



Playing house

Entering into a cohabitation agreement may not appeal to couples still in the throes of romance, but too much is at stake in the wake of *Kernott*, say Adam Colenso and Graeme Fraser

THE DECISION IN *Kernott v Jones* has attracted much critical coverage and the unfavourable result for Ms Jones may well deter speculative beneficial interest claims in the future.

Lord Justice Wall's judgment sends a very strong message to practitioners and litigants alike: without a trust document there needs to be powerful evidence of the parties' common intention that beneficial interests were intended to be different to legal interests.

"The purchase of residential accommodation is perhaps the single most important financial transaction which any individual transacts in a lifetime," said Wall LJ, "it is therefore of the utmost importance... that those who engage in these transactions, and those who advise them, should take the greatest care over such transactions, and must – particularly if they are unmarried or if their clients are unmarried – address their minds to the size and fate of the respective beneficial interests on acquisition, separation and thereafter.

"Cohabiting partners must, it seems to me, contemplate and address the unthinkable, namely that their relationship will break down and that they will fall out over what they do and do not own."

With these words, Wall LJ warned lawyers and the general public that cohabittees – which in this article connotes people living

together at a property who are neither married nor in a civil partnership – should not expect the court to fix any inequity caused by their failure to express in writing any 'fairer' division of property ownership than that set out in the legal title.

The aftermath of *Stack*

In *Stack v Dowden* [2007] UKHL 17 and [2007] IFLR 1858 the law lords attempted to give cohabittees much greater certainty about how the courts would interpret their beneficial interests; doubtless hoping that this would help to reduce the number of future cohabitee disputes. Mr Stack and Ms Dowden bought a property (in which they subsequently lived together with their four children) in joint names but did not make an express declaration of beneficial interest. Ms Dowden contributed the whole of the purchase price of the property and most of the mortgage repayments (though Mr Stack paid the mortgage interest) such that the Court of Appeal thought it reasonable to award Ms Dowden 65 per cent of the beneficial interest in the property.

While the law lords agreed on the same percentage split as the Court of Appeal, they indicated that such an unequal division was going to be the exception rather than the norm in the future.

Recent social and economic trends over the last 20 years or so have, though, made such

cohabitee disputes more likely as there are now many more home owners, property prices are much higher in relative terms – meaning that for some they are only affordable when bought jointly – and people increasingly live together without being married or in a civil partnership. It is perhaps not that surprising that there have been many reported cases since *Stack* testing the courts' view of cohabitee disputes.

The seeds for such litigation may have been sown in Baroness Hale's opinion in *Kernott*, when she said: "At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual."

However, the factors she then took into account in deciding that this was a "very unusual" case were not the most unusual of circumstances. The principal factor appears to have been that the parties kept their finances separate; other than the house, there were no pooled resources or joint account.

If the 'exceptionality' threshold was to be relatively low then this may have encouraged litigants to wonder whether other factors could also persuade the court that the parties' circumstances were sufficiently unusual to justify a departure from the legal interests when determining the extent of the beneficial interests.

family

Crossing the threshold

Though the decisions of the court since *Stack* have not provided a simple checklist to clarify whether or not the "very unusual" threshold has been crossed, the following cases suggest that extremely cogent evidence of very rare circumstances applying will now be required.

Adekunle & Ritchie v Ritchie [2007] EW Misc 5 (EWCC) – a son and mother purchased a right to buy property with unequal contributions and the court decided these were exceptional circumstances that justified awarding the son only one third of the beneficial interest in the property.

Kali & Burlay v Chawla [2007] EWHC 2357 (Ch) – the High Court accepted Mr Chawla's evidence that since their divorce he and Mrs Chawla had had a shared intention that her beneficial interest in the property (though it was registered in their joint names) had ended.

James v Thomas [2007] EWCA Civ 1212 – Ms James moved into the house bought by Mr Thomas in his sole name four years before their relationship began.

The Court of Appeal rejected Ms James' argument that by working for no remuneration, contributing money to their partnership business and living with Mr Thomas as man and wife for many years she had acquired a beneficial interest in the property.

Fowler v Baron [2008] EWCA Civ 377 – although Mr Baron contributed all of the funds for the purchase of the property, the mortgage and property bills, the property was purchased in joint names with Ms Fowler. Mr Baron gave evidence that the parties' common intention had been that Ms Fowler was to be joint legal owner purely so that if he died before her (he was much older than her) and they were still together then she would get the house.

