Common intention and the family home – Towards a composite enquiry?

Mark Pawlowski, *Barrister and Professor of Property Law, School of Law, University of Greenwich*

In *Jones v Kernott* [2012] 1 AC 776, the Supreme Court (Lord Walker and Lady Hale giving the leading joint judgment), established the principle that it was open to a court to impute an intention where it was apparent that beneficial ownership of the family home was to be shared in *some* proportion, but the parties had given no indication themselves as to how their entitlement was actually to be shared. In these circumstances, the court had no choice but to give effect to the parties' common intention by determining what the parties "as reasonable people, would have thought at the relevant time": at [33].

The wider significance of this approach suggests that the whole exercise of determining beneficial entitlement (at least so far as joint ownership cases are concerned) condenses essentially into just one fundamental question focusing on the parties' common intention by reference to an examination of all the relevant circumstances. Significantly, according to Baroness Hale in *Stack v Dowden* [2007] 2 AC 432, these circumstances include any advice or discussions at the time of transfer (i.e., the equivalent of express discussions pertinent to finding an express common intention in Lord Bridge's first category constructive trust in *Lloyds Bank plc v Rosset* [1991] 1 AC 107) as well as how the purchase was financed both initially and subsequently (i.e., the equivalent of financial contributions relevant in determining whether an inferred common intention exists in Lord Bridge's second category).

Such an approach would, of course, mark a significant move away from the *Rosset* scheme in single ownership cases in favour of a much simplified composite test as to the parties' common intention by reference to a broader range of factors (not necessarily limited to just their financial contributions) as providing the answer to *both* whether the claimant has established an entitlement to share beneficially in the property and also (at the same time) as a means of identifying the precise extent (or quantum) of each party's respective shares.

A move away from Rosset

Significantly, a recent High Court decision involving single ownership appears to have shifted away from the traditional *Rosset* approach in favour of a more composite analysis in determining beneficial ownership in line with the cases where the property is purchased in joint names. In *Amin v Amin* [2020] EWHC 2675 (Ch), the house had been registered in the wife's sole name at HM Land Registry. The action started as a claim for possession but was met by a counterclaim for a declaration that she held the property on trust for her husband and her two sons, who claimed that they were entitled to an equitable interest by way of a common intention constructive trust.

(1) decision at first instance

HH Judge Saunders in the County Court, applying *Jones*, concluded that financial contributions were relevant in determining beneficial ownership but that there were many other factors that might enable the court to decide what shares, if any, were intended. He made several factual findings including that: (1) mortgage payments were made by the husband; (2) the wife had made no financial contribution; (3) the registration of the property in her sole name had been done without significant thought, the family having a history of transferring properties between members of their extended family; and (4) both sons had made financial contributions towards the mortgage and had carried out construction and renovation work on the property. In the learned judge's view, the evidence was sufficient to displace the presumption that the property was held in accordance with the terms of ownership at the Land Registry and, accordingly, he concluded that the property was held on trust by the wife for all three claimants.

On the wife's appeal, it was argued that the authorities distinguished between the case where a property was taken in joint names and the case where it was taken in a sole name. In the latter case, there were three stages in establishing a common intention constructive trust: (1) whether there was a common intention to share beneficially, either expressed or inferred; (2) if the common intention is established, whether there has been detrimental reliance on the common intention; and (3) the quantification of the parties' shares. It was, therefore, important not to confuse the first stage with the third stage – the establishment of a common intention was separate from quantification, although if the common intention itself established the parties' respective shares, then that would conclude the matter. Moreover, in the absence of an express agreement or arrangement or understanding, the court was not permitted to impute (as opposed to infer) an intention to the parties at the first stage. It was submitted on behalf of the wife that the trial judge had fallen into error in not applying these basic principles.

(2) High Court ruling

Nugee LJ, whilst acknowledging that there was no presumption of joint beneficial ownership where the family home is put into the name of one party only, accepted that the parties' common intention had to be deduced objectively from their conduct. But that apart, the exercise, in his view, was broadly similar in a sole name case to that in a joint names scenario. In his Lordship words, at [32]:

> "In each case what needs to be found to displace the presumption that equity follows the law is a common intention that beneficial ownership should be something different from legal ownership; and (save for the case where there is evidence of express discussions as referred to by Lord Bridge in *Lloyds Bank plc v Rosset*) that is to be deduced objectively from their conduct."

And more significantly, at [33]:

> "I accept that in strict theory one can distinguish between two different questions, namely (i) was there a common intention that the beneficial ownership should be something different from the legal ownership and (ii) if so, what is the appropriate quantification . . . But I do not think the two stages can always be neatly distinguished . . . Lord Walker and Lady Hale [in *Jones v Kernott*] say that examples of the sort of evidence that might be relevant to the drawing of inferences on the first question can be found in *Stack v Dowden* at [69]. There Lady Hale said: 'Many more factors than financial contributions may be relevant to divining the parties' true intentions'. That is almost identical language to that used in *Jones v Kernott*."

