Jones v Kernott: Inferring and Imputing in Essex

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Every once in a while, English law on trusts of the family home, like a snow globe of a wintry landscape, is shaken up by another decision of the highest appellate court. The blizzard occasioned by *Stack v Dowden* in 2007[1] had not yet settled down when the decision of the Supreme Court in *Jones v Kernott* set everything swirling again.[2] While *Jones* does clarify a number of aspects of *Stack*, it also raises a new set of concerns. It is unlikely to satisfy those who, somewhat paradoxically, feel that the legislature's explicit decision not to proceed with reform in respect of the property rights of cohabitants[3] provides a warrant for radical judicial law-making. References to imputed common intention in *Stack* had raised hopes in some observers that English law was moving towards some great leap forward. However, *Jones* is no *Pettkus v Becker*[4] or *Baumgartner v Baumgartner*.[5] The decision appears to limit the imputation of openly fictional common intentions to the relatively uncontroversial context of quantifying the parties' shares under a constructive trust in cases where a common intention has been found to exist which does not specify precisely the respective shares. While not signalling any radical new departure in terms of claimants' prospects, *Jones* also fails to deliver in terms of doctrinal coherence. New levels of artificiality are introduced by the insistence by a majority of the Supreme Court that the 'objective' process of inferring common intentions from the conduct of the parties has a very broad scope, so as to rival imputation in practical terms. This note begins by considering the decision in *Jones* itself, arguing that it is questionable whether it was correct on the facts. It then looks in turn at the significance of *Jones* in respect of imputing and inferring common intentions.

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[1] [2007] UKHL 17, [2007] 2 AC 432.
[2] [2011] UKSC 53, [2011] 3 WLR 1121.
[3] Note the recommendations of the Law Commission: *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007), upon which it is not proposed to act during the current parliamentary term: written statement by Parliamentary Under-Secretary of State, Ministry of Justice (Jonathan Djanogly), House of Lords, 6 September 2011.
[4] [1980] 2 SCR 834 (Supreme Court of Canada).
[5] (1987) 164 CLR 137 (High Court of Australia).

The Decision

The parties in *Jones v Kernott* lived together for around ten years, from 1983 to 1993. For most of this time, they lived in a house in their joint names, 39 Badger Hall Avenue in Essex. The claimant, Patricia Jones, was a 'mobile hairdresser' and the defendant, Leonard Kernott, worked as a self-employed ice cream salesman during the summer and, in the winter, either claimed benefit or worked as a builder. The house was purchased in 1985 for £30,000. The claimant contributed £6,000 from the sale of a mobile home and the remaining £24,000 was borrowed on the security of an endowment mortgage. In 1986, a further £2,000 was borrowed for an extension to the house, which was largely carried out and paid for by the defendant and which increased the value of the property by around 50%. The parties earned around the same amount, and shared household bills and mortgage repayments. They had two children, born in 1984 and 1986.

The relationship between the parties ended in October 1993. The defendant moved out and the claimant remained in the home with the children. The claimant assumed sole responsibility for the maintenance of the property and for the repayment of the mortgage. She made no application to the Child Support Agency and the defendant made no offer to provide maintenance for the children. The property was put on the market in October 1995 for around £70,000 but did not sell. Around this time, the parties agreed to cash in a jointly owned insurance policy (not associated with the house) and the proceeds were divided equally. The defendant used his share as a deposit on a house, 114 Stanley Road, also in Essex. The purchase price for this house was around £57,000, with a mortgage of over £54,000. The claimant used her share of the proceeds to pay for 'some cosmetic surgery'.[6] In 2006, many years after the parties had separated, the defendant initiated correspondence with a view to realising his share in 39 Badger Hall Avenue. The claimant started proceedings in 2007, claiming that she was the sole beneficial owner of that property. In May 2008, the defendant purported to sever the joint tenancy over the property by means of a formal notice.

[6] [2010] EWCA Civ 578, [2010] 1 WLR 2401 [82] (Rimer LJ).

