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Jones v Kernott:
Supreme Court decision on
property rights for unmarried couple

Fairness prevails as Court of Appeal decision reversed but position for cohabiting couples still unsatisfactory and until the law changes, family practitioners recommend those purchasing a property jointly to enter into a written agreement to avoid future litigation and uncertainty.

The Supreme Court have now clarified the position in relation to a property owned jointly by an unmarried couple, in this case Ms Jones and Mr Kernott, where only one of them went on to pay the mortgage and the cost of the upkeep on the property for a long period after they separated.

The decision reverses the decision of the Court of Appeal, which many had found to be surprising since it held that the couple still had an equal interest in the proceeds of the jointly owned property, despite the fact that only one of them, Ms Jones, had been contributing financially towards it since they separated 14 years earlier. The Supreme Court restored the original decision of the County Court judge, who determined that their respective shares in the property may have been 50:50 at the time that they separated but that their interests had changed. It was determined that the property was held by them both now in unequal shares with Ms Jones having an interest of 90% and Mr Kernott having an interest of 10%. In view of Ms Jones taking over financial responsibility for the property their intentions were found to have changed over time and Ms Jones had acquired a greater financial interest.

Although the Supreme Court judgment has provided some guidance in what remains a complex area of law, it remains a cautionary tale for those who have purchased a property with a partner or ex-partner about the importance of taking steps to formalise what is to happen to the ownership of that property upon separation. It is much better for all involved to set out clearly in writing at the time of purchasing a property what should happen to that property in the event that the relationship breaks down, and how any proceeds should be divided upon a sale of the property, and to regularly review any such agreements in the event that circumstances change, particularly upon separation. This will hopefully avoid a situation where the courts are being asked to decide, many years later, what was intended by all involved, as happened in this case. The reasons for this are considered in more detail below.

Jointly owned property

There are three ways to legally own a property; in one person's sole name; in joint names as 'joint tenants'; or in joint names as 'tenants in common'.

If a property is owned jointly as *joint tenants* then each person jointly owns the entire property, rather than a distinct share of it. The consequence of this is that upon the death of one person, their interest in the property automatically passes to the survivor. It is common for married couples to purchase properties in this way.

On the other hand, if a property is owned jointly as *tenants in common* each owner has a distinct share in the property. What this share is will depend upon many factors, but often a couple who are contributing in unequal shares towards the purchase price of a property that they are purchasing in joint names will agree at the outset that they will own it in accordance with their contributions, e.g. if one person is contributing 90% of the purchase price they may agree to hold the property as tenants in common with their respective shares being 90:10. Each of the tenants in common are only entitled to that percentage of the sale proceeds, if the property is sold during their lifetime. If they die then their share of the property forms part of their estate and will pass according to their Will, or, in the absence of a Will, according to the rules of intestacy.

The name(s) in which a property is held, as recorded at the Land Registry, merely reflects the 'legal' ownership of a property. This is distinct from the 'beneficial' ownership, which determines who has a financial interest in the property, and how that financial interest is shared. It may be, and often is, that the beneficial ownership is different to the legal ownership. This can also apply if a property is purchased in one person's sole name but other people have contributed to it financially over time.

Where a property is purchased jointly, agreeing and documenting the beneficial ownership of a property can prevent problems arising on any subsequent relationship breakdown. If a couple have set out in an express declaration what they agree their financial interest in the property is then it can be very straight forward to establish what should happen to that property, or the proceeds of sale from that property, if they separate. In the absence of an express declaration, the starting point where a property is in joint names, is to presume that the couple intended joint beneficial ownership and that they each have an equal interest in the property. Similarly where a property is in one person's sole name, the starting point will be a presumption that that person owns the whole of the property beneficially as well, and that the other person – who may have been living in it and paying contributing financially towards it - has no financial interest. The onus is on the person seeking to depart from these presumptions to prove that the beneficial ownership is different to the legal ownership. The Court, when considering an application to determine that the beneficial ownership is held differently to the legal ownership will look at a couples' whole course of dealings to determine their common intentions, taking into account all of their conduct which throws light on the question of what shares were intended. This can be a lengthy and expensive process and can make it very difficult for a couple to deal with their separation in a dignified and cost effective way, and without the involvement of lawyers.

