Neutral Citation Number: [2015] EWCA Civ 1056

Case No: B2/2014/0738

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HIS HONOUR JUDGE MADGE
2YN16765

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LLOYD JONES
and
MR JUSTICE HAYDEN

- -

Between :

KENNETH MICHAEL BARNES	**Appellant**
- and -	
DENISE ROSAMUND PHILLIPS	**Respondent**

- -
- -

Mr. Michael Horton (appearing by direct access) for the **Appellant**
Mr. Mark Simeon Jones (instructed by **Dodd Lewis, Blackheath**) for the **Respondent**

Hearing date: 13 October 2015

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Approved Judgment

LORD JUSTICE LLOYD JONES :

1. This is an appeal by Mr. Kenneth Michael Barnes against the order of His Honour Judge Madge made in the Central London County Court on 13 February 2014 whereby he held and declared that the parties held the beneficial shares in their jointly owned property at 88, Leyland Road, London, SE12 8DW ("the property") as tenants in common in shares of 85% in favour of the respondent Denise Rosamund Phillips and 15% in favour of Mr. Barnes.

Factual background

2. The appellant and the respondent began a relationship in about 1983. They set up home together in 1989, initially living in rented accommodation. They had two children together, Briaa Mercedez Barnes who was born in November 1993 and Vienna Precious Barnes who was born in July 2000.

3. In January 1996 the appellant and the respondent purchased the property. They paid approximately £135,000 for the property, using approximately £25,000 from their savings for the deposit and taking out a joint repayment mortgage with HSBC for the balance. The property was registered in both their names as joint tenants.

4. The respondent worked full time as a nurse except for a short while when the children were very small when she worked only part time. The appellant was a self-employed businessman. He paid the mortgage and some of the bills and the respondent paid the rest. Between purchasing the property and 2005 they carried out major works to the property, including installing double glazing, resurfacing the driveway and landscaping the garden. They both contributed to the cost of these works.

5. In 1988 the appellant purchased a property at 7, Stoke Newington Road which was registered in his sole name and which he rented out. In addition, while the relationship continued, he bought two other properties, 37 and 41 Otter Close, London E15. Both of these properties were registered in his sole name and were rented out. He told the respondent that he considered the properties a business investment for himself.

6. The respondent's evidence, which was accepted by the Judge, was that in late 2004 and early 2005 she began to notice that the appellant was having financial problems. There were letters and telephone calls from bailiffs. The appellant eventually told her that he was having debt problems. She was angry as he had not long purchased the two flats. Early in 2005 he told her that he wanted to remortgage the property. He kept insisting that they had to remortgage the property otherwise they would lose their home. In her evidence she said that she clearly remembered his words that "you and the girls will be out on the street" if they did not remortgage. He told her that she would have to sign a remortgage document but assured her that everything would be alright. He had said that he would always be with her so that it would be no problem to remortgage and pay off the debt, as he would continue to pay the mortgage.

7. The remortgage of the property took place on or about the 4 May 2005. The mortgage offer valued the property at £350,000. The London Mortgage Company loaned £145,000 of which £78,930.62, was immediately paid to HSBC to redeem the original mortgage. After the repayment of the HSBC mortgage the funds received on the

remortgage were reduced to £66,069.38. The London Mortgage Company was aware that the purpose of the remortgage was to enable the appellant to pay off his debts totalling £64,811 (£12,088 to Egg, £39,716 to Freeway and £13,007 to Mint). It was therefore a term of the remortgage that the debts be paid upon completion of the loan. It was the respondent's evidence that these debts were paid off at this time. Accordingly, as she explained in her evidence, there was almost nothing of the remortgage funds left. However, the appellant gave evidence that he did not pay off the debts to Egg or Mint.

8. The judge found that shortly before the remortgage the respondent took out a personal loan from the National Westminster Bank in the sum of £10,000 in order to redecorate the property. In order to repay this loan when required, in November 2006 she had to take out a replacement loan for £11,000.