At first instance, before Judge Dedman in the County Court, it was common ground that the parties had held the beneficial interest in 39 Badger Hall Avenue jointly at the time of their separation.[7] However, the claimant's argument was that subsequent events, including the defendant's purchase of another property, indicated that the parties' intentions as to the beneficial ownership of 39 Badger Hall Avenue had changed. Judge Dedman accepted this and decided that the claimant was entitled to 90% of the value of that property. This decision was upheld on appeal to Nicholas Strauss QC, sitting as a deputy judge of the High Court. On further appeal, the majority of the Court of Appeal (Wall and Rimer LJJ, Jacob LJ dissenting) overturned this decision and held that the parties were entitled to 39 Badger Hall Avenue in equal shares. On a third and final appeal, the Supreme Court disagreed with the Court of Appeal and unanimously restored the decision of the lower courts.

The leading judgment was given by Lord Walker and Lady Hale (with whose reasons Lord Collins agreed, although delivering his own judgment). In dealing with 'the first question' which arises in respect of the common intention constructive trust doctrine, as to whether there was a common intention that the beneficial interests would differ from the legal title, these judges concluded that it was possible to infer from the behaviour of the parties that, after their separation, they had formed such a common intention. Lord Wilson took the same view,[8] as apparently did Lord Kerr (although this is not entirely clear).[9]

Lord Walker and Lady Hale, with whom Lord Collins agreed, were satisfied that it was also possible to infer a common intention in relation to 'the second question', as to what the respective beneficial interests were to be. Lord Walker and Lady Hale explained that, after the house was put on the market in 1995 but did not sell, 'a new plan was formed' whereby Mr Kernott would purchase a home for himself and would not have to contribute to the mortgage and other outgoings on 39 Badger Hall Avenue. According to these judges:

[7] [2011] UKSC 53 [43] (Lord Walker and Lady Hale).
[8] [2011] UKSC 53 [84].
[9] While Lord Kerr was not as explicit as the other judges in distinguishing between the first and the second questions, it seems his discussion at [2011] UKSC 53 [70]-[77] should be taken as referring to the secondary issue of quantification.

> 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.'[10]

Lord Walker and Lady Hale went on to undertake a 'rough calculation on this basis' which 'produces a result so close to that which the judge produced that it would be wrong for an appellate court to interfere'.[11] Therefore, they upheld 90%/10% division which has already been mentioned.

Lord Wilson regarded it as 'more realistic' to conclude that it was not possible to infer that the parties had an actual common intention in terms of the secondary question of quantification. He preferred to reach the equivalent result by means of imputation.[12] Similarly, Lord Kerr felt that 'the bare facts of [the defendant's] departure from the family home and acquisition of another property are a slender foundation' for the necessary inference.[13] Therefore, he too thought it preferable to deal with the quantification issue on the basis of imputation, thereby reaching the same result as the other judges.[14] Lord Walker and Lady Hale (with whom Lord Collins agreed) would also have been willing to reach this result by means of imputation, if they had felt that no common intention as to shares could be inferred, since they believed that it was the intention which 'reasonable people would have had had they thought about it at the time'.[15]

The Wrong Result?

The actual decision in the case is open to criticism on two grounds. First, the basis for the trial judge's crucial inference that there was a common intention that the beneficial interests would differ from the legal title was that 'whilst the intentions of the parties may well have been at the outset to provide them as a

[10] [2011] UKSC 53 [48].
[11] [2011] UKSC 53 [49].
[12] [2011] UKSC 53 [89].
[13] [2001] UKSC 53 [76], referring to the similar view expressed by Nicholas Strauss QC [2009] EWHC 1713 (Ch), [2010] 1 WLR 2401 [48].
[14] [2011] UKSC 53 [77].
[15] [2011] UKSC 53 [48].

