



## Living together: what now?

### Introduction

The long-awaited judgment in the case of Ms Jones and Mr Kernott was released by the Supreme Court on 9 November. In the absence of clarity through new legislation, many have been waiting for guidance on how to deal with an increasing problem in today's society: dealing with property disputes when unmarried couples separate.

Unmarried couples still have very limited rights to make claims against each other's property when they separate, but the Supreme Court has now given some additional opportunities to make claims, in limited circumstances.

This is a complex area of property and trust law, and it is disappointing that, far from giving clarity, the new Supreme Court judgment adds another layer of uncertainty and legal complexity for separating couples.

This briefing note reflects on what has arisen from Jones v Kernott and what the implications are for unmarried couples.

### Jones v Kernott

Ms Jones and Mr Kernott met in 1980 and lived together for ten years from 1983 to 1993. They had two children together but were never married.

In 1985, Ms Jones purchased a property in joint names with Mr Kernott for £30,000; £6,000 came directly from the proceeds of sale from Ms Jones' previous home with the balance from a joint mortgage. Although the house was in joint names, there was never any express agreement as the percentage of their respective shares.

Ms Jones paid the mortgage instalments and Mr Kernott paid towards household expenses. In 1986 they took out a joint loan and extended the property. It was accepted that this enhanced the value of the house.

The parties separated in 1993 when Mr Kernott moved out of the property. He made no subsequent contribution towards the mortgage, household costs or child maintenance.

A joint life policy was later encashed in 1995 and the proceeds divided equally, from which Mr Kernott purchased his own property.

Both accepted that at the point of their separation, they each had an equal share in the property. The question to be determined was whether that had changed by the time Mr Kernott claimed his interest in the property some 13 years later.

At first instance, and having regard to the facts of this case the court decided that Mr Kernott's interest in the property had reduced from 50% to 10%. That was upheld on the first appeal.

However, when Mr Kernott appealed again, the Court of Appeal felt that the lower courts were wrong and that Mr Kernott indeed had a 50% share in the property. Mr Kernott believed that was fair, on the basis that Ms Jones had had the benefit of using the property during their separation, which he saw as a benefit to her and their children.

Unanimously, however, the five judges of the Supreme Court restored the original judgment that left Ms Jones with 90% and Mr Kernott with a 10% interest in the property.

### Jointly owned properties

The leading judgment states that unless there is an express agreement when a property is purchased in joint names, the presumption, regardless of 'who put in what' is 50:50 ownership.

If one party claimed more than half, they would need to prove that both parties had a common intention that the property was owned other than equally. If that could not be proved, the court could have regard to the parties' conduct, looking at the 'whole course of dealings' between them. If and only if the parties' conduct was not in itself evident – then the court could impute to the parties the court's own interpretation of what it considered to be fair.

This is what happened in Jones v Kernott. The court imputed an intention to vary the interests from 50/50 to 90/10, on the basis that Mr Kernott had been absent from the property for over 13 years and had failed to make any financial contribution during that time.

## Properties owned in sole name

The present case concerned a jointly owned property. However, the Supreme Court did indicate that if the property was registered in the name of just one of the parties then, providing that some beneficial interest could be established by the non-owning individual, the court could once again impute its own version of intention/fairness, having regard to all the circumstances.

## What do we take from this?

It has been widely reported that this is a landmark judgment which brings cohabitants' rights closer to those enjoyed by married couples. It certainly does not go that far. However it does now enable the court to introduce an element of discretion to the exercise and impute fairness into what was previously viewed as an area of law which was based on strict property rights.

There are still however stark limitations on what the court can impose, and it is to be expected that the fairness principle will only be applied in limited circumstances.

Importantly also, proving ownership through the courts in this way is likely to be risky and uncertain, as the judgment contains no clear rules.

## Our advice

If nothing else, this case makes it very clear that anyone who is unmarried and is:

- (a) purchasing a property in joint names; or
- (b) owns their own property and is living with someone; or
- (c) is thinking about moving into a property owned by their partner;

must take legal advice about how the property will be owned, at the outset.

**Do not leave things to chance.** Ensure that whatever is agreed is properly recorded. It was only because the parties had failed to express clearly in writing or agreed what they intended that the court was able to impute what it viewed to be fair. This can easily be achieved by a Declaration of Trust or a Cohabitation Agreement. Provide some certainty.

**Do not delay!** By the time the Supreme Court gave judgment in the case, Mr Kernott had been out of the property for 18 years. It was agreed that had he asserted his claim when they first separated, that he would have had an equal share in the property. It was because of the delay and the parties' subsequent conduct that the judges imposed their view and reduced Mr Kernott's share to 10%.



**Ashley Palminteri**  
Senior Associate

+44(0)117 902 7761  
ashley.palminteri@burges-salmon.com

Editor of Resolution's Guide to  
Cohabitation Claims



**Tom Boyce**  
Associate

+44(0)117 902 7710  
tom.boyce@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
Chancery Exchange, 10 Furnival Street, London EC4A 1AB Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266

[www.burges-salmon.com](http://www.burges-salmon.com)

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