Arden LJ found these factors did not amount to the "very unusual" circumstances that would be needed for the court to depart from the 50/50 beneficial interest suggested by the joint legal ownership.

Morris v Morris [2008] EWCA Civ 257 – Catherine Morris was the second wife of Mr Morris who lived on the farm owned by his mother, Mrs Morris senior. Mr Morris stood to inherit the farm and Catherine Morris spent money and time working on the farm. After they separated and Mrs Morris senior died, she claimed a beneficial interest in the farm.

The court found that when Mrs Morris senior acquired the farm, Catherine Morris had no beneficial interest and no change in intention post-acquisition was established.

Williamson v Sheikh [2008] EWCA Civ 990 – Ms Williamson contributed the deposit funds needed to purchase the property bought in the sole name of Mr Sheikh in which they lived together for less than a year.

The court found that Ms Williamson, even though she was not a legal owner at all, was entitled to the return of her deposit sum and 60 per cent of the remaining beneficial interest in the property (this 60 per cent figure being something that had been discussed with their solicitor even though no declaration of trust was executed).

Kernott v Jones [2010] EWCA Civ 578 –

Mr Kernott and Ms Jones bought a property together as joint tenants in which they lived together as man and wife with their children for a number of years. Ms Jones paid the deposit and Mr Kernott paid £100 a week to Ms Jones from which she paid the mortgage and some other expenses. Mr Kernott undertook extensive work on the property including the building of an extension which increased the value of the property by some 50 per cent. When the relationship ended, Mr Kernott moved out and stopped paying any funds to Ms Jones. After the children reached majority Mr Kernott sought a 50 per cent beneficial interest in the property and an order for sale.

The Court of Appeal rejected the idea that the long period of non-residence at the property and a failure to contribute thereafter to the mortgage or other bills after Mr Kernott moved out meant that the court could infer or impute a common intention that the parties' beneficial interests were to be changed after Mr Kernott's departure.

intractable selfishness. Without a written agreement in place, in most cases beneficial interests are likely to match legal interests no matter how 'unfair' that may appear. For this reason, cohabitees should consider a declaration of trust and/or a 'living together' agreement which sets out the parties' agreed terms. Advice from both property and family solicitors should be taken when such documents are drafted and solicitors will need to consider whether there is a need for separate independent legal advice to be taken by each of the parties to avoid any conflict issues.

While the additional legal costs incurred will, undoubtedly, be unwelcome to many clients, such financial investment may be a tiny fraction of the expense involved in trying to remedy problems at a later date if the relationship turns sour and there is no declaration or agreement in place.

When cohabitees separate, solicitors should ensure that they provide advice about the implications for ownership of the property. Such legal input may initially come from family lawyers acting in relation to the break up.

One of the issues to be considered will be whether the parties intend to vary the beneficial interests should one party move out of the property. If there is such a common intention to vary then it needs to be recorded in writing and any existing declaration of trust or 'living together' agreement should be varied. Other alternatives might be for one party to buy out the other at the time of separation at an agreed price or for the property to be sold on the open market.

It will not only be cohabitees who suffer the consequences if inadequate advice is provided to them. Although there is no suggestion that the solicitors who acted for Mr Kernott and Ms Jones in the purchase of the property were negligent, it must be expected that a professional negligence claim will follow if a cohabitee has suffered a loss caused by incompetent legal advice on the purchase and then sale of a property.

The decision in *Kernott* highlights the risks involved for practitioners in this difficult area of law. Solicitors must give and record clear and accurate advice so that cohabitees fully understand the consequences at the time they intend to buy a property together – when they sell and when they separate.

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Here we stand

The first occasion when solicitors are likely to need to advise cohabitees is when a conveyancer is approached to act on the purchase of property. At this stage, the solicitor should provide very clear information about the different kinds of property ownership; the difficulty (at a later date) of claiming that a beneficial interest in the property is different to the legal interest; the

need to record any agreement in writing; and the necessity of formalising any change in the parties' beneficial interest at the time such change is agreed.

While cohabitees tend to purchase a property together precisely because they are optimistic about the permanence of their relationship and/or the reasonableness of their partner, cohabitee relationships often begin in romantic generosity only to end in