9. In or around June 2005 the relationship broke down and the parties separated, the appellant leaving the property and moving into one of his other properties. It was the respondent's evidence that after he left the property the appellant at first continued to pay the mortgage and that she initially made payments to support this. However, he only paid the mortgage without problem for approximately eight months. The judge found that during the period 1 June 2005 to 18 April 2008 the respondent made mortgage payments totalling £12,552.27, and the appellant made mortgage payments totalling £22,077.12. It was the respondent's evidence that when the appellant moved out of the property they agreed an arrangement whereby he would pay £250 per month as his contribution to the children. He paid this on various occasions but not on a regular basis. From January 2008 she had sole responsibility for paying all the mortgage instalments as well as having financial responsibility for both children (although the appellant made some contributions to child support). She was also responsible for all the work and expenditure required on the property since 2005. She produced a schedule of expenditure with receipts in respect of £11,261.90, and a total estimated expenditure of £22,671.36.

10. There was no valuation of the property in 2008. However, at the trial there was evidence of "recent valuations" of the property suggesting marketing at a price between £450,000 and £545,000. The judge took a mid point in the valuations of £497,500. As at the 24 August 2013 the outstanding balance under the mortgage was £113,328.80, and the monthly repayments were then £691.47. The judge allowed for costs of sale at 3% and arrived at a total equity of redemption of around £369,247.

11. The respondent commenced proceedings against Mr. Barnes in the Bromley County Court for a declaration under section 14, Trusts of Land and Appointment of Trustees Act 1996. The proceedings were transferred to the Central London County Court for trial.

The decision of HH Judge Madge

12. Judge Madge noted that there was a conflict of evidence on some issues between the appellant and the respondent. He considered that the respondent had been an honest and truthful witness (although mistaken in her original account of the source of the £10,000). The appellant had not been frank and open when it came to disclosure. He had produced no documentation showing his financial position. The judge doubted his evidence that he had not submitted a tax return to the HMRC during the relevant

period. The judge also noted his evidence that he did not pay off the debts to Egg or Mint. The judge therefore concluded that whenever there was a conflict between their respective evidence he must prefer the evidence of the respondent. He did not accept the appellant's evidence unless it was corroborated by independent evidence. He did accept the respondent's evidence.

13. The judge held that on purchase of the property the appellant and the respondent were joint tenants both in law and in equity because that was their intention. The fact that there may have been a slight difference in contributions to the initial deposit made no difference, in his judgement. The fact that the appellant paid the mortgage and the life insurance and that the respondent paid council tax and that they shared utilities again made no difference. Both were contributing equally to what was in effect a marriage without a wedding ceremony. They had both intended to set up a joint home. He may have made a greater financial contribution because he earned more but she no doubt made a greater contribution towards the care of their daughters.

14. The judge then continued:

> "Secondly, there is no evidence that, using lay person's language, the Claimant and the Defendant later formed an actual common intention that their shares would change. There was no specific agreement as to a variation of the shares on the split. I bear in mind in particular what Ms. Phillips said at the conclusion of her evidence. I also bear in mind what Mr. Barnes said … [in] his final case summary, "There has never been a discussion or written agreement with regards to a change in our respective beneficial shares in the property". (at paragraph 37)

15. The judge had recorded what Ms. Phillips said at the conclusion of her evidence at paragraph 22 of the judgment:

> "When giving oral evidence, Ms. Phillips was asked about any subsequent agreement in relation to the parties' respective shares in the property. She was asked whether there were any discussions. She said that the Claimant and the Defendant had tried to sort out the situation. She said, "We may have discussed it in text messages, but so far as agreement I would say no, there was no agreement". (at paragraph 22)

16. The judge then continued:

> "Thirdly, so this is a case where it is not possible to ascertain by direct evidence or by inference what the parties' actual intention was as to the shares they would own in the property after the split. That means that the Claimant and Defendant are each entitled to that share which the court considers fair, having regard to the whole course of dealing between them in relation to the property. I have to impute the parties' intention by considering what is fair." (at paragraph 38)

17. The judge added that he had not been asked to conduct an equitable accounting exercise and that in the absence of disclosure from the appellant it would not be possible for him to carry out such an exercise.

18. The judge concluded that in May 2005 when the property was remortgaged its value was £350,000. After repayment of the first mortgage the equity in the property was in the region of £275,000. Mr. Barnes received £66,000 from the remortgage for his sole benefit.

