Introduction

The highest court in the land appears to have taken responsibility to rectify what Lord Wilson [78] described as ‘the continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship.’ On the 6th September 2011, Jonathan Djanogly in a ministerial statement announced the Government’s response to the Law Commission’s report ‘Cohabitation: the financial consequences of relationship breakdown’ that-

‘This government have now carefully considered the recommendations of this thorough report…… the family justice system is in a transitional period, with major reforms already on the horizon. We do not therefore intend to take forward the Law Commission’s recommendations for reform of cohabitation law in this parliamentary term.’

Where Parliament has failed the Supreme Court has clearly succeeded by providing authority for imputing parties intentions in cohabitation cases where the parties themselves have not considered the matter, upheld Lord Hoffman’s concept of ‘the Ambulatory Constructive Trust’ and injected fairness into an area of law from which it has hitherto been absent, concerned instead with strict principles of property law.

The Supreme Court’s decision is reminiscent of the Court of Appeal judgments of the 1970s in which the late Lord Denning was at the vanguard of feminism, upholding the rights of the female cohabitants, in cases such as Cooke –v- Head [1972] 1 WLR 518 and Eves –v- Eves [1975] 1 WLR 1338, the now famous sledgehammer wielding mistress cases. The Supreme Court has therefore shown itself to be more radical in this decision than the Court of Appeal.

The Facts

Leonard Kernott and Patricia Jones purchased 39 Badger Hall Avenue (the Property) in their joint names for £30,000, for use as their family home.

Patricia supplied a deposit of £6,000, from the sale of a mobile home in which she lived and in which Leonard had come to live with her. The balance of the Property purchase price was funded by an interest-only endowment mortgage in their joint names. A year later Leonard built, and largely paid for, an extension to the Property which enhanced the property’s value by about 50%. During the relationship Leonard gave Patricia £100 per week; she then paid all household bills, including the main mortgage payments, using this money and her own earnings. The couple had two children together. After over 8 years in the Property the relationship broke down and

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1 All references in square paragraphs are to Jones –v- Kernott [2011] UKSC 53 unless otherwise stated.
2 For ease of reference, throughout the course of this paper we refer to the parties as Leonard and Patricia.
Leonard moved out. Thereafter Patricia was responsible for all household expenditure, and she maintained the Property and supported the children with little or no contribution from Leonard, a state of affairs which continued for a further fourteen and a half years. Upon separation, the parties agreed to cash in a life insurance policy, dividing the proceeds equally, in part to enable Leonard to buy 114 Stanley Road in his sole name.

Some 12 years post separation, when both properties had increased in value, Leonard served a notice of severance in respect of the joint property. Patricia responded by bringing a claim under the Trusts of Land and Appointment of Trustees Act 1996, seeking a declaration that she owned the entire beneficial interest in the property in joint names, and that if Leonard was found to have an interest in it, she should have an interest in Leonard’s property.

At the time of the hearing before the judge in April 2008, the Property was valued at £245,000. The outstanding mortgage was £26,664 and the endowment policy supporting it was worth £25,209. On the basis that they had contributed jointly to the endowment policy for over eight years and that Patricia had contributed alone for fourteen and a half years, it was calculated that Leonard was entitled to about £4,712 of its value, which would leave Patricia with £20,497. Leonard’s property was valued at £205,000, with an outstanding mortgage of £37,968. If the whole of the endowment policy was used to discharge the mortgage, the net worth of the Property would be £243,545 and if the mortgage on Leonard’s property was a repayment mortgage, the net worth of his home would be £167,032.

At first instance, in the Southend County Court, Patricia’s claim to an interest in Leonard’s sole property was dismissed, but the judge held that Patricia was entitled to 90% of the value of the Property and Leonard only 10%, on the basis that this was fair and just considering there had been a lengthy separation and the parties’ conduct during that separation, given that Leonard had made no contribution to the property for many years, and had not helped to support the children. On the figures given above, had the property been sold then, and the whole of the endowment policy used to defray the mortgage debt, that would have given her £219,190 and him £24,355 (giving him a total of £191,387 from the equity in his home and the sale of the Property). See paragraph [43]. Once the figures are considered, together with the ‘whole course of dealing’, the decision seems fair and just. Leonard however appealed to the High Court but failed, as the Deputy High Court Judge, Mr Nicholas Strauss QC, dismissed his appeal.

