



At what point does what's mine become yours?

A critical analysis of the current law on common intention constructive trusts and cohabitation

by Ben Fullbrook

Abstract

This article examines the current state of the law in relation to the use of common intention constructive trusts to determine disputes arising from the breakdown of relationships between cohabiting, non-married couples. It is clear that there is a need to protect vulnerable parties to a relationship and to maintain certainty with regard to property ownership, but this is a difficult balance to strike. This examination has been conducted by analysing the key cases that have been heard in the senior courts in relation to this matter since the landmark ruling of the House of Lords in *Stack v Dowden* almost ten years ago. This has identified three key issues with the current state of the law: (1) judicial confusion over whether the existence of beneficial shares in property should be imputed or implied by the courts; (2) the creation of unrealistic expectations as to the reliance that the court will place on non-financial contributions to a relationship; and (3) practical and evidential difficulties caused by its implementation. Further analysis of the Cohabitation Rights Bill suggests that it is unlikely to overcome any of these issues because it seeks to increase, rather than reduce the role of the courts. This article concludes that the law should be simplified such that couples are allocated the same portion of the beneficial interest in the property as their legal interest unless they expressly declare otherwise.

Introduction

In 2015 the Office for National Statistics reported that there were 3.2 million cohabiting, unmarried couples in the UK, representing 17% of all couples and making this the fastest growing family model.¹ According to the 2008 British Social Attitudes Survey, 51% of respondents believed that such couples had the same legal rights as those who were married or in a civil partnership.² In fact, this is a complete myth: at present, unmarried, cohabiting couples have virtually no statutory protection for their property in the event of their relationship breaking up. The courts have sought to address this, most notably in the landmark House of Lords ruling in *Stack v Dowden*.³ Parliament is also now beginning to take an interest in the issue: a Cohabitation Rights Bill was published in 2015.⁴ However, progress has been slow and the Bill's future under Theresa May's post-Brexit government is uncertain.

Clearly, determination of cases such as these presents difficulties for the courts. An excessively *laissez fair* approach risks injustice for parties to a relationship who might be more vulnerable or who contribute less in financial terms than their partners. Conversely, an excessively interventionist approach risks creating uncertainty and attaching monetary value to the actions of

¹ Office for National Statistics, *Statistical Bulletin: Families and Households 2015* <<http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-11-05#cohabiting-couples>> accessed 19 August 2016.

² *Ibid.*

³ [2007] UKHL 17, [2007] 2 AC 432.

⁴ Cohabitation Rights HL Bill (2015-16) 29

parties within relationships that are often highly complex. Given that almost 10 years have passed since *Stack v Dowden* and that changes to the law are currently being contemplated, now is an ideal time to analyse the key judgments in this area over the past decade in order to identify issues and options for reform. This analysis reveals that this area of the law is beset by judicial confusion on key issues and practical complications. The Cohabitation Rights Bill does little to overcome these issues and it is doubtful that significant judicial intervention ever can. As a result simplification is required.

The current state of the law

The law as it currently stands is most concisely stated in the joint speech of Lord Walker and Lady Hale in *Jones v Kernott*.⁵ This case provided the Supreme Court with an opportunity to expand on and clarify their position as set out in *Stack v Dowden* several years before. Their speech is worth quoting at length:

In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(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.*

*(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.*

(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

Lord Walker and Lady Hale also confirmed that the same process of analysis would be applied to cases where a family home was bought in a single name, with the exception that in these

⁵ [2011] UKSC 53, [2012] 1 AC 776.

⁶ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 [51].

cases the starting presumption (at stage (1) above) would be that the sole legal owner would also be the sole beneficial owner.⁷

The application of these rules by the courts has arguably created as many issues as it has resolved. These are discussed at length below.

Issue (1): should the parties' common intention be inferred or imputed?

Perhaps the most enduring issue with the law as it currently stands relates to how the court is to determine the parties' common intention with regard to their beneficial interests, where this is not expressly stated (see Lord Walker's stage (3) above), specifically whether this intention should be imputed or inferred.

As to the difference between the two approaches, Lord Neuberger, in his dissenting judgment in *Stack v Dowden*, explained:

An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend...