> "I accept Mr. Jones's calculation that [the appellant] received 24% - 25% of the net equity. He had that sum for his use. If he had redeemed the debt, it would have left him with a surplus of only £1,258.38. So I impute at that stage, at the time of the remortgage and split, an intention that from that stage the property was to be held in shares of 75% to 25%." (at paragraph 42)

> "I then look at the position from 2005 to April 2008. Over that period Mr. Barnes paid approximately two-thirds of the mortgage contributions, Ms. Phillips paid approximately one-third. But from April 2008 Ms. Phillips has alone made mortgage repayments." (at paragraph 43)

The judge considered that a further adjustment was required. Bearing in mind the repayments made in respect of the mortgage, the payments in respect of repairs and contributions of both parties towards the children and the sums outstanding due from appellant to the Child Support Agency, he concluded that it was fair to determine that the property was held with the respondent having an 85% share and the appellant having a 15% share. He granted a declaration to that effect.

Grounds of Appeal

19. Mr. Barnes now appeals against the order of Judge Madge on the following grounds.

(1) The learned judge erred in law in that, having found that there was no agreement by the parties to change their beneficial interests, it was simply not open to him to impute to them a common intention that their shares were unequal.

(2) The learned judge was plainly wrong and/or erred in principle in holding that the shares were 85% to the Respondent and 15% to the Appellant.

(3) The learned judge was wrong in law in taking into account any supposed lack of child support payments when quantifying the parties' respective beneficial interests.

In addition he renews his application for permission to appeal on a further ground, in connection with which he applies for permission to adduce fresh evidence.

(4) The learned judge was wrong in law and /or there was a serious procedural or other irregularity in his allowing the respondent, at a very late stage in the proceedings, to change her pleaded case in relation to the receipt by her of a sum of £10,000 from the proceeds of a re-mortgage in 2005.

Ground 1: The learned judge erred in law in that, having found that there was no agreement by the parties to change their beneficial interests, it was simply not open to him to impute to them a common intention that their shares were unequal..

20. Mr. Michael Horton's submission on behalf of the appellant is founded on the decision of the Supreme Court in *Jones v. Kernott* [2011] UKSC 53; [2012] 1 AC 776 and in particular the formulation of principle in the joint judgment of Lord Walker of Gestingthorpe and Baroness Hale of Richmond JJSC at [51].

> "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:
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> > "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.E
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> Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v. Dowden* [2007] 2 AC 432 , 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))."

21. Mr. Horton submits that the judge found that there was no change in the common intention of the parties as to the basis on which they held their respective interests in the property and that that compelled the conclusion that they remained beneficial joint tenants until severance. The presumption that the property was held beneficially as joint tenants may be rebutted by a finding of an actual common intention to hold other than as beneficial joint tenants. However, in the absence of evidence to establish such an intention it is not for the court to impute a common intention to the parties which they never in fact formed themselves. If the court cannot find that the parties agreed expressly or by inference that they would hold in unequal shares, there is no room for any result other than that they hold as joint tenants and thus in equal shares on severance.

22. On behalf of the respondent, Mr. Mark Simeon Jones submits, first, that while the judge used the word "impute" in paragraph 38 of his judgment to describe his

ascribing a common intention to the parties, the exercise he was conducting was in fact the drawing of an inference from the parties' course of dealing. He points to a blurring of the distinction between "inferring" and "imputing" intention which, he submits, may be so close as to admit of no real distinction in practice. He submits that such an approach closely mirrors the drawing of an inference which, on the authority of *Jones v. Kernott*, it was entirely proper to draw in this case.

23. I am unable to accept this submission. While I would accept that "inferring" and "imputing" intention can often be confused in practice and that, as Lord Collins of Mapesbury observed in *Jones v. Kernott* at [65], what is one person's inference will be another person's imputation, it seems most unlikely that the judge was in paragraph 38 of his judgment confusing the terminology in the manner suggested. This part of his judgment had been immediately preceded by a section on the applicable law in which not only had he set out paragraph 51 of *Jones v. Kernott* in its entirety, but he had also drawn attention to and set out the discussion in that joint judgment of the observations of Lord Neuberger in *Stack v. Dowden* on this distinction.

> "26 In *Stack v Dowden* [2007] 2 AC 432 Lord Neuberger observed, at paras 125–126:
>
> > "125. 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 v. 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.
> > "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."
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> Rimer LJ made some similar observations in the Court of Appeal in this case [2010] 1 WLR 2401, paras 76–77.
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> …
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> 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."