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'.[16]

However, the intentions discussed here by the trial judge appear, in fact, to relate to the planned use of the land, rather than to the question of the beneficial entitlement. There is an obvious difference between not 'intending to avail' oneself of beneficial ownership (by using and occupying the property) and intending to give up one's valuable beneficial interest. It was made clear by the House of Lords in *Lloyds Bank v Rosset*, in rejecting the trial judge's finding of a common intention in that case, that a common intention between the parties as to how the disputed property would be used 'throws [no] light on their intentions with respect to the beneficial interest in the property'.[17] In fact, Mr Kernott stated that he had 'periodically broached the subject [of the house] with Ms Jones' and had always been told that 'you will get your share when I am ready', so that he had decided not to press the matter until the children were older.[18] In the Court of Appeal, Wall LJ took the plausible view that it was not possible to infer, from the actions of the parties, the common intention found by the trial judge that the beneficial interests were to change. In fact, '[i]f anything' he found 'equal interests on separation and an agreement by the defendant to defer realisation for a number of years'.[19] The fact the Supreme Court concluded that 'the inferences are not difficult to draw'[20] and arrived at a quite different common intention, illustrates the uncertain nature of the process of inference (which will be discussed in more detail below).

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[16] This part of the judgment of Judge Dedham was quoted by Lord Walker and Lady Hale [2011] UKSC 53 [40].
[17] [1991] 1 AC 107, 130C-D (Lord Bridge).
[18] [2010] EWCA Civ 578 [78] (Rimer LJ).
[19] [2010] EWCA Civ 578 [62].
[20] [2011] UKSC 53 [48] (Lord Walker and Lady Hale). Note that there was no mention of what Lord Walker described in *Stack v Dowden* [2007] UKHL 17 [14], referring to Lady Hale's remarks [2007] UKHL 17 [68], as the 'considerable burden' upon a claimant seeking to show that the beneficial interests differ from the legal title in a joint names case (of which *Jones* was, admittedly, an unusual example).

It is also possible to criticise the decision in the case on the basis of the suspect mathematics underlying it. The effect of regarding Mr Kernott's share as having 'crystallised' in 1995 is that the capital represented by his share, although invested in real property over a period when house prices went up more than three-fold, was regarded as having generated a return of zero per cent over the relevant period. The judgments assume that it was fair for Mr Kernott to have 'the sole benefit of any capital gain in his own home, [while] Ms Jones would have the sole benefit of any capital gain in Badger Hall Avenue'.[21] However, this ignores the fact that Mr Kernott's money was left in Badger Hall Avenue, contributing to Ms Jones' capital gain rather than to his own (and meaning that the mortgage on his new home was almost twice as great as it would have otherwise have been). Taking the Badger Hall Avenue house to be worth £70,000 in late 1995, with the mortgage loan representing a liability of around £20,000 at that point, each party's equity was worth about £25,000. Thus, each was entitled to roughly 35% of the total value of the property, with the mortgage liability representing the other 30%. Since Ms Jones made all the remaining mortgage repayments it might be reasonable that she would become entitled to all the increase in the value of the property attributable to the proportion represented by the outstanding mortgage, as well as to the increase represented by her own 35% share in the equity. But why should she be credited with the 35% of the increase represented by Mr Kernott's 35% share? If one were to allocate Mr Kernott 35% of the ultimate value of the house, he would have been entitled to roughly £72,000, far more than the share worth £25,000 to which the Supreme Court felt he was entitled.[22]

These calculations suggest that, if inference in respect of quantification were regarded as impossible on the facts (and Lord Walker and Lady Hale's idea that an unspoken 'plan' had existed between these estranged cohabitants seems highly implausible) and the courts were obliged instead to determine a fair share

[21] [2011] IESC 53 [48].

[22] It could be argued that Mr Kernott's share should have been reduced because of his limited contribution towards the rearing of his children. This point was not emphasised by the Supreme Court and note Wall LJ's view in the Court of Appeal that 'the claimant had a remedy in this regard which she chose not to exercise': [2010] EWCA Civ 578 [51]. The issue was regarded as 'possibly controversial' and 'not … a major factor' in the High Court: [2009] EWHC 1713 (Ch) [50] and [52] (Nicholas Strauss QC).

in light of the whole course of dealing with the property, Mr Kernott could have been entitled to a fraction which, although less than the 50% which he claimed, would be much greater than the 10% with which he ended up. At a more fundamental level, the logic behind these calculations reinforces the view that it was not realistic to infer a common intention in respect of the first question as to whether the beneficial interests were intended to differ from the legal title. The current author's preferred resolution of the case would have been that favoured by the Court of Appeal, involving vindicating the defendant's right to an equal share in the beneficial interest, subject to the application of the principles of equitable accounting. The judgment of Lord Walker and Lady Hale appears to indicate a distaste for the application of these principles.[23] However, it is difficult to see why issues of equitable accounting should invariably be swept up into a 'fairness' quantification process under the common intention analysis, with expenditure related to the property always leading to an increased fractional share instead of monetary compensation.

