**Michaelmas Term**
**[2011] UKSC 53**
*On appeal from: [2010] EWCA Civ 578*

# JUDGMENT

# Jones (Appellant) *v* Kernott (Respondent)

**before**

**Lord Walker**
**Lady Hale**
**Lord Collins**
**Lord Kerr**
**Lord Wilson**

## JUDGMENT GIVEN ON

## 9 November 2011

**Heard on 4 May 2011**

*Appellant*
Richard Power

(Instructed by A I Sampson & Co)

*Respondent*
Andrew Bailey

(Instructed by Francis Thatcher & Co)

**LORD WALKER AND LADY HALE**

1. This appeal gives the Supreme Court the opportunity to revisit the decision of the House of Lords in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432. That case, like this, was concerned with the determination of the beneficial interests in a house acquired in joint names by an unmarried couple who intended it to be their family home. Its reasoning was closely examined, in particular by Rimer LJ, in the present appeal: [2010] EWCA Civ 578, [2010] 1 WLR 2401. The fact that the Court of Appeal itself gave permission to appeal is a mark of the difficulties felt by the majority, not only with the reasoning but also with the outcome to which it led.

2. The decision in *Stack v Dowden* has also attracted a good deal of comment from legal scholars, which we have read although it was not referred to by counsel (who took a sensibly economical approach to the presentation of the appeal). This ranges from qualified enthusiasm (K Gray & S Gray, *Land Law*, 6th ed (2009) para 7-072) to almost unqualified disapprobation (Swadling, "The Common Intention Trust in the House of Lords: An Opportunity Missed" (2007) 123 LQR 511; Dixon, "The Never-Ending Story – Co-Ownership After *Stack v Dowden*" [2007] Conv 456). But counsel have not argued that *Stack v Dowden* was wrongly decided or that this court should now depart from the principles which it laid down. This appeal provides an opportunity for some clarification.

*Stack v Dowden*

3. Mr Stack and Ms Dowden lived together for 19 years, from 1983 to 2002. They did not marry but they had four children born between 1986 and 1991. Ms Dowden was a well-qualified electrical engineer, and throughout the time when they lived together she worked full-time (except for periods of maternity leave) for the LEB and its successor. Mr Stack was a self-employed builder and decorator until 1987, after which he was employed by Hammersmith and Fulham LBC.

4. They started living together in 1983 in a house acquired in Ms Dowden's sole name at the price of £30,000. The deposit of £8,000 was paid out of a building society account in Ms Dowden's sole name; there was a conflict of evidence as to whether Mr Stack had made any contributions to the account. The balance of £22,000 was raised on a mortgage for which Ms Dowden alone was responsible. She made the mortgage payments and paid other household outgoings. Mr Stack kept his finances separate (he had most of his post, including his bank statements, sent to his father's address). They carried out extensive repairs and improvements

to the house. The judge found that Mr Stack was responsible for most of this work but could not put a figure on its contribution to the sale value of the house.

5. They moved house in 1993. Ms Dowden received over £66,000 from the sale of their first home. Their new home was bought for £190,000. Nearly £129,000 came from Ms Dowden's building society account and the balance from a bank loan secured on the house and on two endowment policies, one in joint names and one in Ms Dowden's sole name. The house was transferred into their joint names with no express declaration of trust, but a standard-form provision that the survivor could give a good receipt.

6. Mr Stack paid the mortgage interest and the premiums on the joint policy, to a total amount of nearly £34,000. The principal of the mortgage loan was repaid by a series of lump sum payments, to which Mr Stack contributed £27,000 and Ms Dowden over £38,000. The utility bills were in Ms Dowden's name and she paid all or most of them. There were some improvements to the property, but not on a large scale. The parties continued to maintain separate bank accounts and each made a number of separate investments.

7. In short, there was a substantial disparity between their respective financial contributions to the purchase. The trial judge held that the proceeds of sale should be divided in equal shares. Although Ms Dowden had been the bigger earner, "they have both put their all into doing the best for themselves and their family as they could". The Court of Appeal allowed Ms Dowden's appeal and divided the proceeds 65% to 35% as she had asked. The House of Lords (Lord Hoffmann, Lord Hope, Lord Walker, Lady Hale and Lord Neuberger) unanimously upheld that order, although Lord Neuberger did so for different reasons from the majority.

8. The curious feature of the decided cases up until then had been that, once an intention to share ownership had been established, the courts had tended to adopt a more flexible and "holistic" approach to the quantification of the parties' shares in cases of sole legal ownership than they had in cases of joint legal ownership. In the former, they had adopted a concept of the "common intention" constructive trust which depends upon the shared intentions of the parties. In the latter, they had tended to analyse the matter in terms of a resulting trust, which depends upon the law's presumption as to the intention of the party who makes a financial contribution to the purchase. This point was made by Lady Hale in *Stack v Dowden*, paras 64 and 65 (see also Peter Gibson LJ in *Drake v Whipp* [1996] 1 FLR 826, 827, cited in *Stack v Dowden*, para 29).

9. The leading opinion in the House of Lords was that of Lady Hale. Lord Hoffmann, Lord Hope and Lord Walker all agreed with it, though Lord Hope and

Lord Walker added some observations of their own. Lord Hope discussed Scots law, drawing attention to the importance in Scotland of the law of unjust enrichment. Lord Walker contributed what he referred to as an "extended footnote", with a detailed commentary on Lord Diplock's speech in *Gissing v Gissing* [1971] AC 886.

10. The conclusions in Lady Hale's opinion were directed to the case of a house transferred into the joint names of a married or unmarried couple, where both are responsible for any mortgage, and where there is no express declaration of their beneficial interests. In such cases, she held that there is a presumption that the beneficial interests coincide with the legal estate. Specifically, "in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved": Lady Hale, at para 58; Lord Walker at para 33.

11. Secondly, the mere fact that the parties had contributed to the acquisition of the home in unequal shares would not normally be sufficient to rebut the presumption of joint tenancy arising from the conveyance: "It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names . . . are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase": Lady Hale, at para 68.