24. The judge would, therefore, have had clearly in mind the importance of the distinction. To my mind, however, his use of "impute" in paragraph 38 of his judgment was both intentional and appropriate. As I read this paragraph, the judge is here addressing the second stage of the analysis, namely that which seeks to determine the shares in which the parties are to own the property following a change in the basis on which their beneficial interests are held. The use of "impute" in this context is entirely appropriate. All of the members of the Supreme Court in *Jones v. Kernott* agreed that in this context the imputation of intention is entirely permissible in circumstances where it is not possible to infer the intention of the parties. I consider that paragraph 38 of the judgment of Judge Madge is entirely devoted to the quantification exercise.

25. In the alternative, Mr. Jones submits that the present state of the law does not bar the imputing of a common intention to vary the basis on which property is held. In his submission the search for a different common intention, that is the first stage of the exercise, is not limited to an actual express or inferred intention to the exclusion of an imputed intention. This is, however, an incorrect reading of the joint judgment of Lord Walker and Baroness Hale in *Jones v. Kernott* with which Lord Collins concurred. Throughout their joint judgment Lord Walker and Baroness Hale make clear that imputation is not permissible at the stage of determining whether there has been a common change of intention, but only at the second stage of determining the share of each in circumstances where inference is not possible. Thus, for example, they state at [47]:

> "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."

(I note that this further passage was also set out in full by Judge Madge in his judgment in the present case.) This approach is also apparent at [31] and [51] of the joint judgment which are set out above. Similarly, Lord Collins concluded at [64]:

> "64 I agree, therefore, that authority justifies the conceptual approach of Lord Walker and Baroness Hale JJSC 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."

26. Finally in this regard, I note that Lord Wilson left this issue open, observing at [84]:

> "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."

However, the majority in *Jones v. Kernott* held that imputation of intention was permissible only at the stage of ascertaining the shares in which property was held following the demonstration of an actual intention to vary shares in the property. The approach advocated by Mr. Jones on behalf of the respondent on this alternative ground is inconsistent with the decision of the Supreme Court in *Jones v. Kernott*.

27. I find paragraph 37 of the judgment in the present case very unclear. The appellant was unrepresented below and it is, therefore, understandable that the judge should have decided to express himself by "using lay person's language". This may provide an explanation of what has occurred here. In legal usage the term "actual common intention" employed by the judge, is wide enough to include both express and inferred intention. It seems to me, however, that the judge is here addressing the question whether there was an express agreement. The first two sentences when read in conjunction are certainly open to this interpretation. If, as seems likely, the second sentence is an amplification of the first, the conclusion that "there was no specific agreement" supports this reading. Furthermore, the evidence of the respondent and the submission of the appellant to which the judge made reference at this point of paragraph 37 are both consistent with and support this reading. In the course of her evidence the respondent had said:

> "We may have discussed it in text messages, but so far as agreement I would say no, there was no agreement."

The written submissions of the appellant included a statement that:

> "There has never been a discussion or written agreement with regards to a change in our respective beneficial shares in the property."

(I note in passing that it is clear that there were discussions with regard to a change in the beneficial shares in the property, not least those evidenced by the text messages which were before the court.)

28. On behalf of the appellant, Mr. Horton submits that the word "so" in the first sentence of paragraph 38 indicates a conclusion that it is not possible to ascertain by direct evidence or inference a common intention to vary their shares in the property. It reads:

> "Thirdly, so this is a case where it is not possible to ascertain by direct evidence or by inference what the parties' actual intention was as to the shares they would own in the property after the split."

He submits that this reflects on the meaning of paragraph 37 where the judge must be taken to have concluded that there was neither an express nor an inferred intention to vary the shares in the property. However, as I have explained earlier in this judgment, I consider that paragraph 38 is addressing the second stage of the analysis at which the court has to consider quantification of the parties' respective shares following the variation. The judge is not saying that it is impossible to ascertain by direct evidence or inference a common intention to vary the interests in the property. Rather, he is resorting to imputation as a permissible means of determining the parties' respective shares where drawing an inference as to their shared intention on this issue is not possible.