Having considered issues relating to the decision in the case itself, the discussion now turns to an assessment of the significance of *Jones* in respect of the two key concepts of imputation and inference.

Imputation

The conventional view of the distinction between inference and imputation was stated by Lord Neuberger in *Stack*:[24]

> '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.'

However, also in *Stack*, Lord Walker had offered some unexpected observations in respect of inference and imputation, calling into question the conventional

[23] [2011] UKSC 53 [50].
[24] *Stack* [2007] UKHL 17 [126].

understanding that there was a clear distinction in principle between the two concepts.[25] In her leading speech in *Stack*, to which Lord Walker regarded his own speech as merely 'a sort of extended footnote',[26] Baroness Hale also appeared to envisage the imputation of common intention, referring at one point to ascertaining 'the parties' shared intentions, actual, inferred or imputed'.[27] Lord Neuberger, on the other hand, reacted strongly against the idea to imputation[28] (as subsequently did Rimer LJ in the Court of Appeal in *Jones v Kernott*).[29] In the wake of *Stack* (and the decision of the Privy Council in *Abbott v Abbott*),[30] one view was that it was now permissible for the courts to impute a common intention, even in respect of the first question as to whether the beneficial interests should differ from the legal title.[31]

Lord Walker and Lady Hale saw *Jones v Kernott* as providing an opportunity to 'revisit' *Stack* and to provide 'some clarification'[32] (and, indeed, their judgment devotes considerable attention to *Stack* before getting around to the facts of *Jones* itself). They conceded '[i]n deference to the comments of Lord Neuberger and Rimer LJ … that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct'.[33] Given their stated desire to provide clarity, it is unfortunate that it is not more emphatically stated in the judgment of Lord Walker and Lady Hale that imputation is not permissible in respect of the first question. On the whole, however, the point appears to emerge clearly from their judgment. In their summary of the law, it is stated that, in respect of the first question, the common intention of the parties is to be 'deduced objectively' from their conduct, which is clearly a reference to inference, as is confirmed by a reference to 'such

[25] [2007] UKHL 17 [20]-[21].
[26] Ibid [15] (Lord Walker). Given that Lord Walker and Lady Hale jointly gave the leading judgment in *Jones*, it is possible that Lord Walker's speech in *Stack*, although none of the other judges in the case formally expressed agreement with it, may retrospectively be conferred with *de facto* joint majority status alongside that of Lady Hale: see *Jones* [2011] UKSC 53 [60] (Lord Collins), summarising '[t]he reasoning of Baroness Hale and Lord Walker, taken together, in *Stack v Dowden*'.
[27] [2007] UKHL 17 [60].
[28] [2007] UKHL 17 [125]-[127].
[29] [2010] EWCA Civ 578 [77].
[30] [2007] UKPC 53.
[31] See Gardner 'Family Property Today' (2007) 124 LQR 422.
[32] [2011] UKSC 53 [1] and [2] (Lord Walker and Lady Hale).
[33] [2011] UKSC 53 [31].

inferences' in their next sentence.[34] There is no reference to the possibility of imputation, as there surely would have been if they had regarded it as permissible in respect of the first question.[35] Lord Collins stated plainly that imputation was not permissible in respect of the first question and that this was the approach of Lord Walker and Lady Hale.[36] Even Lord Wilson, who showed great enthusiasm for the idea of imputation in respect of the second question, went no further than stating that the question of whether imputation was permissible in respect of the first question did not arise on the facts of *Jones* and that it would 'merit careful thought'.[37]