Until the Court of Appeal decision, which allowed Leonard’s appeal holding that the parties’ respective beneficial interests in the property remained at 50% each, it appeared that the previous two judicial decisions were reached as if dealing with a matrimonial case, considering what was fair and just, looking at the parties’ contributions during the relationship and post separation together with the lack of child support from the absent partner, almost losing sight of the fact that these parties were unmarried and therefore subject to strict principles of property law, not section 25 of the Matrimonial Causes Act 1973, although this appears to have been the approach of many county court judges.

The Supreme Court decision

As expected, not only has the Supreme Court answered the question ‘what is the correct approach to calculating beneficial interests in property where the legal title to the property is held in joint names by an unmarried couple but there is no express statement of how it is to be shared’ but it has also taken the opportunity to clarify the decision in *Stack v Dowden [2007]*

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3 Not the one supporting the mortgage.
4 Indicating it was a repayment mortgage
UKHL 17, although not to the extent hoped. Considerable attention is given in the judgment to that case and that up until that decision ‘the courts had tended to adopt a more flexible and ‘holistic’ approach to the quantification of parties’ shares in cases of sole legal ownership than they had in cases of joint legal ownership,’ adopting the common intention constructive trust in the former and the resulting trust in the latter, which depends upon the law’s presumption as to the intention of the party making the financial contribution to the purchase.

The principles from Jones –v- Kernott in cases where the family home is purchased in the joint names of a cohabiting couple, both of whom are responsible for the mortgage, but in the absence of any express declaration of their beneficial interests are these-

1. The starting point where a family home is purchased in joint names is that the parties own the property as joint tenants in law and in equity;
2. The presumption can be rebutted by evidence that the parties’ common intention was, in fact, different, either when the property was purchased or that the parties later formed the common intention that their shares would change;
3. The common intention is to be ‘objectively deduced’ (inferred) from the conduct and dealings between the parties;
4. Where it is clear that they had a different intention at the outset or had changed their original intention, but it is not possible to infer an actual intention as to their respective shares, then the court is entitled to impute an intention that each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property;
5. Each case will turn on its own facts;
6. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair;

The reason for the presumption is the recognition that lay parties who make a financial and emotional commitment to each other do not ordinarily consider formulating an agreement about what is to happen in the event of their relationship breakdown. It is only in recent times in matrimonial cases that the pre-nuptial agreement is gaining in popularity and therefore hardly surprising that cohabitants do not consider a living together agreement. Although the TR1 form enables parties to ensure the appropriate box is ticked in respect of beneficial ownership and conveyancers provide more detailed advice these days, it is nonetheless the case that lay parties still seem unwilling to heed it in the heady days of a new relationship and that there are cases of disparity of contribution yet a signed TR1 demonstrating a beneficial joint tenancy rather than a tenancy in common in unequal shares. Surely then the law must be an instrument of protection for parties who for whatever reason do not protect themselves especially where Parliament does not assist.

It is clear from the Supreme Court judgment [25] that-

The time has come to make it clear, in line with Stack v Dowden (see also Abbott v Abbott [2007] UKPC 53, [2007] 2 All ER 432), that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal

5 [8] Lord Walker and Lady Hale
6 See Professor Elizabeth Cooke, ‘In the Wake of Stack v Dowden: The Tale of TR1’, October [2011] Fam Law 1142
The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources.

Further, there is recognition that it is often unfair to compel the parties to stick to an arrangement which has clearly changed over time and for good reason, such as in the case of Jones v Kernott itself thus endorsing the concept of the ‘ambulatory constructive trust’. This view repeats that of Baroness Hale in Stack v Dowden at paragraph 60-

‘The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.’

and also the views of the Law Commission-

‘If the question really is one of the parties’ ‘common intention’, we believe that there is much to be said for adopting what has been called a holistic approach to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.’

As to the difference between inferring and imputing the common intention, Lord Neuberger sought to explain it in Stack v Dowden thus-

‘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.’

Lord Kerr commented that imputing the parties’ intentions involves the court deciding what is fair in light of the whole course of dealing with the property and that it has nothing to do with what the parties intended or might have intended. But then, as Nicholas Strauss QC said in the High Court-

‘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 [not] express to each other. The intention is one which the parties “must be taken” to have had. It is difficult to see how this process can work, without the court supplying, to the extent that the intention of the parties cannot be deduced from their words or conduct, what the court considers to be fair. In particular, in the present case, if there is evidence of conduct from which it is right to conclude that the parties intended their respective shares to alter following Mr Kernott’s departure, but none to indicate how, 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.’