29. If I am correct in my reading of paragraphs 37 and 38 of the judgment, the judge has moved directly from considering whether there was an express common intention to vary shares in the property to considering in what shares the parties now hold the property, from concluding that there was "no specific agreement" to considering what intention must be imputed as to the shares. A critical step in the process is simply not addressed in the judgment. As we have seen, the judge was well aware of the structure laid down in *Jones v. Kernott* within which the issues should be addressed; he had just set it out in great detail in his judgment. He cannot be taken to have departed from it in the radical manner submitted by the appellant. Moreover, he must have appreciated that there would be no point in discussing the shares in which the property is held following variation if no common intention to vary had been established. In these circumstances, it is at the very least strongly arguable that the judge must be taken to have concluded that there was such a common intention. Nevertheless, this stage of the reasoning is totally absent from his judgment.

30. In these circumstances it is open to this court to consider whether a common intention to vary shares should be inferred in the circumstances of this case. It is clear from the judgments of the majority in *Jones v. Kernott* that the scope for inference in this context is very extensive indeed. (See in particular Lord Walker and Baroness Hale at [34]: "In this area, as in many others, the scope for inference is wide.") It is also significant that the majority in *Jones v. Kernott* felt able to draw an inference as to the shares in which the property should be held after the variation.

31. In the present case the weight of the evidence supports an inference that the parties intended to alter their shares in the property. Throughout the relationship the appellant was carrying on business activities. The property at 7, Stoke Newington Road, which he had owned since 1988 was owned by him in his sole name and was rented out. It was the respondent's evidence that this was "in order to supplement his income". In addition, during their relationship the appellant purchased two more properties at Otter Close where he installed tenants. These were owned by the appellant in his sole name. It was the respondent's evidence that the appellant had told her at the time he acquired them that he considered the properties as a business investment for himself. The remortgage of the property in May 2005 was entered into for the sole benefit of the appellant, in order to pay off debts which he had incurred in his personal capacity. After the repayment of the original mortgage this made available £65,600.13. Virtually all of this money went to the appellant for his personal use. In particular, the

judge found that the respondent did not receive £10,000 from the proceeds of the remortgage. The judge accepted the submission of Mr. Jones that the appellant received between 24% and 25% of the net equity, which was approximately £275,000, for his sole benefit. It was the appellant's evidence that he did not, in fact, pay off the debts to Egg and Mint as required by the terms of the remortgage. Nevertheless, the judge found that the appellant had received virtually all of the proceeds of the remortgage. A month later, in June 2005 their relationship came to an end and the appellant left the property. I consider that in those circumstances, where nearly 25% of the equity in the property had been paid to the appellant for his own purposes and the relationship ended almost immediately thereafter, there is to be inferred a common intention at that point to vary their interests in the property.

32. Between June 2005 and January 2008 both the appellant and the respondent contributed to the mortgage repayments. It was the respondent's evidence that at first the appellant continued to pay the mortgage and she made some payments to him to support this initially. However, the appellant only paid the mortgage without problem for about eight months and then his direct debit payments ceased. In total, over that period the appellant paid £22,077.12 and the respondent paid £12,552.27. After January 2008 the appellant made no further contribution to the mortgage repayments which were paid by the respondent alone. It was his evidence that prior to ceasing to pay any contribution to the mortgage he informed the respondent that the strain of paying two mortgages, one on the flat he was occupying and the other on the property, plus child care, was proving difficult and he would have to cease paying for the mortgage on the property. It was the respondent's evidence that he simply stopped paying the mortgage. These further matters support an inference that there was a common intention in June 2005 to vary their interests in the property. The appellant could only legitimately have taken this stance and acted in this way if there had been a change in the beneficial interests in the property.

33. I note that there was in evidence below a single page setting out text messages sent by the respondent to the appellant. This document was produced by the appellant. I am unable to attach any great weight to its contents. The text messages are very fragmentary and inevitably present an incomplete picture as there are 32 messages over a period of five years between November 2006 and December 2011. However, they do provide some evidence that in September 2008 the parties were discussing what their shares in the property should be.

34. For these reasons, I consider that a common intention should be inferred to the parties at June 2005 to vary their beneficial interests in the property.

