and paid for an extension to the house that increased its value significantly (from £30,000 to £44,000). After he moved out, however, Ms Jones remained in the house for a further 15 years, paying all the mortgage instalments and outgoings during that time.

At first instance, the County Court judge held that, while the parties' intentions at the outset might have been to provide them as a couple with a home, those intentions had changed, as Mr Kernott had ignored the property since he moved out. The judge, therefore, held that the beneficial interest should be split 90% to 10% in favour of Ms Jones, taking into account Mr Kernott's ability to afford his new accommodation by not contributing to the Badger Hall Avenue property, Ms Jones' payment of the 20% deposit and preponderant contribution to the mortgage (81.5% of the total payments), and the lack of assistance from Mr Kernott in providing maintenance for their two children. In reaching this conclusion, the judge adopted the approach of considering what was fair and just between the parties. It was this aspect of the judge's ruling that was challenged on appeal.

Imputing intention and the notion of fairness

The primary issue before Mr Nicholas Strauss QC (sitting as a deputy judge of the High Court) was whether it was open to a court to consider what is 'fair' in assessing the amount of a party's beneficial entitlement to property. The reference in both *Stack v Dowden* [2007] and *Abbott v Abott* [2007] to the intentions of the parties being 'actual, inferred or imputed' showed that it was certainly permissible for a judge to attribute to the parties a common intention that they did not have, or at least had not expressed to each other. But did this also allow the court to assess the quantum of each party's beneficial interest by reference to a notion of fairness?

In *Oxley v Hiscock* [2004], Chadwick LJ (with whom Mance and Scott Baker LJJ

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agreed) confirmed the already-accepted view that, in determining a claim based on a constructive trust, the court is embarked on a two-stage assessment of the claimant's case.

The first stage involves the court asking whether there is evidence from which to raise a common intention that each party should have a beneficial share in the property. If the parties had expressly discussed the matter at the time of acquisition, that would give rise to the first category of common intention constructive trust recognised by Lord Bridge in *Lloyds Bank plc v Rosset* [1991]. Alternatively, where the matter is not discussed at all, the requisite constructive trust could be inferred from the fact that each party had made a direct (or indirect) financial contribution: Lord Bridge's second category.

Assuming that the common intention is present, the second stage involves the court assessing the extent of the parties' respective beneficial interests in the property. In some cases, if the parties have discussed the amount of their respective shares, this will be a straightforward task. Invariably, however, the parties will have said nothing about the actual proportions in which they should hold the property. In this latter type of case, Chadwick LJ concluded that the amount of the parties' respective shares would be what the court considered to be fair on the basis of all the relevant conduct. Significantly, his Lordship emphasised that what the court was doing was supplying or imputing a common intention when the parties had not expressed that intention themselves (paragraph 66). The right question, therefore, in his view, was:

> What would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?

Interestingly, the rationale for the court in imputing a common intention in respect of the parties' shares in this way is summarised by his Lordship as follows (at paragraph 71):

> ... if it were [the parties'] common intention that each should have some beneficial interest in the property – which is the hypothesis upon which it becomes necessary to answer the second question – then, *in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair.* (Emphasis added.)

In *Stack*, however, the House of Lords cast doubt on this approach. Baroness Hale (who gave the leading speech) felt that it was inappropriate for the court to impose its own view of what is fair, given that the correct approach (as explained in paragraph 61) was to search for:

> ... the result which reflects what the parties must, in the light of their conduct, be taken to have intended.

Lord Neuberger was more forceful on this point, suggesting that while an intention may be inferred as well as expressed it could not be imputed, since this would permit the court to attribute to the parties an intention which could not be deduced from their actions or statements, and which they did not have but were to be taken as having. To impute intention, in his view, 'would involve a judge in an exercise which was difficult, subjective and uncertain' (paragraph 127). For this reason, fairness could not be a guiding principle.

Adopting these criticisms, the deputy judge in *Jones* concluded that the process of quantification of beneficial shares depended on an assessment of what, in the light of the parties' conduct, they must be taken to have intended and not what the court itself considered to be fair or just. Some element of imputation, however, was inevitable where there was no evidence at all of the parties' actual intentions. This did not mean that the court could override the intention of the parties in favour of what the court itself considered fair. The crucial point was that the court could not impose its own view in the face of what the parties had said or from their conduct. In the words of the deputy judge (at paragraph 31):

> To the extent that the intention of the parties cannot be inferred, the court is free... to impute a common intention to the parties. Imputing an intention involves, as Lord Neuberger points out, attributing to the parties an intention which they did not have, or at least did express [sic] to each other. The intention is one which the parties 'must be taken' to have had.

In the deputy judge's view, the process of assessment simply could not work without the court supplying what it considered to be fair where the evidence of the parties' intention cannot be found from their own words or conduct. In these circumstances, as stated at paragraph 31:

> ... the only available criterion by which to assess the extent of the alteration is what is objectively fair, and the only available judge of that is the court.

In Jones v Kernott, *the deputy judge acknowledged that a trust may be ambulatory and that the intentions of the parties as regards their beneficial interests may change (or be taken to have changed) over time.*

Significantly, in *Jones*, the County Court judge had not overridden any different intention that, from their words or conduct, could reasonably have been attributed to the parties. Thus, his approach could be justified as being in accordance with the common intention of the parties. Alternatively, it could be justified as the only option available to the court on quantification.