12. Thirdly, the task of seeking to show that the parties intended their beneficial interests to be different from their legal interests was not 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. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result, unless the facts are very unusual": Lady Hale, at para 68; also Lord Walker at para 33.

13. Fourthly, however, if the task is embarked upon, it is to ascertain the parties' common intentions as to what their shares in the property would be, in the light of their whole course of conduct in relation to it: Lady Hale, at para 60. It is the way in which this point was made which seems to have caused the most difficulty in the lower courts. The difficulty is well illustrated in Lord Wilson's judgment, at paras 85 to 87, which read the judgment in a way which we would not read it. It matters not which reading is correct. It does matter that any confusion is resolved.

14. It was also accepted that the parties' common intentions might change over time, producing what Lord Hoffmann referred to in the course of argument as an "'ambulatory' constructive trust": Lady Hale, at para 62. An example, given in para 70, was where one party had financed or constructed an extension or major improvement to the property, so that what they had now was different from what they had first acquired. But of course there are other examples. The principal question in this case is whether this is one.

15. At its simplest the principle in *Stack v Dowden* is that a "common intention" trust, for the cohabitants' home to belong to them jointly in equity as well as on the proprietorship register, is the default option in joint names cases. The trust can be classified as a constructive trust, but it is not at odds with the parties' legal ownership. Beneficial ownership mirrors legal ownership. What it is at odds with is the presumption of a resulting trust.

*A single regime?*

16. In an interesting article by Simon Gardner and Katherine Davidson, "The Future of *Stack v Dowden*" (2011) 127 LQR 13, 15, the authors express the hope that the Supreme Court will "make clear that constructive trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to 'joint names' and 'single name' cases". At a high level of generality, there is of course a single regime: the law of trusts (this is the second of Mustill LJ's propositions in *Grant v Edwards* [1986] Ch 638, 651). To the extent that we recognise that a "common intention" trust is of central importance to "joint names" as well as "single names" cases, we are going some way to meet that hope. Nevertheless it is important to point out that the starting point for analysis is different in the two situations. That is so even though it may be necessary to enquire into the varied circumstances and reasons why a house or flat has been acquired in a single name or in joint names (they range, for instance, from *Lowson v Coombes* [1999] Ch 373, where the property was in the woman's sole name because the man was apprehensive of claims by his separated wife, to *Adekunle v Ritchie* [2007] WTLR 1505, where an enfranchised freehold was in joint names because the elderly tenant could not obtain a mortgage on her own).

17. The starting point is different because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed a "common intention" constructive trust. The claimant whose name is on the register starts (in the absence of an express declaration of trust in different terms, and subject to what is said below about resulting trusts) with the presumption (or assumption) of a beneficial joint tenancy.

18. The official Land Registry application form (TR1) for registration of a transfer was replaced on 1 April 1998 by a new form with a box enabling joint transferees to clarify the beneficial ownership of the property. That should help to avoid uncertainty but in practice it does not always do so (this is explained in detail in a case note: "Anything to Declare? Express Declarations of Trust in *Stack v Dowden*" [2007] Conv 364). We understand that the Land Registry does not propose to implement the recommendations for change made by an expert working party which it convened in response to *Stack v Dowden*: see Elizabeth Cooke, "In the wake of *Stack v Dowden*: the tale of TR1" [2011] Fam Law 1142.

19. The presumption of a beneficial joint tenancy is not based on a mantra as to "equity following the law" (though many non-lawyers would find it hard to understand the notion that equity might do anything else). There are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on. The first is implicit in the nature of the enterprise. If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise. That is so even if the parties, for whatever reason, fail to make that clear by any overt declaration or agreement. The court has often drawn attention to this. Jacob LJ did so in his dissenting judgment in this case: [2010] EWCA Civ 578, [2010] 1 WLR 2401, para 90.

20. One of the most striking expressions of this approach is in the judgment of Waite LJ in *Midland Bank plc v Cooke* [1995] 4 All ER 562, 575. It is worth quoting it at some length, even though the case was a single-name case and the couple were married (the husband was 19, and the wife a little older, at the time of the marriage):

> "Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time. The present case is typical of hundreds, perhaps even thousands, of others. When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or

> unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it."

21. Gardner and Davidson make the same point at (2011) 127 LQR 13, 15-16:

> "The context under discussion is one in which people will not normally formulate agreements, but (this is crucial) the very reason for this – the parties' familial trust in one another - also warrants the law's intervention nonetheless. Unless the law reacts to such trust as much as to more individualistic forms of interaction, those who put their faith in the former rather than the latter will find their interests thereby exposed."

Gardner has termed this "a materially communal relationship: ie one in which, in practical terms, they pool their material resources (including money, other assets, and labour)": *An Introduction to Land Law*, 2nd ed (2009) para 8.3.7.)

22. The notion that in a trusting personal relationship the parties do not hold each other to account financially is underpinned by the practical difficulty, in many cases, of taking any such account, perhaps after 20 years or more of the ups and downs of living together as an unmarried couple. That is the second reason for caution before going to law in order to displace the presumption of beneficial joint tenancy. Lady Hale pointed this out in *Stack v Dowden* at para 68 (see para 12 above), as did Lord Walker at para 33:

> "In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case."

*The competing presumption: a resulting trust?*

23. In an illuminating article, "Explaining Resulting Trusts" (2008) 124 LQR 72, 73, footnote 6) William Swadling has commented:

> "A resulting trust also traditionally arose where A and B contributed unequally to the purchase price and the title was conveyed to A and B as joint tenants, whereby A and B held as equitable tenants in common in proportion to their contributions (*Lake v Gibson* (1729) 1 Eq Cas Abr 290). In *Stack v Dowden* [2007] UKHL 17, a majority of the House of Lords held that this rule no longer applied in the case of 'matrimonial or quasi-matrimonial homes.' "

That is probably a reference to para 31 of Lord Walker's opinion. Lady Hale's opinion does not in terms reach that conclusion. But the extended discussion from para 56 to para 70 (and in particular, the express disapproval of *Walker v Hall* [1984] FLR 126, *Springette v Defoe* [1992] 2 FLR 388 and *Huntingford v Hobbs* [1993] 1 FLR 736) is inconsistent with a resulting trust analysis in this context. It is not possible at one and the same time to have a presumption or starting point of joint beneficial interests and a presumption (let alone a rule) that the parties' beneficial interests are in proportion to their respective financial contributions.