35. Finally, I note, as did Lord Walker and Baroness Hale in *Jones v. Kernott* (at [35]) that in certain other Commonwealth jurisdictions legislation has conferred on the courts a limited power to vary or adjust proprietary rights in the home when an unmarried couple split up. Here, the Law Commission has made recommendations to a similar effect (Cohabitation: The Financial Consequences of Relationship Breakdown (2007), Law Commission No. 307). The Government's final response to this report is, however, still pending.

Ground 2: The learned judge was plainly wrong and/or erred in principle in holding that the shares were 85% to the Respondent and 15% to the Appellant.

36. For reasons set out above, I consider that the judge did not infer that the parties had formed a common intention to hold the property in shares of 85% to the respondent and 15% to the appellant. On the contrary, having inferred a common intention to vary their interests in the property he imputed an intention to them as to their respective shares.

37. Mr. Horton submits on behalf of the appellant that it is wholly wrong to impute a change to the shares of 75% to the respondent and 25% to the appellant in May 2005 when over the next thirty four months the appellant contributed approximately 64% of the mortgage repayments on a property in which he was not living. However, to my mind the judge's conclusion as to the intention to be imputed at that point is entirely appropriate. The appellant had received almost 25% of the equity in the property for his own use very shortly before the parties split up in 2005. This entirely warranted an adjustment of the beneficial shares in the property which reflected that change of position. Furthermore the judge was clearly correct in his conclusion that subsequent events required a further adjustment in the intention to be imputed to the parties. Here, the judge properly took account of the respective positions of the parties and, in particular, the payments made in respect of the mortgage and in respect of repairs. For reasons set out below in relation to Ground 3, I also consider that he acted correctly in taking account of payments made (or not made) in respect of the children. In this regard the contributions to the mortgage after June 2005 are particularly important. In the period from June 2005 to January 2008 the appellant paid approximately two-thirds of the mortgage contributions and the respondent one-third. However thereafter the appellant failed to contribute towards the mortgage repayments for a period of six years up to trial. In these circumstances it was clearly necessary to vary the intention to be imputed to the parties as to their respective interests in the property. The further adjustment of 10% in the respondent's favour was entirely justified by these changed circumstances.

Ground 3: The learned judge was wrong in law in taking into account any supposed lack of child support payments when quantifying the parties' respective beneficial interests.

38. On behalf of the appellant it is submitted that the judge, when imputing an intention to the parties as to the shares in which the beneficial interest in the property should be held, erred in law in taking account of the failures of the appellant to make maintenance payments for the children. Mr. Horton submits that this is not a matter which is relevant to the quantification of the parties' beneficial interests and that bringing child support issues into the process of quantification is liable to result in double counting. In particular, he submits that any monies which are owed by the appellant to the Child Support Agency ("CSA") will remain owing to the CSA notwithstanding their inclusion in the judge's assessment of the appropriate shares in the property.

39. In *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432 Baroness Hale (at [69]) emphasised the importance of the domestic context and contemplated that a very wide range of circumstances, including responsibility for children, would be relevant. Similarly in *Jones v Kernott* Lord Walker and Baroness Hale considered that, when

imputing intention as to the shares in which property was held, the whole course of dealing in relation to the property would be relevant. They emphasised (at [51]) that this concept 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. (In this regard, see also *Fowler v Barron* [2008] EWCA Civ 377; [2008] 2FLR 831 per Arden LJ at [32]).

40. I note that in *Jones v Kernott* the Deputy High Court Judge (Mr. Nicholas Strauss QC) who heard the first appeal expressed the view, obiter, that failure to contribute to the maintenance of children was a factor which could legitimately be taken into account. In doing so he referred to the speech of Baroness Hale in *Stack v Dowden* at [69] and [91]. However, on appeal to this court Wall LJ (at [51]) left to one side the defendant's failure to maintain the children on the ground that the claimant in that case had a remedy in this regard which she had chosen not to exercise. However, he observed that the defendant's failure to maintain the children might well be relevant were he to seek to charge the claimant for her occupation of the property and were the process of equitable accounting applied between them.