His Lordship concluded that, "if one stands back from the detail, the broad question is always: what did the parties intend?" Again , in his Lordship's words, at [34]-[35]:

> "Once one allows the parties' intention to be inferred from their conduct, it seems to me to make no sense to try and make a sharp divide between evidence that enables an inference to be made as to their common intention that the beneficial interests should not follow the legal ownership, and evidence that enables an inference to be made as to what they intended those beneficial interests to be. Those questions are necessarily bound up together. In my judgment the [trial judge] was right to say that financial contributions and many other factors could enable the court to decide not only what shares the parties intended, but also whether there was a common intention at all that the sole legal owner should not be the sole beneficial owner."

On this analysis, therefore, his Lordship rejected the criticism that the trial judge had failed to deal with the question of common intention properly. He, accordingly, dismissed the wife's appeal.

Non-financial contributions

In *Graham-York v York* [2015] EWCA Civ 72, involving a single ownership case, the parties cohabited for over 33 years until the male partner's death, during which time the female claimant brought up the couple's daughter, made financial contributions to the household expenditure and a small contribution to the payment of the mortgage debt on the property. Despite this, the Court of Appeal declined to impute to the parties a common intention of equal beneficial ownership preferring instead to focus primarily on financial contributions as governing the assessment of the claimant's interest in the family home. The result was a modest award of only a 25 per cent share in the net proceeds of sale after discharge of the mortgage debt affecting the property.

The decision suggests that looking at "the whole course of dealing" does not mean looking at everything related to the parties' relationship (despite the seemingly broad and non-exhaustive range of factors indicated in *Stack*), but just at what is relevant specifically "in relation to the property". This means, of course, that the court's attention is focused inevitably on financial contributions, whether they be towards the initial purchase, household

utilities, mortgage instalments or subsequent capital improvements to the property. In practical terms, therefore, the Court of Appeal in *Graham-York* appears to have applied a form of "mutated" resulting trust whilst, at the same time, characterising the result as a legitimate consequence of the wider enquiry undertaken under the *Stack* principles.

Although domestic and home care services (such as bringing up the children) may inevitably be provided out of motives of natural love and affection, this, it is submitted, should not deny a claimant relief where such services are directed, pursuant to the parties' system of money management, to the acquisition and maintenance of property where one party meets mortgage instalments and the other pays for general outgoings and living expenses and acts as homemaker. Unfortunately, the current trend of the cases, most notably, *Graham-York*, is to largely ignore these wider factors in the interests of a simple and formulaic solution.

There has been much academic criticism of this formulaic approach in perpetuating gender bias within the law. In her influential article, Simone Wong submits that, because women are more likely to be the primary homemaker or care giver, they are, therefore, less likely to be able to make financial contributions and, consequently, find it more difficult to meet the current requirements of the common intention constructive trust. In order to address this imbalance, she argues that that the English courts should recognise that non-financial contributions have just as an important role to play in determining beneficial ownership as purely financial contributions: see, S. Wong, "Constructive Trusts over the Family Home: Lessons to be Learned from other Commonwealth Jurisdictions", (1998), Vol. 18/3, Legal Studies Journal, at pp. 369-390.

Conclusion

In the writer's view, there is much to be said for abandoning the *Rosset* scheme in favour of a simplified enquiry, in both single and joint ownership cases, involving an examination of the parties' shared intentions (actual, inferred or imputed) by reference to all the relevant circumstances. Such an enquiry would subsume all aspects of the acquisition question as well as the question of quantification because the factors used to address entitlement would also dictate (and resolve) the extent of the beneficial shares.

Interestingly, Lord Walker and Lady Hale in the Supreme Court in *Jones* alluded to the possibility of a "single regime" governing single and joint ownership cases, although they also openly recognised the inevitable different starting points for a claimant seeking to establish a beneficial share where the property is purchased in a single name and where it is purchased jointly. In the former case, the onus is on the claimant to establish initially a common intention to share beneficial ownership (i.e., the acquisition hurdle) whereas, in the latter case, the claimant already starts with the assumption of a beneficial joint tenancy. In the latter case, therefore, the enquiry is focused on the assessment of the parties' respective beneficial shares either at the time of or following acquisition in the light of any significant circumstances pointing to a contrary intention.

In the writer's view, however, the essential enquiry boils down to the same thing in both cases, namely, "to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct": see, *Jones*, at [31] and [52]. In particular, in a single ownership case, the evidence must establish a common intention to share beneficial entitlement which may be inferred from the parties' conduct in the absence of express agreement. Such conduct should not, however, be limited to financial contributions but may include a wider range of factors relevant to the parties' management and running of their family home. Moreover, if it is not clear what shares were actually intended, the court will proceed in the same way as in a joint ownership case by seeking to deduce a common intention as to quantum either objectively from the parties' conduct (significantly, the same conduct which establishes the common intention to share beneficially in the first place) or, as the Supreme Court has now confirmed, in a way which the court considers fair having regard to whole course of dealing between the parties. This suggests that, at both the first and second stage, the essential exercise is the same based on the court deducing the parties' common intention objectively from all the circumstances of the case.

The emergence of a composite enquiry for determining the parties' intentions, based on a "multifactorial" examination of the circumstances (allowing equal weight to be placed on both financial and non-financial contributions), would, it is submitted, provide a welcome development in the English law on constructive trusts in both single and joint ownership cases. It remains to be seen, however, whether the recent approach taken in *Amin* finds universal favour at appellate level.