24. In the context of the acquisition of a family home, the presumption of a resulting trust made a great deal more sense when social and economic conditions were different and when it was tempered by the presumption of advancement. The breadwinner husband who provided the money to buy a house in his wife's name, or in their joint names, was presumed to be making her a gift of it, or of a joint interest in it. That simple assumption – which was itself an exercise in imputing an intention which the parties may never have had - was thought unrealistic in the modern world by three of their Lordships in *Pettitt v Pettitt* [1970] AC 777. It was also discriminatory as between men and women and married and unmarried couples. That problem might have been solved had equity been able to extend the presumption of advancement to unmarried couples and remove the sex discrimination. Instead, the tool which equity has chosen to develop law is the "common intention" constructive trust. Abandoning the presumption of advancement while retaining the presumption of resulting trust would place an even greater emphasis upon who paid for what, an emphasis which most commentators now agree to have been too narrow: hence the general welcome given to the "more promising vehicle" of the constructive trust: see Gardner and Davidson at (2011) 127 LQR 13, 16. The presumption of advancement is to receive its quietus when section 199 of the Equality Act 2010 is brought into force.

25. 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 shares. 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.

*Inference or imputation?*

26. In *Stack v Dowden* Lord Neuberger observed (paras 125-126):

> "While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt* [1970] AC 777, as accepted by all but Lord Reid in *Gissing v Gissing* [1971] AC 886, 897H, 898B-D, 900E-G, 901B-D, 904E-F, and reiterated by the Court of Appeal in *Grant v Edwards* [1986] Ch 638 at 651F-653A. The distinction between inference and imputation may appear a fine one (and in *Gissing v Gissing* [1971] AC 886, at 902G-H, Lord Pearson, who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.
>
> 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."

Rimer LJ made some similar observations in the Court of Appeal in this case [2010] EWCA Civ 578, [2010] 1 WLR 2401, paras 76-77.

27. Both observations had been to some extent anticipated as long ago as 1970 by Lord Reid in his speech in *Gissing v Gissing* [1971] AC 886, 897:

> "Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the court has power to impute such an intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way. But if it were to be held to be the law that it must at least be possible to infer a contemporary agreement in the sense of holding that it is more probable than not there was in fact some such agreement then I could not contemplate the future results of such a decision with equanimity."

28. The decision of the House of Lords in *Gissing v Gissing* has been so fully analysed and discussed that it is almost impossible to say anything new about it. However it may be worth pointing out that their Lordships' speeches were singularly unresponsive to each other. The only reference to another speech is by Viscount Dilhorne (at p 900) where he agreed with Lord Diplock on a very general proposition as to the law of trusts. The law reporter has managed to find a ratio for the headnote (at p 886) only by putting these two propositions together with some remarks by Lord Reid (at p 896) which have a quite different flavour. We can only guess at the order in which the speeches were composed, but the third and fourth sentences of the passage from Lord Reid's speech, set out in the preceding paragraph, suggest that Lord Reid had read Lord Diplock's speech in draft, and thought that it was about "an imputation of a deemed intention."

29. This sort of constructive intention (or any other constructive state of mind), and the difficulties that they raise, are familiar in many branches of the law. Whenever a judge concludes that an individual "intended, or must be taken to have intended," or "knew, or must be taken to have known," there is an elision between what the judge can find as a fact (usually by inference) on consideration of the admissible evidence, and what the law may supply (to fill the evidential gap) by way of a presumption. The presumption of a resulting trust is a clear example of a rule by which the law *does* impute an intention, the rule being based on a very broad generalisation about human motivation, as Lord Diplock noted in *Pettitt v Pettitt* [1970] AC 777, 824:

> "It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples 'presumptions' which are based upon inferences of fact which an earlier generation of judges

> drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

That was 40 years ago and we are now another generation on.

30. The decision in *Stack v Dowden* produced a division of the net proceeds of sale of the house in shares roughly corresponding to the parties' financial contributions over the years. The majority reached that conclusion by inferring a common intention (see Lady Hale's opinion at para 92, following her detailed analysis of the facts starting at para 86). Only Lord Neuberger reached the same result by applying the classic resulting trust doctrine (which involved, it is to be noted, imputing an intention to the parties).

31. In deference to the comments of Lord Neuberger and Rimer LJ, we accept that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. However, there are at least two exceptions. The first, which is not this case, is where the classic resulting trust presumption applies. Indeed, this would be rare in a domestic context, but might perhaps arise where domestic partners were also business partners: see *Stack v Dowden*, para 32. The second, which for reasons which will appear later is in our view also not this case but will arise much more frequently, is where it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared. In those two situations, the court is driven to impute an intention to the parties which they may never have had.

32. Lord Diplock, in *Gissing v Gissing* [1971] AC 886, 909, pointed out that, once the court was satisfied that it was the parties' common intention that the beneficial interest was to be shared in some proportion or other, the court might have to give effect to that common intention by determining what in all the circumstances was a fair share. And it is that thought which is picked up in the subsequent cases, culminating in the judgment of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, paras 65, 66 and 69, and in particular the passage in para 69 which was given qualified approval in *Stack v Dowden*:

> "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."

33. Chadwick LJ was not there saying that fairness was the criterion for determining whether or not the property should be shared, but he was saying that

the court might have to impute an intention to the parties as to the proportions in which the property would be shared. In deducing what the parties, as reasonable people, would have thought at the relevant time, regard would obviously be had to their whole course of dealing in relation to the property.

34. However, while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great. In this area, as in many others, the scope for inference is wide. The law recognizes that a legitimate inference may not correspond to an individual's subjective state of mind. As Lord Diplock also put it in *Gissing v Gissing* [1971] AC 886, 906:

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, 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 or 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."