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7 Which was the case in Stack v Dowden where the parties were described as keeping their financial affairs ‘rigidly separate’.
8 Discussion paper on Sharing Homes (2002, Law Com No 278, para 4.27)
9 [126] Stack v Dowden
As Lord Collins commented at [66],

‘it would be difficult (and perhaps absurd) to imagine a scenario involving circumstances from which, in the absence of express agreement, the court will infer a shared or common intention which is unfair. The courts are courts of law but they are also courts of justice.’

The inevitable catch all provision of ‘each case turning on its own facts’ prevents generalisations being made and with regard to the final point that although financial contributions are relevant, there are many other factors to assist the court in deciding what shares were intended or fair, are we going to see a return to the days when all contributions will be prayed in aid of obtaining a greater share even though the TR1 is clear. Will there be more rather than less litigation?

What does this mean for Practitioners?

While many welcome the ‘fairness’ aspect, the writers consider that two aspects of Stack –v- Dowden which required clarification have not been dealt with, given that the Supreme Court considered Jones –v- Kernott to provide them with such an opportunity. These are the double regime of the resulting trust approach in the case of sole ownership and the constructive trust approach in joint ownership cases. Sadly there is still no single regime for both.

Where there is a family home conveyed into the name of one party although contributions have been made by both cohabitants, the courts will firstly have to consider whether the non-owning party has any beneficial interest at all in the property and then if so, the court conducts the same exercise in trying to ascertain and quantify that interest by applying the whole course of dealing between the parties in relation to the property as propounded by Chadwick LJ in Oxley –v- Hiscock [2005] Fam 211, paragraph 69 and paragraph 52 of Jones –v- Kernott.

The second omission is in the area of equitable accounting in which we have two regimes, one where the beneficiary to be compensated by way of occupation rent is entitled to occupy the property and the other where he is not so entitled, such as a trustee in bankruptcy, whose job it is to obtain the best outcome for the creditors, and therefore to obtain an occupation rent. Stack and Dowden’s ‘statutory’ accounting regime would seem to apply in the former case but not in the latter. Paragraph 50 of the Jones –v- Kernott judgment provides no assistance and merely fudges the issue suggesting in the instant case that there is no liability to pay an occupation rent, at least while the home was needed for the couples’ children. Would this apply in cases involving a Trustee in Bankruptcy? This topic will be the subject of a further article in due course.

What about the conveyancers? Having produced fact sheets on the nature of the beneficial joint tenancy and the tenancy in common in equal shares or unequal shares, having explained the meaning of the declaration of trust in the TR1 before the box is ticked, having further advised that any changes to the manner in which the property is held beneficially must be evidenced in writing, Jones –v- Kernott seems to be saying that none of that matters and the courts can simply impute an intention that the parties may never have had in order to arrive at what the court considers the fair outcome. Where will this leave the conveyancers and their indemnity insurers? Clearly many of the problems arise where the TR1 boxes are left blank, which is something HM Land Registry needs to address.

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10 Re: Barcham (In Bankruptcy) [2008] EWHC 1505 (Ch), Amin & Amin –v- Amin and Others [2009] EWHC 3356 (Ch)

11 See ss 53(1)(b) and 58 Law of Property Act 1925
Conveyancers will need to advise clients and perhaps pass them on to their colleagues in the family department, to regarding entering into a Cohabitation Agreement in order to deal with what is to happen in the event of relationship breakdown and enable parties to contract out of the confusion created by this latest decision.

However, the fear remains that however well conveyancers advise prospective cohabitants about to purchase their joint home, the door which it was believed Stack –v- Dowden closed rather firmly has now been reopened by Jones –v- Kernott, and is likely to encourage more contribution and change of circumstance arguments.

What of family practitioners and other litigators advising clients on the merits of their TLATA cases? Previous advice has been that the documents of title are conclusive and in the absence of a variation of the declaration of trust, if the documents demonstrate a beneficial joint tenancy, that is the end of the story and there are no arguments on contribution. Jones –v- Kernott has now shown that not to be the case. In addition how will this decision square with government policy of trying to keep family disputes out of the courts?

In conclusion, it would seem to the writers that the vast move away from strict principles of property law towards ‘fairness’ in cohabitation cases is a policy decision on the part of the Supreme Court in the absence of any desire on the part of Government to legislate. The delay in handing down this judgment until the Minister had announced the intention to ignore the Law Commission recommendations is surely no coincidence and begs the question as to whether the Supreme Court Justices would have decided this case differently had a commitment been made to legislate.