*To impute an intention would not only be wrong in principle...it also would involve a judge in an exercise which was difficult, subjective and uncertain.*⁸

This suggests quite strongly that the parties' intention to hold separate or different shares should only ever be inferred, not imputed. Lord Wilson, giving judgment in *Jones v Kernott*, agreed. Lord Wilson went on to state that the court should only impute when deciding on the size of the shares (see Lord Walker's stage (4) above) and even then only where it was not possible to draw an inference.⁹ This is the approach preferred by the editors of *Snell's Equity* and is arguably the most orthodox position.¹⁰

Yet, such consensus as there is on this issue is at best skin deep, and appears to gloss over what the leading judgments in *Stack v Dowden* and *Jones v Kernott* – particularly the speeches of Lord Walker and Lady Hale – actually say on the matter. In *Stack v Dowden*, Lord Walker and Lady Hale made no explicit distinction between inference and imputation. Nevertheless, Lady Hale was prepared to state that:

*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 [Married Woman's Property] Act.*¹¹

Ostensibly this reads like a blanket prohibition on imputing intention. However Lady Hale and Lord Walker were quick to deny this in *Jones v Kernott*, explaining that this sentiment only applied where the intention of the parties could be 'deduced objectively from their words and actions'.¹² In such a case, they said, 'it is not open to a court to impose a solution upon them in contradiction to those

⁷ Ibid. [52].

⁸ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [126-7].

⁹ *Jones v Kernott* [89].

¹⁰ *Snell's Equity* (32nd edn, 2014), paras 24-049 – 24-056.

¹¹ *Stack v Dowden* [61].

¹² *Jones v Kernott* [46].

intentions, merely because the court considers it fair to do so'.¹³ This does little more than beg the question: what happens when the parties' intention cannot be deduced objectively?

It seems that some judges, particularly at first instance, have – contrary to the orthodox view outlined above – interpreted this as a license to impute an intention in such cases. Evidence for this can be found in the sheer number of appeals that have been allowed in circumstances where a trial judge has expressly imputed an intention, which it is argued they should have inferred.¹⁴ A clear example of this is *Barnes v Phillips*.¹⁵ Mr Barnes and Ms Phillips purchased a property in their joint names using joint savings and a joint mortgage. Mr Barnes paid the mortgage, but Ms Phillips also worked full time and contributed to the family outgoings. In 2005 Mr Barnes remortgaged the property, again in their joint names, but used the extra funds to settle his personal business debts. The couple's relationship broke down shortly afterwards and Mr Barnes moved out. By 2008 Mr Barnes had ceased to make mortgage repayments.¹⁶ When reaching judgment in the case, the trial judge stated:

*Thirdly, so this is a case where it is not possible to ascertain by direct evidence or by inference what the parties' actual intention was as to the shares they would own in the property after the split. That means that the Claimant and Defendant are each entitled to that share which the court considers fair, having regard to the whole course of dealing between them in relation to the property. I have to impute the parties' intention by considering what is fair.*¹⁷

On the face of it, this seems to be clear evidence of a judge imputing common intention. When this case reached the Court of Appeal, Lord Justice Lloyd Jones appeared to lend support for the orthodox view that intention must be inferred, but the size of shares may be imputed. However, his reasoning reveals that current judicial approaches to this issue remain flexible to the point of being vague. Lord Justice Lloyd Jones found that, despite his apparently clear wording, the trial judge had not in fact followed the wrong approach. Instead he found that the judge had inferred that the parties should each have a share, but had simply omitted to record this in his judgment; the statement above represented the quantification stage only, during which the judge was perfectly entitled to impute the parties' shares.¹⁸ This is a fairly dubious conclusion. However, either way, argued Lord Justice Lloyd Jones, it made no difference to the result because Mr Barnes' decision to remortgage the property to settle his own debts and subsequently to move out was one from which, when considered objectively, an intention to vary their shares in the property could be inferred.¹⁹ Accordingly, Ms Phillips was found to own an 85% share of the property. The logic of this decision is difficult to follow. In deciding to remortgage, Mr Barnes was taking on more debt for which the property was security. It is quite a leap to suggest that this, coupled with his decision to cease occupation of it, can be seen as evidence that he wished to reduce his beneficial interest in it – particularly when he had been the main contributor to the mortgage since 1996. There was no other evidence of agreement between the parties to hold the property in these shares and, arguably, the result reached by the Court of Appeal is no more than imputation dressed as inference.

Perhaps, though, in Lord Justice Lloyd Jones' mind, there was little difference between the two. He would certainly not be alone in this opinion. In contrast to Lords Neuberger and Wilson's fairly strong views, Lord Walker and Lady Hale have argued that the practical difference between the two approaches 'may not be great' – a sentiment that was embraced by Lord Collins in the same

¹³ *Ibid.* [85].