Lord Walker and Lady Hale stated that there were 'at least two exceptions' to the focus on actual intentions.[38] One was where the presumption of resulting trust was applied, which would be rare in the domestic context. The second, which they felt was of more practical importance, was that imputation was permissible in relation to the second question, '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'.[39] In this situation, 'the court is driven to impute an intention to the parties which they may never have had'.[40] According to Lord Walker and Lady Hale, adopting the formulation of the test by Chadwick LJ in *Oxley v Hiscock*,[41] the result of the process of imputation would be 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'.[42] In *Stack*, Lady Hale – although regarding the two formulations as expressing 'essentially the same thought' – had preferred an alternative formulation of the relevant test, whereby the court would undertake 'a survey of the whole course of dealing between the parties and taking account

[34] [2011] UKSC 53 [51](3).
[35] See also [2011] UKSC 53 [33] (Lord Walker and Lady Hale).
[36] [2011] UKSC 53 [64].
[37] [2011] UKSC 53 [84]. The better view of Lord Kerr's judgment seems to be that he did not regard imputation in respect of the first question as permissible, although his judgment does not distinguish explicitly between the two stages.
[38] [2011] UKSC 53 [31].
[39] [2011] UKSC 53 [31].
[40] [2011] UKSC 53 [31].
[41] [2005] Fam 211 [69].
[42] [2011] UKSC 53 [51].

of all conduct which throws light on the question what shares were intended'.[43] In *Jones*, Lord Walker and Lady Hale stressed that, '"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'.[44] This seems to suggest a continued desire on the part of Lady Hale to emphasise the similarities between the search for 'imputed' and 'actual' intentions.

In his judgment, Lord Wilson made much of the proposition that the test in respect of the second question involved imputation. He regarded Chadwick LJ in *Oxley v Hiscock*[45] as having been 'emboldened' by developments since *Gissing* and as having seen 'fit to reassert the power to impute'[46] which had been rejected by the House of Lords in *Pettitt v Pettitt*[47] and *Gissing v Gissing*.[48] He also referred to Lady Hale's 'ground-breaking' speech in *Stack*[49] and trumpeted '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' which meant that common intentions can be imputed.[50] It must be suspected that, for Lord Wilson, the acceptance of imputation at the second stage gets its foot in the door, so to speak, thus opening up the possibility of also utilising it where it would make a difference, in respect of the first question.

Except for the tactical purpose which may have been in Lord Wilson's mind, it is difficult to see the value in references to imputation in the quantification context. The same practical result in that context can be reached without reference to the concept of imputation, as is witnessed by the summary of the law at the end of the judgment of Lord Walker and Lady Hale which does not employ the term at all.[51] In *Oxley v Hiscock*, Chadwick LJ had referred to the

[43] [2007] UKHL 17 [61].
[44] [2011] UKSC 53 [51].
[45] [2005] Fam 211.
[46] [2011] UKSC 53 [83].
[47] [1970] AC 777.
[48] [1971] AC 886.
[49] [2011] UKSC 53 [85].
[50] [2011] UKSC 53 [78].
[51] [2011] UKSC 53 [51].

idea of imputation in this situation as 'artificial – and an unnecessary fiction'[52] and, in *Jones*, Lord Kerr convincingly developed the point as follows:

> [I]n 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.[53]

In the end, one can only regret the discussion of imputation in *Stack* and *Jones*, which seems to have confused matters greatly without bringing any greater theoretical coherence to the common intention doctrine. It seems circular to invoke imaginary intentions which the court has devised on the basis of what it thinks would be fair as a justification for a test which looks to what the court thinks would be fair. A more promising line of argument in terms of the quantification issue involves drawing an analogy with estoppel. Unfortunately, after being overstated in the past, this analogy has now been discarded too casually.[54] There seems to be a strong argument that, where there is no common intention as to quantification, the remedy should reflect the extent of the detriment suffered by the claimant in reliance upon the common intention.[55] This type of approach would be fairly close to that favoured in *Jones* but could more satisfactorily be justified by reference to principle.

