

Cohabitees' property rights and Jones v Kernott

Jones -v- Kernott Judgment

The Supreme Court has recently handed down the long awaited judgment in the case of Jones v Kernott. The case concerned the correct approach to calculating how the beneficial interest in a property used as the family home is to be held in the absence of an express provision, where the legal title to that property is held in joint names by an unmarried couple.

The Supreme Court has unanimously allowed the appeal of Ms Jones from the Court of Appeal, awarding her 90% of the beneficial interest of the property in question, and restoring the order of the County Court. The Court of Appeal had overturned a 50/50 split awarded by the County Court and upheld by the High Court on appeal.

Affirmation of Stack -v- Dowden

The judgment affirms the principle set out in Stack v Dowden, that where an unmarried couple purchases a family home in joint names, there is a rebuttable presumption of joint beneficial ownership. In determining whether the presumption has been overturned, a Court can examine the parties' conduct in so far as it indicates expressly, or by inference, their shared or common intention as to the beneficial ownership of the property. Jones v Kernott takes the principle yet further, expanding upon the idea struck upon in Stack v Dowden, that a Court can impute an intention of sharing where it is not possible to infer from direct or objective evidence the parties' actual intention.

The principles

Lord Walker and Lady Hale state in their joint leading judgment in Jones v Kernott, that in the case where a family home is purchased in joint names, the following principles will apply:

- The starting point is that equity follows the law and the parties will therefore be joint tenants in equal shares in both law and equity;
- This presumption can be displaced by evidence that their common intention was, in fact, different at the time when the home was acquired, or that they later formed a common intention that their respective shares would change;
- Common intention is to be deduced objectively, or inferred, from the parties' conduct;
- Where it is clear that either of the parties did not intend there to be a joint tenancy in equal shares at the outset, or 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 their respective shares, "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" (*Lord Diplock in Gissing v Gissing [1971] AC 886, 906*). This appears to allow the imputation by a Court of an intention that could not be proved by objective evidence.
- Each case will turn on its facts. In addition to financial contribution, there are many other facts or types of contribution that may enable a Court to determine what shares were either intended or are fair. The Court

expressly referred to Stack v Dowden in relation to what sorts of contributions may now fall to be considered. These may include why the home was acquired in joint names, the nature of the parties' relationship, whether they had children for whom both had responsibility to provide a home, and how the home and house bills were financed, both at the time of purchase and subsequently.

Stack v Dowden and Jones v Kernott deal with properties purchased in joint names. For single name cases, the starting point will remain different. No beneficial joint tenancy is to be presumed, and the party claiming a beneficial interest has the burden of establishing this.

A need for Cohabitation Agreements?

The Supreme Court judgment in Jones v Kernott follows hot on the heels of the Government's response to the Law Commission's 2007 report, "Cohabitation: The Financial Consequences of Relationship Breakdown" last month (see our briefing note "Cohabitation – the Government's response" for more information on this). The lack of reform in this area, together with Courts now being given a wide discretionary power to impute fairness when determining how the beneficial interest in a property is held, makes it advisable for unmarried cohabitees to enter into a co-habitation agreement documenting how property should be held and divided in the event of their relationship breaking down. And in light of Jones v Kernott, parties should review any such agreements when their circumstances change, such as the building of an extension to the property, or an alteration in how a mortgage is paid.

Conclusion

Although the outcome in Jones v Kernott may seem fair, in so far as Ms Jones had paid the mortgage and all outgoings in relation to the property from 1993 onwards when Mr Kernott moved out, and indeed received little child maintenance from her ex-partner, it does not seem to be the outcome that should have been reached from a strict application of the law of property and trusts to the facts of this case. Courts have now been given liberty to substitute their own interpretation of fairness to complex family problems in circumstances where they have been unable to find evidence that the parties actually changed their intention with regard to how the family home was held.

Unmarried couples with no express agreement as to how the beneficial interest in their property is to be shared are now left to the mercy of an undefined test of fairness. Jones v Kernott does what Parliament has failed to do; it gives the court a wide discretionary power to determine the distribution of real property on the breakdown of a relationship. However, it appears simply to have muddied the waters yet further in an area of law already rife with uncertainty. Family lawyers may find themselves very busy as a result! Whether the law will catch up with the reality of modern relationships is a matter that remains to be seen.

Get in touch

Our team of family lawyers under Alan Kaufman's leadership provide pragmatic advice to individuals wishing to solve/prevent family disputes.



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