¹⁴ For the most recent examples see *Barnes v Phillips* [2015] EWCA Civ 1056, [2016] H.L.R. 3 and *Capelhorn v Harris* [2015] EWCA Civ 955, [2016] H.L.R. 1.

¹⁵ [2015] EWCA Civ 1056.

¹⁶ *Barnes v Phillips* [2-11].

¹⁷ *Ibid.* [16].

¹⁸ *Ibid.* [29].

¹⁹ *Ibid.* [31-32]

judgment, who stated: 'the difference...will hardly ever matter'.²⁰ As a result, judges currently face a situation in which they can be successfully appealed for imputing an intention which they should have inferred, despite the fact that a significant proportion of senior judges do not even recognise a practical difference between the two.

Confusion in this area not only produces uncertainty, it also has the potential to produce inconsistent outcomes for claimants. Contrast, for example, the fairly generous proportion of the property given to Ms Phillips in *Barnes v Phillips* with the arguably much harsher outcome in *Greary v Rankine* in which Ms Greary was allowed no share in a guesthouse, which was in the sole name of her partner, despite working full time at the guesthouse for several years and for no salary.²¹

All of this confusion is, in itself, undesirable. However, so, ultimately, is the whole notion that the court should be allowed to impute parties' common intention at all. As Lord Neuberger suggested, there is something 'unprincipled' about the process. Surely, it is for the parties to decide, in the context of their relationship, what to do with their property. Inferring this intention from conduct is one thing, but imposing the court's idea of fairness, which is usually determined only after examination of highly personal, complicated and contentious facts is another entirely. Although this approach is common in divorce cases, it is at least sanctioned by statute. No such sanction exists here and, where in doubt, the court should surely resist the temptation to follow anything other than the presumption that the beneficial interest follows the legal title.

Issue (2): what conduct can support an inference?

It is a relatively uncontentious feature of the case law in this area that, whether inferring or imputing a common intention to vary the parties' beneficial interest, the court is entitled to consider their whole course of dealing in relation to the property.²² One of the most radical features of *Stack v Dowden* was the House of Lords' departure from the traditional judicial approach, which focused almost exclusively on the parties' financial contributions to the property and related expenses. Instead, Lady Hale called on judges to consider the 'domestic context'. She stated:

*Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include [but are not limited to]: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses [and]...the parties' individual characters and personalities.*²³

The best example of this apparent shift in focus away from financial contributions is *Fowler v Barron*.²⁴ Mr Barron and Ms Fowler bought their property in joint names. Mr Barron, paid the mortgage and all household expenses; he even looked after the couple's children while Ms Fowler worked. Ms Fowler's financial contributions were limited to paying for clothes and trips for their children. Despite this, Mr Barron was found not to have done enough to displace the presumption that Ms Fowler should be entitled to a 50% share of the property. Further, in his conclusion, Lord

²⁰ *Jones v Kernott* [34, 66].

²¹ [2012] EWCA Civ 555.

²² *Snell's Equity*, para 24-053.

²³ *Stack v Dowden* [69].

²⁴ [2008] EWCA Civ 377.

Justice Toulson expressly stated that the trial judge, who looked only at financial matters, adopted 'too narrow an approach'.²⁵

However, it would be all too easy to overstate the significance of this new approach. Lord Justice Gibson, in *Morris v Morris* stated that:

'the authorities make clear that a common intention constructive trust based only on conduct [ie where there is no accompanying financial contribution] will only be found in exceptional circumstances'.²⁶

This sentiment seems to have been borne out by subsequent cases. For example, in *Graham-York v York*, a claimant whose circumstances touched on a number of Lady Hale's factors – she had been in a 33 year relationship with the defendant; she had moved into a property in order to start a family; she had brought up two children; and had endured years of abuse and control by the defendant – was found to be entitled to only 25% of her partner's property because, according to Lord Justice Tomlinson, 'whilst her plight attracts sympathy' her financial contributions 'did not amount to much'.²⁷ Similarly, in *James v Thomas*, a woman who moved in with her partner and worked full time for his agricultural business for no salary was denied any share in her partner's property despite the fact that she had been involved in renovation work and contributed, via her work, to the business account from which the mortgage had been paid.²⁸ The logic of the Court of Appeal was that in doing all of this she was showing an intention to contribute to the business, but not to the property.²⁹ It is also telling that the only addition so far to Lady Hale's non-exhaustive list of factors relates to finances – specifically contributions (or lack of them) to the maintenance of children.³⁰

Results such as these have led commentators to suggest that the law as it stands remains too closely tied to financial contributions to the point of being unfair.³¹ In reality though, it could never be otherwise. Financial contributions are by their very nature quantifiable, which is likely to make them much more attractive to judges. The motivations behind them are also arguably much easier to discern: if a person contributes to a mortgage, then it is likely that they intend to obtain an interest in a property. If a person cares for their children or cheats on their partner, it may say a great deal about their personality and the nature of their relationship, but it is difficult to translate into evidence of their intentions with respect to their property.