This point has been developed by Nick Piska, "Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*" (2008) 71 MLR 120. He observes at pp 127-128:

> "Subjective intentions can never be accessed directly, so the court must always direct itself to a consideration of the parties' objective intentions through a careful consideration of the relevant facts. The point is that the imputation/inference distinction may well be a distinction without a difference with regard to the process of determining parties' intentions. It is not that the parties' subjective intentions are irrelevant but rather that a finding as to subjective intention can only be made on an objective basis."

35. In several parts of the British Commonwealth federal or provincial legislation has given the court a limited jurisdiction to vary or adjust proprietary rights in the home when an unmarried couple split up. Most require a minimum period of two years' cohabitation (or less if there are children) before the jurisdiction is exercisable. In England the Law Commission has made recommendations on similar lines (Law Com No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown*, 2007), but there are no plans to implement them in the near future.

36. In the meantime there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence. It is the court's duty to reach a decision on even the most difficult case. As the deputy judge (Mr Nicholas Strauss QC) said in his admirable judgment [2009] EWHC 1713 (Ch), [2010] 1 WLR 2401, para 33 (in the context of a discussion of fairness) "that is what courts are for." That was an echo (conscious or unconscious) of what Sir Thomas Bingham MR said, in a different family law context, in *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1, 33. 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 findings.

*The facts of this case*

37. The parties met in 1980. Ms Jones worked as a mobile hairdresser. Mr Kernott worked as a self employed ice-cream salesman during the summer and claimed benefits during the winter if he could find no other work. The judge found that their incomes were not very different from one another. Ms Jones bought a mobile home in her sole name in 1981. Mr Kernott moved in with her (according to the agreed statement of facts and issues) in 1983. Their first child was born in June 1984. In May 1985 Ms Jones sold her mobile home and the property in question in these proceedings, 39 Badger Hall Avenue, Thundersley, Essex, was bought in their joint names.

38. The purchase price was £30,000. This was relatively cheap because the house had belonged to the elderly mother of a client of Ms Jones. The deposit of £6000 was paid from the proceeds of sale of Ms Jones' mobile home. The balance was raised by way of an endowment mortgage in their joint names. Mr Kernott paid £100 per week towards the household expenses while they lived at the property. Ms Jones paid the mortgage and other household bills out of their joint resources. In March 1986 they jointly took out a loan of £2000 to build an extension. Mr Kernott did some of the labouring work and paid friends and relations to do other work on it. The judge found that the extension probably enhanced the value of the property by around 50%, from £30,000 to £44,000. Their second child was born in September 1986.

39. Mr Kernott moved out of the property in October 1993. The parties had lived there together, sharing the household expenses, for eight years and five months. Thereafter Ms Jones remained living in the property with the children and paid all the household expenses herself. Mr Kernott made no further contribution towards the acquisition of the property and the judge also found that he made very little contribution to the maintenance and support of their two children who were

being looked after by their mother. This situation continued for some 14 and a half years until the hearing before the judge.

40. The Badger Hall Avenue property was put on the market in October 1995 for £69,995, but was not sold. This may be some indication of its market value at that time but no more than that. At some date which is not entirely clear, the parties agreed to cash in a joint life insurance policy (not, of course, the endowment policy supporting the mortgage) and the proceeds were divided between them. The judge held that this was to enable Mr Kernott to put down a deposit on a home of his own. This he did in May 1996, when he bought 114 Stanley Road, Benfleet, for around £57,000 with a deposit of £2,800 and a mortgage of £54,150. The judge observed that he was able to afford his own accommodation because he was not making any contribution towards the former family home, nor was he making any significant contribution towards the support of his children. The judge also found that "whilst the intentions of the parties may well have been at the outset to provide them as a couple with a home for themselves and their progeny, those intentions have altered significantly over the years to the extent that [Mr Kernott] demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property on which he concentrated".

41. At the time of the hearing before the judge in April 2008, 39 Badger Hall Avenue was valued at £245,000. The outstanding mortgage debt was £26,664. The endowment policy supporting that mortgage was worth £25,209. On the basis that they had contributed jointly to the endowment for eight years and five months and that Ms Jones had contributed alone for fourteen and a half years, it was calculated that Mr Kernott was entitled to around £4712 of its value, which would leave Ms Jones with £20,497. 114 Stanley Road was valued at £205,000, with an outstanding mortgage of £37,968 (suggesting that this was a repayment rather than an endowment mortgage). If the whole of the endowment policy was used to discharge the mortgage, the net worth of 39 Badger Hall Avenue would be £243,545. If the mortgage on 114 Stanley Road was an ordinary repayment mortgage, the net worth of 114 Stanley Road would be £167,032.

*These proceedings*

42. Mr Kernott initiated correspondence with a view to claiming his interest in the property in 2006. Ms Jones began proceedings in the Southend County Court in October 2007, claiming a declaration under section 14 of the Trusts of Land and Appointment of Trustees Act 1996: (i) that she owned the entire beneficial interest in 39 Badger Hall Avenue; alternatively (ii) if Mr Kernott had any beneficial interest in 39 Badger Hall Avenue, that she also had a beneficial interest in 114

Stanley Road, and that these respective interests be determined by the court; and (iii) that either she be registered as sole proprietor of 39 Badger Hall Avenue, or that they be registered as joint proprietors of 114 Stanley Road.

43. At the trial, which took place in April 2008, Ms Jones conceded that, in 1993 when the couple separated, there would not have been enough evidence to displace the presumption that their beneficial interests followed the legal title, so that they were then joint tenants in law and equity. She also conceded that she had no legal claim on 114 Stanley Road. Her contention was that its purchase, along with other events since their separation, was evidence that their intentions with respect to the beneficial interests in 39 Badger Hall Avenue had changed. The judge accepted that contention. In the light of *Stack v Dowden* and *Oxley v Hiscock* he had "to consider what is fair and just between the parties bearing in mind what I have found with regard to the whole course of dealing between them". He concluded that the value of the property should be divided as to 90% for Ms Jones and 10% for Mr Kernott. 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).