How the Supreme Court decision has changed this

Where a couples' respective interests in a property are not set out expressly, it has now been unanimously confirmed by the Supreme Court that in the absence of being able to infer a common intention as to their shares in the property from their conduct, the court is entitled to attribute an intention to the couple, based upon what is fair.

The facts in Jones v Kernott

- Mr Kernott and Ms Jones were not married, although they had two children together.
- In 1985 they purchased a property in their joint names for £30,000.
- Although the documents relating to the purchase of the property were in joint names there was no evidence that either Mr Kernott or Ms Jones sought or was given advice about the implications of this or what should happen in respect of their beneficial interests in the property in the event of a separation. The documents filed with the land registry contained no express declaration of their respective beneficial interests.
- Ms Jones contributed £6,000 towards the purchase and the balance was raised by way of a mortgage.
- Mr Kernott gave Ms Jones £100 per week, and from that and her own earnings she discharged the mortgage, outgoings, housekeeping and paid the premiums on an insurance policy.
- Mr Kernott built an extension on the property which increased its value by 50%, and which was financed by a joint loan.
- The couple separated in 1993.
- Thereafter Ms Jones and the children continued to live in the property and she assumed sole responsibility for the mortgage and the outgoings, including repairs and improvements and the maintenance of the children.
- In 1995 the jointly owned property was put on the market, although it failed to sell. It is thought to have been worth in the region of £70,000 at that time.
- In 1996 Mr Kernott purchased a property in his sole name. He raised the deposit by cashing in a joint life insurance policy (with Ms Jones' consent), the proceeds of which were divided equally.
- In 2006 Mr Kernott sought payment from Ms Jones of his half share in respect of the jointly owned property, which Ms Jones had continued to live in since their separation some 13 years earlier and which she had been solely responsible for discharging the mortgage upon.
- In 2007 Ms Jones started court proceedings seeking a declaration that either (a) that she owned the whole of the beneficial interest in the jointly owned property or (b) that if Mr Kernott retained an interest in the property, she had an interest in the property that he had since purchased in his sole name (this second claim was later abandoned).
- The value of the jointly owned property in 2008 was £245,000, with an outstanding mortgage of £26,664 and equity of £218,300. The property which Mr Kernott now owned was valued at £205,000 with a mortgage of £37,000.

It was agreed by the couple that had Mr Kernott sought an equal beneficial interest in the property immediately following their separation in 1993 he would have been entitled to it. The value of the property at that time, and the balance of the mortgage, would have been significantly lower than the value in 2006. The couple did not enter into an express agreement setting out what they intended to happen to the property upon their separation, nor was there any evidence that they had had any discussion about this. Therefore the question the Court had to answer was whether it could properly infer an agreement post-separation between Mr Kernott and Ms Jones that their beneficial interests in the property were to alter so that they were now held in anything other than equal shares.

The County Court concluded that the investment made by Ms Jones over the last 14 years, with no contribution by Mr Kernott towards the purchase of the property, meant that she was entitled to a larger share than Mr Kernott. The Court found that whilst their intention as a couple at the outset may have been to provide a home for themselves and their children, those intentions had altered significantly over the years, with Mr Kernott demonstrating no intention to avail himself of his beneficial interest, ignoring the property and concentrating on his own property (which he was able to afford by not contributing to the jointly owned property or his former family). The Court considered that it was fair in light of the change of circumstances that the property should be divided 90% to Ms Jones and 10% to Mr Kernott.