Ambulatory trust

The possibility of altered intentions arising from subsequent events gives rise to the notion that the constructive trust in this context is floating or ambulatory and not fixed at the date of acquisition of the property. To produce a change in beneficial ownership, however, the claimant must in most cases point to evidence involving

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discussions or actions subsequent to acquisition from which an agreement or common understanding as to such a change can be inferred.

In *Stack*, the House of Lords referred to the carrying out of significant improvements to the home as justifying an adjustment of beneficial ownership. The cost of such improvements would be seen as capital expenditure that differs from regular outgoings. The work, however, would have to be substantial, so decoration or repairs would generally be excluded. The making of repayments on the mortgage was also seen as a potential factor influencing the adjustment of the parties' beneficial shares following acquisition. Substantial repayments of capital would have this effect, but payments of mortgage interest may also be considered in appropriate cases.

The deputy judge in *Jones* acknowledged that a trust may be ambulatory and that the intentions of the parties as regards their beneficial interests may change (or be taken to have changed) over time. The correct approach, as suggested by Lord Neuberger in *Stack*, was to consider first what the initial intention was and then to examine whether it had altered, and if so to what extent.

Whole course of dealing between the parties

It was significant that the parties in *Jones*, as in *Stack*, had maintained separate finances following Mr Kernott's departure from the Badger Hall Avenue property. It was, therefore, correct to infer that the parties no longer intended equal beneficial ownership. What different intention, however, fell to be imputed to the parties, given that they had not shown any indication of their intentions as to their respective beneficial shares?

In the absence of any indication by words or conduct as to how the shares should be altered, the appropriate criterion, as discussed above, was what the court considered to be fair and just in all the circumstances. Following this approach, the most significant direct contribution to the value of the Badger Hall Avenue property was the initial 20% deposit paid by Ms Jones on acquisition. There was also the very substantial capital gain on both properties. By not contributing to the outgoings at Badger Hall Avenue after his departure, Mr Kernott was able to buy another property on which there was almost as great a capital gain. According to the deputy judge at paragraph 51:

> It would not be reasonable for Mr Kernott to have, and the parties cannot be taken to have intended that he should have, a significant part of the increased value of Badger Hall Avenue, in addition to the whole of the capital gain from Stanley Road.

It would, therefore, be unreasonable for him to retain more than only a small interest in Badger Hall Avenue. Although Mr Kernott had made substantial improvements to the property, his failure to contribute maintenance to his children was also a relevant factor that could properly be taken into account in the assessment. Looking at the whole course of dealing between the parties, the deputy judge concluded that the 90% attribution to Ms Jones determined by the County Court judge was 'well within' the range of fairness.

Conclusion for trusts and estates practitioners

The decision in *Jones* provides very useful guidance on how the court is to assess beneficial entitlement where the evidence does not disclose what the parties intended. The criterion of fairness comes into play in these circumstances only as a means of supplying the missing elements and not as a means of undermining the parties' intentions in so far as they may be apparent. What the court cannot do is disregard the evidence of what the parties probably intended and substitute what it might consider to be fair. That would be to enter into what Lord Neuberger called the 'forbidden territories' of subjectivity and uncertainty.

The re-introduction of the concept of fairness in this limited way is, in my view, both eminently sensible and practical. As Chadwick LJ observed in *Oxley* (see above), in the absence of any indication from the parties' own words or conduct as to their intentions regarding the quantum of their beneficial ownership, the only recourse left to the court is to undertake its own assessment of what the parties must have intended by reference to what is fair and reasonable. In the words of the deputy judge in *Jones* (at paragraph 35):

> It is difficult to see what intention could then be imputed to the parties other than that each should have his or her fair share in the light of all the circumstances. If that were to be disregarded, there would be no way in many cases of resolving the issue.

Moreover, to impute an intention in this way simply accords with what the parties must have understood would be the outcome, given the absence of any indication on their part as to what their respective beneficial shares are to be. In such cases, as pointed out by the deputy judge at paragraph 33:

> ... their actual or subconscious intention may well be that their respective shares... should be whatever the court decides is fair in all the circumstances.

To suggest, therefore, that considerations of fairness should be excluded in such circumstances is to deny the parties the liberty of assuming that fairness will be relevant in determining their eventual interests where they have failed to clarify their intentions themselves.

The significance of *Jones*, however, goes beyond the facts of the case, since it clearly acknowledges that now there is really no difference in analysis between constructive trust and proprietary estoppel in cases of this kind. In each, the court is supplying (or imputing) a common intention as to the parties' beneficial entitlement on the basis of a notion of fairness (or doing justice to the parties) in the light of all the relevant circumstances: see *Yaxley v Gott* [2000] at 180, per Robert Walker LJ. ■

Abbott v Abott
[2007] UKPC 53

Jones v Kernott
[2009] EWHC 1713 (Ch)
(To be reported in a future edition of *Wills and Trusts Law Reports*)

Lloyds Bank plc v Rosset
[1991] AC 107

Oxley v Hiscock
[2004] WTLR 709

Stack v Dowden
[2006] WTLR 511 (CA);
[2007] WTLR 1053 (HL)

Yaxley v Gott
[2000] Ch 162

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