44. Mr Kernott appealed to the High Court, arguing that the judge was wrong to infer or impute an intention that the parties' beneficial interests should change after their separation and to quantify these in the way which he considered fair. The deputy judge, Mr Nicholas Strauss QC, after a careful review of the authorities, concluded that the change in intention could readily be inferred or imputed from the parties' conduct: [2009] EWHC 1713 (Ch), [2010] 1 WLR 2401, para 47. In the absence of any indication by words or conduct as to how their shares should be altered, the appropriate criterion was what he considered to be fair and just: para 49. The judge's assessment could be justified, given that their direct contributions were a little over 4:1 in Ms Jones' favour and that the larger part of the capital gain on the property must have arisen after 1993. By not contributing to that property, Mr Kernott had been able to buy another property on which there was almost as great a capital gain. The parties could not be taken to have intended that he should have a significant part of the increased value of 39 Badger Hall Avenue as well as the whole of the capital gain from 114 Stanley Road: para 51.

45. The Court of Appeal, by a majority, allowed Mr Kernott's appeal and declared that the parties owned the property as tenants in common in equal shares: [2010] EWCA Civ 578, [2010] 1 WLR 2401. Jacob LJ, who dissented, held that the judge had applied the right legal test and that there was a proper basis in the evidence for concluding that the parties must be taken to have intended that they should each have a fair and just share. He would not interfere with the judge's assessment of the fair proportions. Rimer LJ, in the majority, held that there was nothing to indicate that the parties' intentions had changed after their separation. A

crucial part of his reasoning was his interpretation of the decision in *Stack v Dowden*: that it did not "enable courts to find, by way of the imputation route, an intention where none was expressly uttered nor inferentially formed": para 77. Wall P also concluded that he could not infer an intention to change the beneficial interests from the parties' conduct: paras 57, 58.

*Discussion*

46. It is always salutary to be confronted with the ambiguities which later emerge in what seemed at the time to be comparatively clear language. The primary search must always be for what the parties actually intended, to be deduced objectively from their words and their actions. If that can be discovered, then, as Mr Nicholas Strauss QC pointed out in the High Court, it is not open to a court to impose a solution upon them in contradiction to those intentions, merely because the court considers it fair to do so.

47. In a case such as this, where the parties already share the beneficial interest, and the question is what their interests are and whether their interests have changed, the court will try to deduce what their actual intentions were at the relevant time. It cannot impose a solution upon them which is contrary to what the evidence shows that they actually intended. But if it cannot deduce exactly what shares were intended, it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time. This is a fallback position which some courts may not welcome, but the court has a duty to come to a conclusion on the dispute put before it.

48. In this case, there is no need to impute an intention that the parties' beneficial interests would change, because the judge made a finding that the intentions of the parties did in fact change. At the outset, their intention was to provide a home for themselves and their progeny. But thereafter their intentions did change significantly. He did not go into detail, but the inferences are not difficult to draw. They separated in October 1993. No doubt in many such cases, there is a period of uncertainty about where the parties will live and what they will do about the home which they used to share. This home was put on the market in late 1995 but failed to sell. Around that time a new plan was formed. The life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on 39 Badger Hall Avenue. The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise then. Just as he would have the sole benefit of any capital gain in his own home, Ms Jones would have the sole benefit of any capital gain in Badger Hall Avenue. Insofar as the judge did not in so many words infer that this was their intention, it is clearly the intention which reasonable people

would have had had they thought about it at the time. But in our view it is an intention which he both could and should have inferred from their conduct.

49. A rough calculation on this basis produces a result so close to that which the judge produced that it would be wrong for an appellate court to interfere. If we take the value of the property as £60,000 in late 1993 (or £70,000 in late 1995) and the value in 2008 as £245,000, and share the £60,000 (or £70,000) equally between the parties, but leave the balance to Ms Jones, that gives him £30,000 (£35,000) and her £215,000 (£210,000), roughly 12% (14%) and 88% (86%) respectively. This calculation ignores the mortgage, which may be the correct approach, as in 2008 the mortgage debt was almost fully covered by the endowment policy which was always meant to discharge it. Introducing the mortgage liability in 1993 (or 1995) into the calculation would be to Mr Kernott's disadvantage, because at that stage the endowment policy would not have been sufficient to discharge the debt, so the equity would have been less.

*Further accounting*

50. On this approach, there is no scope for further accounting between the parties (which was obviously contemplated as a future possibility by Rimer LJ on his approach). Had their beneficial interests in the property remained the same, there would have been the possibility of cross-claims: Mr Kernott against Ms Jones for an occupation rent, and Ms Jones against Mr Kernott for his half share in the mortgage interest and endowment premiums which she had paid. It is quite likely, however, that the court would hold that there was no liability to pay an occupation rent, at least while the home was needed for the couple's children, whereas the liability to contribute towards the mortgage and endowment policy would accumulate at compound interest over the years since he ceased to contribute. This exercise has not been done. In a case such as this it would involve a quite disproportionate effort, both to discover the requisite figures (even supposing that they could be discovered) and to make the requisite calculations, let alone to determine what the ground rules should be. The parties' legal advisers are to be commended for the proportionate approach which they have taken to the preparation of this case.

*Conclusion*

51. 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). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(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. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(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)).

52. This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.

53. The assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case.

54. It follows that we would allow this appeal and restore the order of the judge.

**LORD COLLINS**

55. I agree that the appeal should be allowed for the reasons given in the joint judgment of Lord Walker and Lady Hale.

56. It is not surprising that the decision in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 gave rise to difficulties. It was a decision which was responding to the increasing number of co-habiting couples with joint interests in their homes, and to the fact that couples (whether married or unmarried) rarely make agreements about their respective shares in their homes, and to the enormous inflation in property prices which has made the division of ownership by reference to initial financial contributions artificial and potentially productive of injustice.

57. The absence of legislative intervention (which continues despite the Law Commission Report on *Cohabitation: the Financial consequences of Relationship Breakdown*, 2007) made it necessary for the judiciary to respond by adapting old principles to new situations. That has not been an easy task. It is illustrated by the fact that in both *Stack v Dowden* and in this case the results at the highest appellate level have been unanimous but the reasoning has not.