Inference

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[52] [2005] Fam 211 [71].
[53] [2011] UKHL 53 [74]. Lord Kerr concluded, however, that 'imputing intention has entered the lexicon of this area of law and it is probably impossible to discard it now': [2011] UKHL 53 [74].
[54] Note Lord Walker's comments in *Stack* [2007] UKHL 17 [37].
[55] Or, if this is regarded as preferable, the remedy should be determined on the basis of a wide judgmental discretion which would be guided by the type of factors identified in *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 but in which, in reality, the question of detriment would normally play a central role.

While all the judges in *Jones* appeared to accept Lord Neuberger's statement in *Stack* of the distinction between imputed and inferred common intention (quoted above),[56] differing opinions were expressed as to the practical significance of the distinction. Lord Walker and Lady Hale suggested that 'while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great'.[57] Lord Collins accepted this point, arguing that 'in the present context the difference between inference and imputation will hardly ever matter' and 'what is one person's inference will be another person's imputation'.[58] However, Lord Kerr stated that he was less inclined to agree 'that the divergence in reasoning is unlikely to make a difference in practice'[59] and Lord Wilson felt that the observation of Lord Walker and Lady Hale 'as a generalisation … goes too far'.[60] This difference of opinion seems to be explicable, to an important extent, by the expansive view of inference favoured by Lord Walker and Lady Hale and by Lord Collins.

Lord Walker and Lady Hale argued that:

> '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.'[61]

To justify this proposition, the judges quoted the following key passage from Lord Diplock's speech in *Gissing*:

> '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

[56] [2011] UKSC 53 [26]-[36] (Lord Walker and Lady Hale); [64]-[65] (Lord Collins); [73]-[75] (Lord Kerr); [79]-[84] (Lord Wilson).
[57] [2011] UKSC 53 [34].
[58] [2011] UKSC 53 [65].
[59] [2011] UKSC 53 [67].
[60] [2011] UKSC 53 [89].
[61] [2011] UKSC 53 [34].

> intention in his own mind or even acted with some different intention which he did not communicate to the other party.'[62]

However, there is no question, under Lord Diplock's formulation, of attributing to the parties an intention that does not reflect either party's understanding of the situation, on the basis of some extreme 'fly on the wall' version of objectivity. It is necessary both that A understands that B has the relevant intention and that this understanding on A's part is reasonable (since each party's intention is that 'which was reasonably understood by the other party to be manifested by that party's words or conduct'). Thus, on the facts of *Jones*, the question would be whether Ms Jones reasonably understood, from his statements and conduct, that Mr Kernott intended that the beneficial interests would differ from the legal title (and, in respect of the second question, whether she understood him to have a particular intention in respect of what the different beneficial interests would be). If Ms Jones did not take Mr Kernott to be communicating an intention that her share would be increased then it should not matter that a reasonable person in her shoes (or the court) would have reached a different understanding.[63]

The version of inference favoured by Lord Walker and Lady Hale seems to involve introducing more than one further level of 'objectivity'. Instead of looking at what the claimant actually (and reasonably) took the defendant to intend, the test seems to look at what a reasonable person in the position of the claimant would have taken the defendant, in light of his conduct and all the surrounding circumstances, to have intended. However, in many cases, it is doubtful that a reasonable person would be justified in concluding that the defendant had any intention at all in relation to ownership. If the reasonable person had a realistic understanding of the likely thought processes of cohabitants, he or she would often conclude that the defendant had most likely given no thought at all to the separate entitlements of the parties (or, depending on the personality of the defendant, had instead made some self-serving assumption which would give the defendant a greater share than would be

[62] [2011] UKSC 53 [34], quoting *Gissing v Gissing* [1971] AC 886, 906.
[63] See further J Mee 'Joint ownership, subjective intention and the common intention constructive trust' [2007] Conv 14, 18-21.

'fair').[64] Therefore, it seems that it would be necessary to look instead at what a reasonable person in the shoes of the claimant would have taken a reasonable person (in the sense of 'fair-minded' or 'reasonably accommodating', rather than 'rational and utility-maximising') in the shoes of the defendant to have had. At this point, however, the analysis has completely parted company with reality, since the real parties have both been kidnapped and replaced by 'Stepford' cohabitants, and it is pointless to pretend that the court is deducing 'actual' intentions from the conduct of the parties.