On appeal, the High Court upheld the decision of the County Court judge. The Court of Appeal, however, subsequently reversed this decision and found that Mr Kernott and Ms Jones each had a 50% interest in the property. The Court of Appeal concluded that the property was held in joint beneficial ownership upon separation and there was no evidence thereafter of any intention to revise their respective shares. The original conveyance into joint names pointed to the couple having joint beneficial interests and the Court of Appeal held that it was not for the Court to impose what it considered to be a fair split upon the couple, imputing an intention to them which they either did not have or did not express to one another at the time. There had to be something to displace the joint beneficial interest that Mr Kernott and Ms Jones had in the property at the time of separation, and the passage of time alone was insufficient to do so. This was despite the fact that Mr Kernott had acquired alternative accommodation and Ms Jones had paid all the outgoings for the previous 14 years. If Mr Kernott and Ms Jones had intended their beneficial interest to reduce post-separation they should have decided and acted accordingly by adjusting their beneficial interests in the property.

The Supreme Court decision

The Supreme Court unanimously allowed the appeal and restored the order of the County Court, which determined that the property should be held in shares of 90% to Ms Jones and 10% to Mr Kernott. In doing so, the Court reiterated the basic principle laid down in 2007 in the case of *Stack v Dowden*, namely that:

1. Where a property is owned jointly by a couple and there is no express declaration of their respective beneficial interests, it shall be presumed that they own both the legal and the beneficial title to the property jointly, unless it is proved to the contrary. The mere fact that a couple have contributed in unequal shares to the purchase price of a property is not, of itself, enough to rebut this presumption.

2. This presumption can be displaced by showing that there was a different common intention at the time that the property was purchased, or that the couple later formed a common intention that their respective shares would change.

The Court should search for evidence of what a couple actually intended in relation to their ownership of a property, by looking at their words and their actions. It is not open to the Court to simply impose a solution which it considers to be fair but which is contrary to the evidence of what the couple actually intended. Where there is no evidence of what a couple intended, the Court can ask itself what their intentions would have been, had they thought about it at this time, i.e. impute an intention and in doing so the Court can then look at the whole course of dealings between the couple to determine what is fair. Each case will turn on its own facts, and although financial contributions are a relevant factor there are many other factors which may be taken into account to help the Court decide what the couple intended.

In this case Lady Hale and Lord Walker of the Supreme Court, giving the leading judgment, found that it was not necessary to impute an intention to this couple as there was evidence from their conduct that showed that they did intend their beneficial ownership of the property to change after they separated, as the County Court judge had originally concluded. After they separated, their joint life insurance policy was cashed in and Mr Kernott purchased a property for himself, which he was able to do by not contributing to the jointly owned property. The Court held that the couple intended that Mr Kernott's beneficial interest in the jointly owned property would crystallise at that time, and that Ms Jones would have the sole benefit of any capital gain in the property going forward. The original decision that they now share ownership of the property in shares of 90:10 reflected this and the Supreme Court therefore found that it should be restored.

Lord Kerr and Lord Wilson agreed that it was fair that the couple should share the property in the proportions of 90:10, but unlike Lady Hale and Lord Walker they each did not feel that it was possible to infer an intention from the conduct of Mr Kernott and Ms Jones, and instead imputed such an intention.

Why it matters?

While the facts in this case may seem extreme, the proportion of families in which the couple is married has decreased over the last ten years, (accounting for 76% in 1996 compared with 71% of families in 2006). Over the same period the proportion of cohabiting couple families increased from 9% to 14%. With an increasing number of couples choosing to cohabit, disputes over what should happen to a property belonging to one or both of them when they separate are only likely to increase.

The Law Commission, the Law Society and Resolution have made recommendations regarding the reform of the law in this area, so that the financial claims of cohabiting couples who live together are more clearly defined upon a relationship breaking down. Regrettably, however, there are currently no plans to implement these recommendations, and the situation remains most unsatisfactory for unmarried couples who separate and then face a complicated and potentially costly legal dispute about what should happen to any property.