58. I would hope that this decision will lay to rest the remaining difficulties, and that it will not be necessary to revisit this question by reconsideration of the correctness of *Stack v Dowden*, by which this court is bound (subject to the application of *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 regarding departure from previous decisions). It should not be necessary because the differences in reasoning are largely terminological or conceptual and are likely to make no difference in practice. But should it be necessary, the court (no doubt with a panel of seven or nine) would need much fuller argument (together with citation of the enormous critical literature which the decision has spawned) than was presented to the court on this appeal.

59. There have been at least three causes of the difficulties with *Stack v Dowden.* The first is that the previous authorities were mainly concerned with a different factual situation, namely where the property was registered in the name of only one of the parties. Second, they did not in any event speak with one voice, particularly on that part of *Stack v Dowden* which has caused most difficulty, namely whether in this part of the law there is any useful distinction between inferred intention and imputed intention: contrast *Gissing v Gissing* [1971] AC 886 with *Lloyds Bank v Rosset* [1991] 1 AC 107. The third reason is that (despite it being trite that it is wrong to do so) Baroness Hale's speech has been treated as if it were a statute, and ambiguities in it have been exploited or exaggerated, particularly the passage at para 60 in which she has been taken as having treated inferred intention and imputed intention as interchangeable, and the passage at para 61 in which she approved, or substantially approved, the reasoning of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69.

60. The reasoning of Baroness Hale and Lord Walker, taken together, in *Stack v Dowden* was as follows: (1) When property is held in joint names, and without any express declaration of trust, the starting point is that the beneficial interest is held equally and there is a heavy burden on the party asserting otherwise: paras 14, 33, 54, 56, 68. (2) That is because it will almost always have been a conscious decision to put the property into joint names, and committing oneself to spend large sums of money on a place to live is not normally done by accident or without giving it thought: para 66. (3) Consequently it is to be expected that joint transferees would have spelled out their beneficial interests when they intended them to be different from their legal interests ([54]) and cases in which the burden will be discharged will be very unusual (para 68). (4) The contrary can be proved by looking at all the relevant circumstances in order to discern the parties' common intention: [59]. (5) There is no presumption that the parties intended that the beneficial interest be shared in proportion to their financial contributions to the acquisition of the property: paras 31, 59-60 (thereby rejecting the approach of the resulting trust analysis as a starting point favoured by Lord Neuberger, dissenting, but not as to the result). (6) 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: para 60. (7) The search was for the result which reflected what the parties must, in the light of their conduct, be taken to have intended, and it did not enable the court to abandon that search in favour of the result which the court itself considered fair: para 61. (8) The matters to be taken into account are discussed in detail at paras 33-34 and 68-70, and it is not necessary to rehearse them here.

61. The crucial parts of Chadwick LJ's summary of the principles in his magisterial judgment in *Oxley v Hiscock* [2005] Fam 211, paras 68-69 take their main inspiration from the speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886 and the judgment of Nourse LJ in *Anderson v Stokes* [1991] 1 FLR 391, 400-

401. For present purposes it is only necessary to note that his discussion is dealing with the case where a home is purchased in the sole name of one party in a co-habiting couple, each of them has made some financial contribution to the purchase, and there is no declaration of trust as to the beneficial ownership. After a treatment of the way in which a common intention that each will have a beneficial interest can be inferred from discussions between the parties or, in the absence of discussion, from the fact that each has made contributions to the purchase price, Chadwick LJ moved at para 69 to a second question, namely "what is the extent of the parties' respective beneficial interests in the property?". It was in that context that he said:

> "… [I]n many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that … 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. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

62. It was in the light of the whole of Chadwick LJ's reasoning that in *Stack v Dowden* Baroness Hale referred to the Law Commission Discussion Paper on Sharing Homes, para 4.27, and went on to say at para 61:

> "First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair."

63. In its context that was plainly a reference to the first stage of the enquiry, namely whether there was a common intention that the property be beneficially owned other than in line with the legal title.

64. I agree, therefore, that authority justifies the conceptual approach of Lord Walker and Lady Hale that, in joint names cases, the common intention to displace

the presumption of equality can, in the absence of express agreement, be inferred (rather than imputed: see para 31 of the joint judgment) from their conduct, and where, in such a case, it is not possible to ascertain or infer what share was intended, each will be entitled to a fair share in the light of the whole course of dealing between them in relation to the property.

65. That said, it is my view that in the present context the difference between inference and imputation will hardly ever matter (as Lord Walker and Lady Hale recognise at para 34), and that what is one person's inference will be another person's imputation. A similar point has arisen in many other contexts, for example, the difference between implied terms which depend on the parties' actual intention, terms based on a rule of law, and implied terms based on an intention imputed to the parties from their actual circumstances: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137, per Lord Wright. Or the point under the law prior to the Contracts (Applicable Law) Act 1990 as to whether (in the absence of an express choice) the proper law of the contract depended on an intention to be inferred from the circumstances or on the law which had the closest connection with the contract.

66. Nor will it matter in practice that at the first stage, of ascertaining the common intention as to the beneficial ownership, the search is not, at least in theory, for what is fair. 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.

**LORD KERR**

67. I agree that this appeal should be allowed. There are differences of some significance in the reasoning that underlies the joint judgment of Lord Walker and Lady Hale and that contained in Lord Wilson's judgment. I agree with Lord Collins that these are both terminological and conceptual. I am less inclined to agree, however, that the divergence in reasoning is unlikely to make a difference in practice. While it may well be that the outcome in many cases will be the same, whether one infers an intention or imputes it, that does not mean that the process by which the result is arrived at is more or less the same. Indeed, it seems to me that a markedly and obviously different mode of analysis will generally be required. Before elaborating briefly on that proposition, let me turn very shortly to the areas in which, as I see it, there is consensus among the other members of the court.