Lord Collins appeared to take Lord Walker and Lady Hale's expansive view of the process of inference even further, commenting as follows:

> '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.'[65]

The logic of these remarks is questionable. If one is genuinely seeking the actual intentions of the parties, why would it not be possible to infer an 'unfair' common intention? There seems to be no reason why the parties' conduct might not sometimes reveal the existence of a tacit agreement that the beneficial interests would differ from the legal interests which might appear to the court to be 'unfair' because it favours one party over the other without apparent justification. One of the parties may have a strong personality and the parties may not be in an entirely equal relationship in emotional terms or they may form intentions on a basis which makes sense to them but which does not fit with what the court would regard as 'fair'. It should not be forgotten that the fact that

[64] In fact, which is a somewhat different point, a reasonable person would frequently conclude that the defendant's conduct, assuming it did not involve any explicit statements on the matter, did not provide enough evidence to safely reach any conclusion as to his or her intention on the matter.
[65] [2011] UKSC 53 [66].

the courts are courts of 'justice' as well as of 'law' has not prevented them from routinely enforcing express declarations of the beneficial interests in family homes without applying a filter based on fairness.[66] Furthermore, even if it were somehow true that the courts would never infer the existence of an unfair common intention from the parties' conduct, there is the obvious possibility that no common intention at all in respect of the first question could be inferred from their conduct, leaving the claimant without a remedy. In such a case, notwithstanding Lord Collins' view, it would clearly make a decisive difference if the court were authorised to impute a 'fair' common intention.

Overall, it is not easy to see any justification in principle for preferring the majority's distorted version of inference to 'an ordinarily rigorous approach to the task of inference'.[67] However, it is less difficult to see a possible tactical motivation for the argument. In relation to the first question in the inquiry, imputation is not permissible and, if there is no express common intention, the only option is inference from conduct. An expansive vision of inference – although it would make little or no practical difference in respect of the second question – would enable a common intention to be found more frequently at the first stage (particularly in relation to single name cases). Thus, following in the footsteps of Lord Diplock in *Gissing*, who developed the unprincipled and convoluted common intention doctrine in a well-meaning attempt to improve the chances of claimants, these judges may have been willing to sacrifice much of the limited coherence of the doctrine in order to give the court a greater degree of flexibility to provide remedies where it appears just. This is the type of reasoning which recently led the Supreme Court of Canada to reject the common intention trust as 'doctrinally unsound' and to condemn 'often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result'.[68]

It seems significant in this context that Lord Walker and Lady Hale emphasised that, in this area, 'appellate courts will be slow to overturn the trial

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[66] *Goodman v Gallant* [1986] Fam 106. Note *Clarke v Meadus* [2010] EWHC 3117 (Ch), which contemplates the possibility of a challenge to an express declaration of trust but on a far more specific basis than mere 'unfairness'.
[67] [2011] UKSC 53 [89] (Lord Wilson). See also [2011] UKSC 53 [72] (Lord Kerr).
[68] *Kerr v Baranow* [2011] SCC 10, [2011] 1 SCR 269 [25], [28] (Cromwell J).

judge's findings'.[69] It would take a rather optimistic outlook to regard this as reflecting a justifiable conclusion that the law in this area is clear and easily applicable by lower courts, so that the primary area of difficulty will lie in interpreting the facts, which a lower court will be in a better position to do. On a more pessimistic view, the statement hints at an abdication by the Supreme Court of responsibility for the creation of doctrinal coherence in this area.

Conclusion

Three of the four judgments in the Supreme Court mentioned the fact that the legislature had not yet implemented the Law Commission's proposals for legislative reform in relation to the position of cohabitants upon the termination of their relationship. Lord Walker and Lady Hale noted that '[i]n the meantime there will continue to be many difficult cases' for the courts to resolve.[70] It is worth pointing out, though, that it seems fairly unlikely that any of the legislative schemes which have been enacted in various common law jurisdictions would have been available in respect of the actual claim in *Jones*. The case did not, in the usual sense, involve a dispute between cohabitants at all. Although the parties had previously lived together for around ten years, the relevant action was initiated some fourteen years after the relationship between the parties had come to an end. All the key events occurred after the parties had become estranged. Existing legislative schemes are primarily focused on events during the cohabitation and claims under them are subject to relatively strict time limits. For example, the scheme applicable in Scotland requires applications to be made within one year of the termination of the relationship,[71] while the scheme proposed by the Law Commission (like that enacted in Ireland)[72] requires a claim to be made within two years of the end of the cohabiting relationship, other than in exceptional circumstances.[73]

