

1. Is the *Lloyds Bank v Rosset* approach of dividing trusts of the family home into two distinct categories helpful?

Suggested Answer

See 17.4 and the whole chapter.

Lloyds Bank plc v Rosset [1991] 1 AC 107 said that there were two types of common intention constructive trust here. The first was based on an oral agreement and acting to one's detriment in reliance upon it. The second depended upon direct financial contributions. Before *Lloyds Bank plc v Rosset* [1991] 1 AC 107 the courts did not divide trusts of the family home into two distinct categories, as can be seen in the earlier House of Lords case *Gissing v Gissing* [1971] AC 886. (see 17.3 and 17.7.) The idea in *Rosset* was to summarize the law at that point and provide a starting point for deciding whether a person has a claim. Unfortunately, it did create some problems in the law. Before *Rosset* there was no insistence that there had to be an express oral agreement and indirect financial contributions were acceptable: (See *Gissing v Gissing* [1971] AC 886) So a claim could now fall between the two categories, e.g. a claimant might have acted to his detriment in many ways and made significant indirect financial contributions, but if there is no oral agreement she would have no claim. Also, *Lloyds Bank v Rosset* gave no guidance upon how to quantify the relative size of the shares, so we were forced, once again, to go back to *Gissing v Gissing* [1971] AC 886. It has taken another series of cases, culminating in *Stack v Dowden* [2007] 2 All ER 929 and *Jones v Kernott* [2012] 1 AC 776, to lay down principles for determining the size of shares. The court must look at the whole course of dealing between the parties, in relation to the house, to ascertain their common intention as to the size of their shares. As *Jones* made clear, that common intention can change over the course of a relationship. Therefore in a case where the legal estate is in the name of one of the parties only, there are two stages. First, the claimant must establish that they have a claim to an equitable interest under one or other of the two categories in *Lloyds v Rosset* and then go on to establish its size, using the principles in *Stack v Dowden*. *Stack v Dowden* and *Jones v Kernott* introduced a further refinement into the law. Single name cases were to be treated differently from cases where the legal estate was in joint names. In a joint name case it was to be presumed that the parties intended joint and equal shares. It was for the party disputing this to prove, from the whole course of dealing that, in fact, their common intention was different. Both cases stated that *Lloyds Bank plc v Rosset* should continue to be the law for single name cases, but made some criticisms of the case as "outdated". Some of the statements made in *Stack v Dowden* were so sweeping, it could be argued that it intended to reform the whole of the law, not just clarify quantification of beneficial interests. Under that school of thought, we do not look at the two categories of *Lloyds Bank plc v Rosset* any longer, but consider the whole course of dealing to decide whether the claimant has any share in the first place: *Apsden v Elvy* [2012] EWHC 1387.

FURTHER READING: *Conveyancer* [2012] for a variety of comment on *Jones v Kernott* from pp. 149–80. There are articles by Mark Pawlowski 'Imputing intent in joint ownership: a return to common sense: *Jones v Kernott*' 149–58, Man Yip 'The

rules applying to unmarried cohabitants' family homes: *Jones v Kernott*' 159–67, and John Mee '*Jones v Kernott*: inferring and imputing in Essex' 167–80.

2. Should the law insist upon the existence of an oral agreement?

Suggested Answer

See 17.5, 17.10.

This is mentioned in Question 1 above. Evidence of a discussion about the house being shared is required by *Lloyds Bank plc v Rosset* [1991] 1 AC 107. This may relate to long ago conversations and the parties may have very different memories of what was actually agreed. Some may even lie to strengthen their case. If we consider some of the cases, e.g. *Eves v Eves* [1975] 1 WLR 1338 and *Ungurian v Lesnoff* [1990] Ch 206, then the 'agreement' seems quite vague and it is not possible to say precisely when it was made. Other cases, such as *Hammond v Mitchell* [1991] 1 WLR 1127, can point to a specific day when the agreement was concluded. The Law Commission, in its 'Sharing Homes' report was not impressed with the need to find an oral agreement, nor was the House of Lords in *Stack v Dowden* [2007] 2 All ER 929, so it is possible that future cases might change the law in this respect. *Apsden v Elvy* [2012] EWHC 1387 might be an example of this, as the claimant did not make a direct financial contribution nor was there an oral agreement.