68. The following appear to be the areas of agreement:

> (i) In joint names' cases, the starting point is that equity follows the law. One begins the search for the proper allocation of shares in the property with the presumption that the parties are joint tenants and are thus entitled to equal shares;
>
> (ii) 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;
>
> (iii) The common intention, if it can be inferred, is to be deduced objectively from the parties' conduct;
>
> (iv) Where the intention as to the division of the property cannot be inferred, each is entitled to that share which the court considers fair. In considering the question of what is fair the court should have regard to the whole course of dealing between the parties

69. The areas of disagreement appear to be these: (a) is there sufficient evidence in the present case from which the parties' intentions can be inferred? (b) is the difference between inferring and imputing an intention likely to be great as a matter of general practice?

*How far should the court go in seeking to infer actual intention as to shares?*

70. At para 33 above Lord Walker and Lady Hale have quoted the important judgment of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211 and at para 52(4) have said that, on the authority of what was said in para 69 of *Oxley,* where it is not possible to ascertain what the actual intention of the parties was as to the shares in which they would own the property, 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. This, I believe, casts the test somewhat differently from the way that it was formulated by Chadwick LJ. At para 69 of *Oxley* he said this:

> "… in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be

> accepted that (at least in this court and below) 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…"

71. Chadwick LJ did not confine the circumstances in which an intention is to be imputed to those where it was impossible to infer an intention. Rather, he considered that it was proper – and necessary – to impute it when there had been no discussion about the amounts of the shares that each was to have or where there was no evidence of such a discussion. Lord Walker and Lady Hale have pointed out that *Oxley v Hiscock* received qualified approval in *Stack v Dowden* [2007] 2 AC 432. It seems clear, however, that there was no approval of the notion that an intention should be imputed where there had been no discussion between the parties for in para 69 of her opinion in *Stack* Lady Hale listed several factors that required to be considered in "divining the parties' true intentions" few of which would involve any verbal exchange whatever.

72. It is hardly controversial to suggest that the parties' intention should be given effect to where it can be ascertained and that, although discussions between them will always be the most reliable basis on which to draw an inference as to that intention, these are not the only circumstances in which that exercise will be possible. There is a natural inclination to prefer inferring an intention to imputing one. If the parties' intention can be inferred, the court is not imposing a solution. It is, instead, deciding what the parties must be taken to have intended and where that is possible it is obviously preferable to the court's enforcing a resolution. But the conscientious quest to discover the parties' actual intention should cease when it becomes clear either that this is simply not deducible from the evidence or that no common intention exists. It would be unfortunate if the concept of inferring were to be strained so as to avoid the less immediately attractive option of imputation. In summary, therefore, I believe that the court should anxiously examine the circumstances in order, where possible, to ascertain the parties' intention but it should not be reluctant to recognise, when it is appropriate to do so, that inference of an intention is not possible and that imputation of an intention is the only course to follow.

73. In this context, it is important to understand what is meant by "imputing an intention". There are reasons to question the appropriateness of the notion of imputation in this area but, if it is correct to use this as a concept, I strongly favour the way in which it was described by Lord Neuberger in *Stack v Dowden* [2007] 2 AC 432 para 126, where he said that an imputed intention was one which was attributed to the parties, even though no such actual intention could be deduced from their actions and statements, and even though they had no such intention. This exposition draws the necessary strong demarcation line between attributing an intention to the parties and inferring what their intention was in fact.

74. The reason that I question the aptness of the notion of imputing an intention is that, in the final analysis, the exercise is wholly unrelated to ascertainment of the parties' views. It involves the court deciding what is fair in light of the whole course of dealing with the property. That decision has nothing to do with what the parties intended, or what might be supposed would have been their intention had they addressed that question. In many ways, it would be preferable to have a stark choice between deciding whether it is possible to deduce what their intention was and, where it is not, deciding what is fair, without elliptical references to what their intention might have – or should have – been. But imputing intention has entered the lexicon of this area of law and it is probably impossible to discard it now.

75. While the dichotomy between inferring and imputing an intention remains, however, it seems to me that it is necessary that there be a well marked dividing line between the two. As soon as it is clear that inferring an intention is not possible, the focus of the court's attention should be squarely on what is fair and, as I have said, that is an obviously different examination than is involved in deciding what the parties actually intended.

*Is there sufficient evidence in the present case from which the parties' intentions can be inferred?*

76. Lord Walker and Lady Hale have concluded that the failure of the parties to sell their home in Badger Hall Avenue in late 1995, leading as it did to the cashing in of the life insurance policy, meant that Mr Kernott intended that his interest in the Badger Hall Avenue property should crystallise then. That may indeed have been his intention but, for my part, I would find it difficult to *infer* that it actually was what he then intended. As the deputy High Court judge, Nicholas Strauss QC put it in para 48 of his judgment, the bare facts of his departure from the family home and acquisition of another property are a slender foundation on which to conclude that he had entirely abandoned whatever stake he had in the previously shared property.

77. On the other hand, I would have no difficulty in concluding, as did Mr Strauss and as would Lord Wilson, that it was eminently fair that the property should be divided between the parties in the shares decreed by Judge Dedman. Like Lord Wilson, therefore, I would prefer to allow this appeal on the basis that it is impossible to infer that the parties intended that their shares in the property be apportioned as the judge considered they should be but that such an intention should be imputed to them.

**LORD WILSON**

78. In the light of 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, I warmly applaud the development of the law of equity, spear-headed by Lady Hale and Lord Walker in their speeches in *Stack v Dowden* [2007] 2 AC 432, and reiterated in their judgment in the present appeal, that the common intention which impresses a constructive trust upon the legal ownership of the family home can be *imputed* to the parties to the relationship.

79. In his speech of dissent (other than in relation to the result) in *Stack v Dowden* Lord Neuberger observed, at para 125, that the distinction between inference and imputation was important. He proceeded as follows:

> "126 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."

80. Almost 40 years earlier, in *Pettitt v Pettitt* [1970] AC 777, Lord Diplock sought to develop the law in a way similar to that achieved in *Stack v Dowden.* The action was between spouses and, analogously, was brought at a time when the divorce court lacked power to make a property adjustment order in relation to the matrimonial home. Lord Diplock said, at p 823F-G:

> "Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses."