This demonstrates that the impact of the Supreme Court's development of the common intention trust is by no means limited to the quasi-matrimonial

[69] [2011] UKSC 53 [36].
[70] [2011] UKSC 53 [36].
[71] Family Law (Scotland) Act 2006, s 28(8).
[72] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s 195.
[73] *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) pp 100-102.

situation. It seems that whenever the parties can be regarded as operating in the 'domestic' context, as distinct from the world of 'commercial men',[74] they are liable to be subjected to the special regime envisaged by the Supreme Court in *Jones* under which two artificial forms of intention are recognised ('objectively' inferred, and imputed) and are translated into trusts with no need being felt for a reasoned elaboration of the grounds for ignoring the statutory formalities in s 53(1) of the Law of Property Act 1925.

Despite Lord Collins' hope that the case would 'lay to rest the remaining difficulties',[75] the judgments in *Jones* do not inspire much hope that Dixon's 'never-ending story'[76] will suddenly end happily. A fair amount of the intellectual energy in the judgments in *Jones* seems to have been devoted to putting out the fires caused by *Stack*. Beyond attempting to clarify, or merely reiterating, points that had already been made in *Stack*, the major contribution of *Jones* seems to relate to the appropriate nature of the process of inference. Unfortunately, on this point, it seems clear that the minority took the preferable position. In respect of imputation, notwithstanding the outward appearance of some serious difference of opinion, there was not actually much between the position of the majority and that of Lord Wilson, given that Lord Wilson went no further than reserving his position on the possibility of imputation in relation to the first question. In the end, the somewhat unusual facts of the case, and the 'proportionate approach'[77] of the parties' legal advisors in not suggesting that the Supreme Court should depart from the principles laid down in *Stack*,[78] limited the potential for *Jones* to revolutionise this area of the law. It must be acknowledged too that the courts find themselves in a bind. The essential problem is that an approach which conscientiously focuses on genuine intentions would provide a remedy in a very limited set of circumstances, while an approach which moves beyond real intentions seems to involve impermissible judicial law-making.

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[74] *Stack* [2007] UKHL 17 [42] (Lady Hale). *Cf* the remarks of Etherton LJ in *Crossco No.4 UnLtd v Jolan Ltd* [2011] EWCA Civ 1619 [85]-[88].
[75] [2011] UKSC 53 [58].
[76] M Dixon 'The Never-Ending Story – Co-Ownership after Stack v Dowden" [2007] Conv 456.
[77] [2011] UKSC 53 [50] (Lord Walker and Lady Hale).
[78] [2011] UKSC 53 [2] (Lord Walker and Lady Hale).

Lord Collins noted that, if it proved necessary to reconsider the correctness of *Stack* in a future case, '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)'.[79] If such a court were assembled, assuming the right case cropped up, there would be much for it to consider. Even if *Jones* could be regarded as resolving satisfactorily the issues with which it dealt (which is not the current author's view), it should be remembered that it was, like *Stack*, a joint names case, so that the position in relation to sole name cases remains to be tested in detail.[80] Moreover, it is still unclear what is to become of the purchase money resulting trust outside the family context. Lord Walker and Lady Hale took the view that '[t]he 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' and they added the loaded comment that '[w]hether they remain appropriate in other contexts is not the issue in this case'.[81] Thus, the future of the purchase money resulting trust seems to be in real doubt. All of this suggests that, even after *Jones*, there is much more to come from the common intention constructive trust. This does not seem an appetising prospect.

[79] [2011] UKSC 53 [58].
[80] Note the discussion of such cases [2011] UKSC 53 [16]-[17] (Lord Walker and Lady Hale).
[81] [2011] UKSC 53 [53].