This being so, the present state of the law again appears to create more issues than it solves. Lady Hale's factors remain good law and some judges appear to remain optimistic that conduct will continue to play a significant role in determining a fair outcome for cohabiting couples. In *Barnes v Phillips*, decided just last year, Lord Justice Lloyd Jones used the fact that *Stack v Dowden* had defined the 'relevant context' in 'very wide terms' to justify the addition of child maintenance payments to the list of factors. In reality, however, there is a danger that all this does is unrealistically raise the expectations of prospective claimants. Further, from the perspective of cohabiting couples seeking to protect their property, it adds an unwelcome level of complexity to their relationships – attributing a mercenary intention to actions which are anything but.

²⁵ Ibid. [56].

²⁶ *Morris v Morris* [2008] EWCA Civ 257 [23].

²⁷ *Graham-York v York* [2015] EWCA Civ 72, [2015] H.L.R. 26 [22-27].

²⁸ *James v Thomas* [2007] EWCA 1212.

²⁹ Ibid. [26].

³⁰ *Barnes v Phillips* [41] (Lloyd Jones LJ).

³¹ Sarah Greer and Mark Pawlowski, 'Imputation, fairness and the family home' [2015] *The Conveyancer and Property Lawyer* 512.

Issue (3): practical and evidential issues

There is no question that the recent developments in the law in this area represent an attempt to do right by cohabiting couples who would otherwise have little protection for their property. However, in doing so, the court has left itself and potential claimants and defendants exposed to several practical difficulties.

In *Jones v Kernott*, Lord Walker and Lady Hale spoke in some detail about the difficulty presented by retrospectively seeking to analyse parties' contributions to what at the time were largely trusting personal relationships, in which partners tend not to hold each other financially accountable.³² In addition to this, the vast majority of cases of this nature cover contributions dating back several decades, which raises significant evidential issues: receipts and documents are easily misplaced and there is a strong temptation to falsify evidence.³³ A high level of reliance is likely to be placed on the parties' recollections, which, as Lady Hale has observed, can be problematic:

*This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms.*³⁴

All of this is likely to increase the length and complexity of the trial at considerable cost to the parties.

The process by which all of this evidence is assessed can never be an exact science. Decided cases are likely to turn almost exclusively on their individual facts. This is illustrated by the apparent difficulty of appealing judgments in this area. Commenting on this, Lord Justice Etherton (as he then was) in *Thompson v Hurst* stated:

*It is worth emphasizing...that the trial judge has the onerous task of finding the primary facts and drawing the necessary inferences and conclusions, and appellate courts will be slow to overturn the trial judge's finding. That applies just as much to the trial judge's conclusions on fairness as it does to inferences of fact. Indeed, as I have said, it is accepted that the District Judge's decision on fairness cannot be successfully challenged unless an error of principle has been made or the overall decision was plainly wrong.*³⁵

The inevitable consequence of this is uncertainty. Potential claimants and defendants could be led into a false sense of security or anxiety regarding their share in their own property and claimants could be encouraged to bring cases to trial which have little prospect of success.

It is clear that these practical and evidential issues have always been in the minds of the Supreme Court and Court of Appeal. Until now it has been thought that they were outweighed by the benefits of the current law. However, in light of the issues raised in this article, it is possible that this balance has changed.

The effect of the Cohabitation Rights Bill 2015

An analysis of this area of law would be incomplete without a brief consideration of the Cohabitation Rights Bill 2015 ("the Bill"). Brief, because there is still no clear timetable for its implementation or even guarantee that it will be passed. The Bill proposes to provide the courts with the power to make financial settlement orders in relation to cohabiting couples in the event that one partner dies or the relationship ends. A co-habiting couple will be one which has lived together as

³² *Jones v Kernott* [20-22].

³³ See for example *S v J* [2016] EWHC 586 (Fam).