81. In *Gissing v Gissing* [1971] AC 886, 904E-F, however, Lord Diplock accepted that in *Pettitt* he had been in the minority in suggesting that the common intention could be imputed. So he proceeded to analyse the case in terms of

whether the necessary intention could be inferred; but he added – ingeniously – at p 909 C-E that it might be possible to infer a common intention on the part of the spouses that their interests in the property should be in such proportions as might ultimately be seen to be fair! It is worthy of note, that in *Pettitt* Lord Reid had, at p 795D-G, also been cautiously amenable to the idea of imputing the necessary intention but had, at p 797A-B, expressed a firm preference for Parliamentary intervention; and that in *Gissing*, in the passage quoted by Lady Hale and Lord Walker at para 29 above, Lord Reid saw fit to reiterate those views notwithstanding that the argument in favour of a power to impute had for the time being already been lost.

82. In *Oxley v Hiscock* [2005] Fam 211, paras 68 and 69 Chadwick LJ, pointed out that assertions that the family home was held under a constructive trust raised two questions. The home had been held in Mr Hiscock's sole name so, for Chadwick LJ, the first question was whether Mrs Oxley could establish that they had nevertheless had a common intention that she should have some beneficial share in it. In the present case, however, the home is held in the joint names of the parties so, for us, the first question is whether Ms Jones can establish that they nevertheless had (albeit not necessarily at the outset) a common intention that the beneficial shares of herself and Mr Kernott should be in some proportions other than joint and equal. The second question, which arises in the event only of an affirmative answer to the first, is to determine the proportions in which the beneficial shares are held.

83. In relation to the second question Chadwick LJ concluded, in his summary at para 69, that, where there was no evidence of any discussion between the parties as to the proportions in which their beneficial shares in the family home were to be held, each was "entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property"; and he had made clear, at para 66, that such an entitlement arose because "what the court is doing, in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which…is shown to be fair". Emboldened by developments in the case-law since the decision in *Gissing*, and apparently in particular by the decision of the Court of Appeal in *Drake v Whipp* [1996] FLR 826, Chadwick LJ thus saw fit to reassert the power to impute. In *Pettitt* Lord Diplock had referred to reasonable spouses rather than to fairness; but reasonable spouses will intend only what is fair.

84. The analysis by Chadwick LJ of the proper approach to the *second* question was correct. In paras 31 and 51(4) above Lord Walker and Lady Hale reiterate that, although its preference is always to collect from the evidence an expressed or inferred intention, common to the parties, about the proportions in which their shares are to be held, equity will, if collection of it proves impossible, impute to

them the requisite intention. Before us is a case in which Judge Dedman, the trial judge, found – and, was entitled on the evidence to find – that the common intention required by the *first* question could be inferred. Thus the case does not require us to consider whether modern equity allows the intention required by the *first* question also to be imputed if it is not otherwise identifiable. That question will merit careful thought.

85. In para 61 of her ground-breaking speech in *Stack v Dowden* Lady Hale quoted, with emphasis, the words of Chadwick LJ in para 69 of *Oxley v Hiscock*, which I have quoted in para 71 above. Then she quoted a passage from a Discussion Paper published by the Law Commission in July 2002 and entitled "Sharing Homes" about the proper approach to identifying the proportions which "were intended" . Finally she added four sentences to each of which, in quoting them as follows, I take the liberty of attributing a number:

> "[1.] That may be the preferable way of expressing what is essentially the same thought, for two reasons.
>
> [2.] First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended.
>
> [3.] Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair.
>
> [4.] 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*… without even the fig leaf of section 17 of the 1882 Act."

86. I leave on one side Lady Hale's first sentence although, whereas Chadwick LJ was identifying the criterion for imputing the common intention, the context of the passage in the Discussion Paper suggests that the Law Commission was postulating a criterion for inferring it. On any view Lady Hale's second sentence is helpful; and, by her reference to what the parties must, in the light of their conduct, be taken to have intended (as opposed to what they did intend), Lady Hale made clear that, by then, she was addressing the power to resort to imputation. Lady Hale's fourth sentence has been neatly explained – by Mr Nicholas Strauss QC, deputy judge of the Chancery Division, who determined the first appeal in these proceedings, at para 30 – as being that, in the event that the evidence were to suggest that, whether by expression or by inference, the parties

intended that the beneficial interests in the home should be held in certain proportions, equity would not "impose" different proportions upon them; and, at para 47 above, Lord Walker and Lady Hale endorse Mr Strauss's explanation.

87. The problem has lain in Lady Hale's third sentence. Where equity is driven to impute the common intention, how can it do so other than by search for the result which the court itself considers fair? The sentence was not obiter dictum so rightly, under our system, judges below the level of this court have been unable to ignore it. Even in these proceedings judges in the courts below have wrestled with it. Mr Strauss observed, at para 31, that it was difficult to see how – at that final stage of the inquiry – the process could work without the court's supply of what it considered to be fair. In his judgment on the second appeal Lord Justice Rimer went so far as to suggest, at para 77, that Lady Hale's third sentence must have meant that, contrary to appearances, she had not intended to recognise a power to impute a common intention at all.

88. I respectfully disagree with Lady Hale's third sentence.

89. Lord Walker and Lady Hale observe, at para 34 above, that in practice the difference between inferring and imputing a common intention to the parties may not be great. I consider that, as a generalisation, their observation goes too far – at least if the court is to take (as in my view it should) an ordinarily rigorous approach to the task of inference. Indeed in the present case they conclude, at paras 48 and 49, that, in relation to Chadwick LJ's second question the proper inference from the evidence, which, if he did not draw, the trial judge should have drawn, was that the parties came to intend that the proportions of the beneficial interests in the home should be held on a basis which in effect equates to 90% to Ms Jones and to 10% to Mr Kernott (being the proportions in favour of which the judge ruled). As it happens, reflective perhaps of the more rigorous approach to the task of inference which I prefer, I regard it, as did Mr Strauss at [48] and [49] of his judgment, as more realistic, in the light of the evidence before the judge, to conclude that inference is impossible but to proceed to impute to the parties the intention that it should be held on a basis which equates to those proportions. At all events I readily concur in the result which Lord Walker and Lady Hale propose.