In family home cases, the oral agreement is important in two respects. Firstly, as we have seen, it might be required to prove the existence of an equitable interest under *Lloyds v Rosset*. Secondly, the court will investigate whether the oral agreement went into sufficient detail to indicate the size of their respective shares: *Gissing v Gissing* [1971] AC 886. This will be an important, though not conclusive factor, in deciding the common intention on the size of shares from the whole course of dealing: *Jones v Kernott* [2012] 1 AC 776.

FURTHER READING: *Conveyancer* [2012] for a variety of comment on *Jones v Kernott* from pp. 149–80. There are articles by Mark Pawlowski 'Imputing intent in joint ownership: a return to common sense: *Jones v Kernott*' 149–58, Man Yip 'The rules applying to unmarried cohabitants' family homes: *Jones v Kernott*' 159–67, and John Mee '*Jones v Kernott*: inferring and imputing in Essex' 167–80.

3. Could detrimental reliance be better defined?

Suggested Answer

See 17.5.

The requirement of detrimental reliance comes from the proprietary estoppel element in the trust of the family home. Cases such as *Grant v Edwards* [1986] Ch 638 and *Lloyds Bank plc v Rosset* [1991] 1 AC 107 declined to define exactly what detriment was, leaving it to be decided on a case by case basis. In *Grant* Nourse L.J. said that it must be "conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house." There might seem to be inconsistencies in the case law. Leaving a home and moving to another country was a detriment in *Ungurian v Lesnoff* [1990] Ch 206, but leaving a

home and having babies was not in *Burns v Burns* [1984] Ch 317. Risking an interest in the house was detrimental in *Hammond v Mitchell* [1991] 1 WLR 1127, but living together and running a business together for thirty years was not, in *Curran v Collins* [2013] EWCA Civ 382 (see 17.10.2). In truth it is more complicated than that, because it also depends upon what was agreed. Was a share in the home ever promised? For example, it was not in *Thomas v Fuller-Brown* [1988] 1 FLR 237, so all Fuller-Brown's "detrimental" work on the house counted for nothing. The actions considered as detrimental must be carried out, because the claimant thought that they had a share in the house. The cases suggest that a person does not usually have children because they think that part of a house is theirs, but they might carry out building work on what they think is their home.

FURTHER READING: (1996) Legal Studies 218 A Lawson, 'The Things We Do For Love: Detrimental Reliance and the Family Home'.

4. Should indirect financial contributions be acceptable?

Suggested Answer

See 17.7, 17.8.

It is arguable that they already are. They seem to be ruled out by the specific wording of *Lloyds Bank plc v Rosset* [1991] 1 AC 107, which mentions direct contributions to the purchase price "initially or by payment of mortgage instalments" and states that it is "extremely doubtful whether anything less will do". *Lloyds*, however, claimed that it was just restating the law from the older House of Lords authority of *Gissing v Gissing* [1971] AC 886. That case clearly accepted indirect financial contributions from the claimant, if they enabled the legal owner to pay for the house. Indirect financial contributions certainly become acceptable if there is an oral agreement as well, when they fall under the first category of trust in *Rosset*. This can be seen in *Grant v Edwards* [1986] Ch 638 (see 17.5.1).

According to Lady Hale at paragraph 69, all forms of contribution, financial and otherwise, become relevant when the court decides the size of the respective beneficial interests: *Stack v Dowden* [2007] 2 All ER 929. The court must look at the whole course of dealing between the couple in relation to the house. *Jones v Kernott* [2012] 1 AC 776 reinforced this point. When Mr Kernott left, Ms Jones paid all the bills, which increased her share from 50% to 90%.