³⁴ *Stack v Dowden* [58].

³⁵ *Thompson v Hurst* [2012] EWCA Civ 1752 [25].

such for a continuous period of three years or more.³⁶ A financial settlement order may require the transfer of money or other assets including property from one partner to another.³⁷ According to s8(1) of the Bill, an order may be granted where:

- (a) *the court is satisfied that the applicant and the respondent have ceased living together as a couple,*
- (b) *the court is satisfied either—*
 - (i) *that the respondent has retained a benefit; or*
 - (ii) *that the applicant has an economic disadvantage,**as a result of qualifying contributions the applicant has made, and*
- (c) *having regard to the discretionary factors, the court considers that it is just and equitable to make an order.*

For the purposes of paragraph (b) above, a 'qualifying contribution' is defined as:

*any financial or other contribution made by the applicant to the parties' shared lives or to the welfare of members of their families during the parties' cohabitation or in contemplation of the parties' cohabitation or likely to be made by the applicant following its breakdown.*³⁸

Finally, the various discretionary factors are listed in s9 and include: the welfare of children, the income and obligations of the parties and the conduct of the parties.

Broadly speaking, the Bill could bring some benefits in that potential claimants would no longer have to overcome the presumption that their beneficial interest mirrored their legal interest. The court would have a clear power to impute the existence *and* size of this beneficial interest, based on discretionary factors. These factors largely mirror those cited by Lady Hale in *Stack v Dowden*, but, having the force of statute, are likely to move the focus away from financial contributions.

However, there are considerable drawbacks. First, the Bill is likely to encourage more litigation, which would not be any less complex or costly than it is now. Indeed, the Bill could well require an even more exhaustive examination of the 'discretionary factors' and conduct of the parties than the current law. Second, it hands the courts full power to determine what a fair settlement between the parties is. Not only does this represent a high level of interference in private and deeply personal relationships, it also adds a whole new level of complication to them – as one blogger has pointed out, it has the potential to make “move in with me” the new “marry me”.³⁹ Arguably couples cohabit precisely because they do not want the level of personal and financial commitment associated with marriage. Whilst it is true that couples have the ability to opt out of the effects of the Bill, this would have to be formally agreed. As things stand, couples are highly unlikely to consider this, and even if they were that way inclined, they could just as easily complete a formal declaration of their beneficial interest, which can be done under the current law and has the added benefit of providing total certainty.

³⁶ Cohabitation Rights Bill 2015, s 2.

³⁷ *Ibid.*, s 10(1).

³⁸ *Ibid.*, s 8(2)(c).

³⁹ Olivia Stiles, 'Is "move in" the new "marry me"?: the Cohabitation Rights Bill' (*Kingsley Napley Family Law Blog* 8 January 2015) <<https://www.kingsleynapley.co.uk/news-and-events/blogs/family-law-blog/is-move-in-with-me-the-new-marry-me-the-cohabitation-rights-bill>> accessed 22 August 2016.

Conclusion

The current law in relation to cohabiting couples is well meaning and thoughtfully formulated. However, it has several flaws. First, the position in relation to inference and imputation remains unclear, creating inconsistency and uncertainty. Second, despite the judicial pronouncements to the contrary, financial contributions continue to be the determining factor in these cases. This gives little protection to partners who have little or no income; it also unfairly raises their expectations. Third, the process of determining cohabitation cases under the current law is fraught with practical difficulties.

The Cohabitation Rights Bill suffers from many of the same flaws and raises the unwelcome prospect of state interference in deeply private and complex relationships.

Ultimately, a balance must be struck between protecting the rights of couples when things go wrong and ensuring that people entering into a relationship have certainty about what will happen to their property. The present system clearly prioritises the former over the latter. However, with more and more young people entering into this type of relationship, this needs to change. First, it should be presumed that if a couple wish to protect their property they will either marry or make a formal declaration of beneficial interest; they are free to do either at any point, provided they follow the necessary formalities. If no declaration is made and things go wrong then the court should do no more than follow the presumption that the beneficial interest follows the legal title. The time and resources that this saves should be devoted to ensuring that couples know the importance of deciding how they will manage their finances and hold their property before they move in together and of continually reviewing this situation. It may be mercenary, it may be messy, but it gives certainty and is much better than dealing with these issues decades later through the prism of a failed relationship.

Ben Fullbrook

*(MSt (Oxon), Pupil Barrister at
Landmark Chambers)*