In this case, it is likely that Ms Jones reasonably believed that she was discharging the mortgage and other outgoings on this property in the expectation that she would benefit significantly, if not entirely, from the increase in the value of the property over time. Unfortunately, because Ms Jones and Mr Kernott did not take any steps either before they started cohabiting or at the time of their separation to address what would happen to their respective financial interests in the property in these circumstances, the position was not clear. Consequently it was left to the Court to determine what this couple intended, which has taken many years and no doubt come at a significant financial, and emotional, cost to the couple concerned**.** This case involved an ordinary couple, with modest assets and yet it took four years to reach a conclusion, and has involved the decisions of four courts. One can only guess at the legal bills of both parties, which are likely to run to several tens of thousands of pounds. In these circumstances, it is doubtful that very much remains in terms of the equity in the property that was the subject of this dispute.

The myth that the law recognises 'common law marriages' continues, and many couples believe that they will be protected financially in the event that their relationship breaks down in much the same way as a couple who are married. This is not the case, and the Court's interpretation of 'fairness' in cohabitation law is not the same as the concept of 'fairness' in financial proceedings following the breakdown of a marriage or civil partnership. The result for the financially weaker person following the breakdown of many cohabiting relationship

will often be far from what most people would consider to be fair, and can leave one person in a vulnerable position. Claims are restricted to claims in respect of property and there is no right for unmarried partners to claim maintenance in their own right from one another, no matter how long they have been together and even if they have had children. The law does provide financial support in respect of the children of unmarried couples, but this is not assessed in the same manner as if the parents were married. Support can include child maintenance and claims for a property and other financial support whilst the child is growing up. All financial support ends when the child becomes an adult. This includes the termination of all maintenance and the parent who looked after the child vacating any home and giving it back to the parent who provided it. This can cause significant financial issues for the parent who looks after the child.

Until the law for unmarried couples is reformed, it is important that awareness is raised so that an unmarried couple have the opportunity to consider these issues at the outset of their lives together, or upon life changing events such as starting a family, and arrange their financial affairs accordingly.

How to avoid litigation

It is very important that anyone purchasing a property or choosing to cohabit carefully considers how they would like the beneficial ownership of the property to be held. It is always preferable to have a clear statement of intention at the time of purchase, although such a statement can be agreed after purchase, or on the happening of a certain event, such as someone moving in or the birth of a child. If there is going to be a lengthy period of separation before a property is sold, as in this case, it would be advisable to revise any existing agreement (or if no such agreement exists, have one drawn up) to take account of what will happen in the future and whether there should be any adjustment to their respective beneficial interests in light of the change in circumstances.

A formal agreement as to how a property should be held and what should happen in the event of separation is normally set out in a document called a 'Declaration of Trust'. This is a flexible document that can record what a couple agree about who owns the property and what they want to happen to it if things go wrong. It is also possible to enter into a document which goes beyond this and regulates other aspects of a couple's financial relationship. These agreements are called 'Cohabitation Agreements' and commonly include provisions regarding the payment of outgoings on the property, including who is responsible for the mortgage and other outgoings.

The existence of an express declaration of trust or cohabitation contract could have significantly changed the way in which Mr Kernott and Ms Jones were adjudged to have owned this property beneficially and would almost certainly have saved both of them a great deal of time, uncertainty and many tens of thousands of pounds.

If you jointly own a property with a partner, or ex-partner, and have not entered into a cohabitation contract or a declaration of trust it may still be possible to reach agreement without recourse to the courts. Constructive and resolution focused solicitors can help with this. Good family solicitors encourage clients to reach their own agreements, often through alternative non-court based processes such as mediation or collaborative law.

If you are already cohabiting, or contemplating doing so, or you have separated from your partner but think that you may be affected by any of the issues raised here please contact any of the family lawyers at Russell-Cooke to arrange an appointment. There are different considerations which may apply for couples who have children together or those who are

married or in a registered civil partnership, and any of the specialist family lawyers at Russell-Cooke can advise on the options that may be available in these circumstances.

Hannah Minty is a solicitor and a collaborative family lawyer at Russell-Cooke LLP specialising in family law and regularly advises upon cohabitation disputes, declarations of trust and cohabitation agreements. Russell-Cooke LLP are a London-based Top 100 Law Firm with over one hundred solicitors specialising in all areas of law.

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