FURTHER READING: *Conveyancer* [2012] for a variety of comment on *Jones v Kernott* from pp.149–80. There are articles by Mark Pawlowski 'Imputing intent in joint ownership: a return to common sense: *Jones v Kernott*' 149–58, Man Yip 'The rules applying to unmarried cohabitants' family homes: *Jones v Kernott*' 159–67, and John Mee '*Jones v Kernott*: inferring and imputing in Essex' 167–80.

5. Does the law provide an accurate means for deciding the size of an equitable interest?

Suggested Answer

See 17.8

The general consensus is that the courts must look at all the factors in the relationship in order to determine the size of shares. There is a lengthy list of these factors in *Stack v Dowden* [2007] 2 All ER 929. From their actions, the whole course of dealing in relation to the house, the court must determine the common intention of the parties. *Jones v Kernott* [2012] 1 AC 776 took this process further. The evidence might show that the common intention changed over the course of the relationship, as in *Jones* itself. If the evidence does not reveal the common intention, the court must decide what the parties' common intention would have been, if they had thought about it and award "fair shares".

It must be doubted whether this is a very accurate means of deciding the size of shares, as *Stack* does not supply a means of deciding the relative value of the different factors to be considered. In several cases, such as *Stack* itself and *Oxley v Hiscock* [2005] Fam 211, the relative size of the man and woman's financial contribution was the significant factor in deciding the size of shares, leaving us to wonder how other, non-financial, contributions might be valued.

FURTHER READING:

Conveyancer [2012] for a variety of comment on *Jones v Kernott* from pp. 149–80. There are articles by Mark Pawlowski 'Imputing intent in joint ownership: a return to common sense: *Jones v Kernott*' 149–58, Man Yip 'The rules applying to unmarried cohabitants' family homes: *Jones v Kernott*' 159–67, and John Mee '*Jones v Kernott*: inferring and imputing in Essex' 167–80.

6. How should the law be reformed?

Suggested Answer

See 17.10.

The Law Commission has reported twice on this area of law and continues to consider the matter. The first report, 'Sharing Homes', did not recommend any specific legislation but drew attention to the issues raised in Questions 2–5 above. The Commission suggested that the courts could make these reforms for themselves, by developing the law and there was sympathy for their views in *Stack v Dowden* [2007] 2 All ER 929 and *Jones v Kernott* [2012] 1 AC 776. In the latter case, the Supreme Court reaffirmed the old law in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, but criticised it. The lower courts have responded by taking a more flexible approach to the law in cases like *Hapeshi v Allnatt* [2010] EWHC 392 and *Apsden v Elvy* [2012] EWHC 1387, but the higher courts have yet to confirm whether this is legally correct.

The Law Commission's report of 2007, 'Cohabitation' advocated a much more radical approach, where the breakdown of a cohabiting relationship would be treated much like divorce. The court would be able to redistribute the couple's assets between them and would not be bound by existing property rights. In 2008 the Government

announced that there were no immediate plans to implement these proposals and subsequent governments have confirmed this approach. They would study the financial impact of similar reforms, which have been already implemented in Scotland, before coming to a decision. Ten years later, despite calls for reform from many judges and the media, nothing has happened in England. In Scotland, the courts have come up with a kind of 'scaled-down' divorce in cases like *Whigham v Owen* [2013] Fam LR 30, which is possibly quite similar to the whole course of dealing idea from *Stack v Dowden* [2007] 2 All ER 929.

FURTHER READING: S Bridge, Law Commissioner's three-part article 'Cohabitants: Why Law Reform is Necessary' [2007] *Family Law* 911–15, 'Financial Relief for Cohabitants: How the Law Commission's Scheme Would Work' [2007] *Family Law* 998–1003, and 'Financial Relief for Cohabitants: Eligibility, Opt Out and Provision on Death' [2007] 1076–81.