41. In view of the very wide terms in which the House of Lords in *Stack v Dowden* and the Supreme Court in *Jones v Kernott* described the relevant context, I consider that, in principle, it should be open to a court to take account of financial contributions to the maintenance of children (or lack of them) as part of the financial history of the parties save in circumstances where it is clear that to do so would result in double liability. However, there seems to be no danger of that in the present case. Mr. Horton pointed to the fact that monies are owed by Mr. Barnes to the Child Support Agency and makes the point that such monies will remain owing notwithstanding the fact that they have been taken into account in the assessment of the parties' fair shares in the property. However, the respondent only referred the matter to the CSA in 2013 when only their second daughter was under the age of 18. By February 2014 when the judge delivered his judgment the appellant's liability to the CSA would be limited to that single year. In the context of the case as a whole such liability is of very limited significance.

Ground 4: The learned judge was wrong in law and/or there was a serious procedural or other irregularity in his allowing the respondent, at a very late stage in the proceedings, to change her pleaded case in relation to the receipt by her of a sum of £10,000 from the proceeds of a re-mortgage in 2005.

42. Mr. Barnes applies for permission to appeal on this further ground and, in this regard, also seeks permission to adduce further evidence.

43. It had initially been the respondent's case that she had received £10,000 from the proceeds of the remortgage which she spent on the maintenance of the property. That was pleaded as an admission in her reply. However, in her witness statement which she signed on 9 December 2013 she maintained that all of the monies released by the remortgage had been applied for the appellant's benefit and that, since there were no funds available from the remortgage, she had taken out a personal loan from National Westminster Bank in April 2005 to pay for decoration of the property. That witness statement was served on the appellant at exchange of witness statements. No steps were taken, however, to amend the pleadings to take account of this change in position on the part of the respondent.

44. In his judgment the judge recorded that it was now the respondent's case that the £10,000 which she received was not part of the monies received from the remortgage, as admitted in paragraph 8 of her reply, but rather a separate loan from National Westminster Bank which she took out shortly before the remortgage. There was documentary evidence before him in a bundle dealing with National Westminster Bank loans which referred to such a loan in the sum of £10,000 with a start date of 20 April 2005 and an end date of 8 November 2006. The judge accepted that this was the source of the £10,000 and noted that the loan had preceded the remortgage which had taken place in early May 2005.

45. The appellant now seeks to challenge this finding. It is submitted on his behalf that this development took him by surprise at the trial because he had not read the respondent's statement with sufficient care in advance of the trial. He submits that he had evidence that he could have deployed to rebut the respondent's new case on this issue. He therefore seeks permission to adduce evidence in the form of a cheque stub filled out in what is presumably his handwriting and a corresponding entry in a bank statement showing a debit of £12,500 from his account. The stub reads:

> "Date: 4/5/05 Payee: Denise Remortgage £12,500 -"

46. It is said that this evidence undermines the judge's finding on this issue and that his acceptance of the respondent's case on this issue will have affected his assessment of the parties' general credibility.

47. I would refuse the application to adduce this evidence which fails to satisfy the criteria in *Ladd v. Marshall* [1954] 1 WLR 1489.

48. First, although the respondent's reply had not been amended to delete the admission that £10,000 had been received by her from the proceeds of the remortgage, her position was made clear in her witness statement which was signed by her on 9 December 2013 and served on the appellant on 17 January 2014. Exchange had been delayed as a result of the appellant's statement having been produced late. However, he was in possession of her statement some four weeks before the trial. I bear in mind that he represented himself at the trial. Nevertheless, he had ample opportunity to consider this change of position and to respond to it. If, as he subsequently claimed, he had not read the statement with care and was, as a result taken by surprise at trial, this was his own fault. There is therefore no satisfactory reason why the evidence which it is now sought to adduce could not have been produced with reasonable diligence at the trial.

49. Secondly, the evidence is not likely to have an important influence on the result of the case. In particular, the judge did not refer to this matter in the context of his findings on the appellant's credibility.

50. Thirdly, the proposed new evidence lacks probative value. During the period when the respondent was accepting that she had received £10,000 from the proceeds of the remortgage, it was never suggested by the appellant that the sum was in fact £12,500. Despite requests, the cheque itself has not been produced nor any explanation provided as to why it cannot be produced. There is no evidence of the destination of the funds. Moreover, at trial it was the appellant's evidence that the payment was made by a direct bank transfer.

51. Accordingly, I would refuse permission to adduce this further evidence and refuse permission to appeal on Ground 4.

Conclusion

52. For the reasons set out above I would dismiss the appeal.

HAYDEN J.

53. I agree.

LONGMORE L.J.

54. I agree also.