Topic 8: Co-Ownership

In the exam:

1. **Start with what type of co-owner relationship do you have?**
    a. This will define what the parties have because that is going to define what the parties ultimately are able to claim.
2. **If you have an explicit articulation of the character of the co-ownership – then move on from there (no need to go to common law or statute).**
3. **But if there is no explicit articulation of the character – then look at common law and statute.**
    a. If you have **registered interests,** which constitute legal interests, and **have two or more parties** – you use s.30(2) of TLA
        i. And Aoun gives support for this.
    b. If you have **unregistered interests**, it is unlikely that s.30(2) will apply – if it is in equity, focus on how equity will deal with it.
4. Look at the facts to **determine whether there is anything at all that would rebut the presumptive application of joint tenancy.**
    a. If it is a creation issue with co-ownership, what you're looking at is the **presumption** – and then are there **any facts that might rebut that presumption?**
    b. *Presumption is crucially important in both common law and equity jurisdiction*
    c. Is there a preceding property agreement?
    d. Are there words of severance?
    e. Even is there anything at all in the transfer that indicates an intention by both parties to participate or receive a portioned share. If not – JT.
5. **Consider equity – presumption of tenancy in common**
    a. Through a resulting trust or a constructive trust
    b. Does it meet one of the three categories?
    c. Commercial context? → *Delehunt v Carmody*
    d. Family home, but circumstances change throughout time? → *Jones v Kernott*

So now you have dealt with the creation issue (if there is one), and you know it is at law or equity it is a JT or a TinC.

1. Then there can be **issues as to rights and duties of the co-owner.**
2. **Ultimately, are the any issues during the currency of the JT where there has been an act that severs it and takes it back to a tenancy in common?**
    a. And therefore, if one party has died, **the right of survivorship does not operate in this circumstance.**

What is Co-Ownership?

- **Only applies to Land** (real property – not a car, or goods etc.)
- Refers to **multiplicity of ownership over single estate**

    - It is **not about fragmentation of land**; it is about **two or more people owning one estate**.
    - *It is not about the fact that a piece of land can attract a fee simple, a lease, a mortgage and potentially even a trust → they're different interests and are all consistent.*
    - What co-ownership is, is if person A and person B are registered proprietors on the title
        - Then what happens if they 'break up' → …
    - *Co-ownership is* the rules that relate to their joint ownership of the single fee simple reversion
- ***Two or more people will be holding THE SAME TITLE – not variable titles***
- **Basic feature**: **each co-owner has an equal right to possession over entirety of land**
    - *Both parties have a right to possession*
- **Distinguish: Ownership of different interests** eg life estate and remainder (lease, mortgage, etc.)
- **Distinguish: Trustee/Beneficiary Relationship**
    - Trustee has a legal estate, and owns the land, the beneficiary does not have a right of possession, and has a right in equity which is superimposed on the trust.
    - This is not a co-ownership relationship because the trustee and beneficiary do not have rights of possession – only the trustee does.
    - Any form of trust is not a co-ownership relationship – it is a trust relationship.

Co-ownership can be in two forms:

(1) Joint Tenancy
(2) Tenancy in Common

(1) Joint Tenancy

- A **form of co-ownership** that **must satisfy a number of elements** (**pre-requisits**) and **must be specifically created**
- *The* **TLA and Common Law presume joint tenancy.**
    - The statutory presumption is based on its consistency with indefeasibility
    - You have to rebut that presumption explicitly as tenancy in common, within the actual framework of the transfer if you are going to rebut that (that is the best way to do it).
    - If you don't, what happens often is parties become registered and then don't want to own as joint tenants, so they **argue that an act that they have done during the course of their ownership has severed the joint tenancy**, so that it **reverts back to a tenancy in common** so that they can pass on their interest under a will.
- Joint Tenants are all seised of the whole. Each joint tenant is severally possessed of an undivided interest.
- **The core benefit: Right of Survivorship applies**

- *The co-owners own the property holistically together, not separate interests, so that when one dies, the interest of the other or others are automatically enlarged – and they continue to own the whole together.*
- *If there is only two co-owners, the single person left inherits, and there is no longer a co-ownership as there is only one party.*
- **Right of survivorship means:** the entire property goes to the remaining co-owner, it doesn't matter if the person who died had a will setting out that their interest was to go somewhere else, **that will cannot defeat the right of survivorship – the right of survivorship is preeminent**
    - That is why it is called a right – it is a right that is intricately connected to the joint tenancy form.

- So it is crucial to inform when you are advising clients about the type or manner in which they are to own property – and that they understand this distinction.
- Generally, **a joint tenancy will apply to spouses or de facto partners** where the aim is that they are building a life together, so they would **expect the right of survivorship would be broadly similar** to the way in which a will would operate anyway.
- **If it is an investment purpose** – the property is being purchased amongst different individuals who each put in a share, and would like to get that share back should they die (wanting it to **go through their will**), then **it must be set up as a tenancy in common.**
    - *This is because with a tenancy in common, the right of survivorship doesn't happen.*
- **Dixon J (Wright v Gibbons) described it as: 'a thorough and intimate union of interest and possession'**

➢ **Must establish 4 unities or no joint tenancy** (you cannot even have a presumptive joint tenancy under the TLA if you don't have these).

ELEMENTS FOR JOINT TENANCY (The Four Unities)

- A joint tenancy does not automatically apply; you need the core requirement of what are called the 4 unities. **It is required that:**

(a) You establish what are known as the four unities

(b) Such unities must exist before a joint tenancy can exist, and

(c) you have to reveal an intention to create the joint tenancy

I. **Unity of Possession**: A feature of all forms of co-ownership. Each co-owner is entitled to possession. No co-owner is liable for trespass
    - *This effectively means, each co-owner is entitled to possession, no co-owner is liable for trespass, and if one co-owner is wrongfully excluded, they can claim occupation rent against the co-owner that remains in possession and this can often be relevant in a separation situation.*
    - *(e.g. one co-owner is going to leave, the other isn't – how rent or mortgages are supposed to be paid).*

II. **Unity of Interest**: The interest held by each JT must be identical in nature, extent and duration: **Example CB 1096**

- *You have to have the same interest*
- *You couldn't have one person owning a fee simple, and the other a remainder*
- *Must be identical in nature, extent and duration – point being, if there is even a condition that attaches (e.g. both are given an inheritance of a fee simple, but one inherits when they turn 21, the other inherits when they turn 25 → this cannot be a joint tenancy) because the interests are not identical.*
    - *The condition attached means that it vests in possession at different times.*

III. **Unity of Title:** The interest held by each JT must derive from the **same document** and the **same act**: **Example CB 1096**

IV. **Unity of Time:** Each JT must acquire their interest at the same time: **Example CB 1097**

- The four unities **MUST** exist if a joint tenancy is to be created.
- If the four unities existed when the joint tenancy was created **but one or more have subsequently been removed – this will 'sever' joint tenancy.** (See severance next week)
    - *Parties often intentionally do this.*
    - *But you would have to remove one of these unities – you decide to say transfer your interest over to your brother who decided to purchase some interest in the property, and then he acquires that title.*
        - *Two reasons why this might be useful:*
            - *You can sell your interest in the property without potentially having to go through too much hassle.*
                - *He will become registered pursuant to a different act, which will sever the JT*
            - *So the other benefit is the right of survivorship is removed after this.*

Right of Survivorship

- The right of survivorship is an **inherent aspect of the joint tenancy**
- The right of survivorship means that where one jt dies, remaining 'inherent' his/her share
- Best to treat survivorship principle as 'freeing interest of deceased jt from control' rather than an enlargement' as all jt seised of whole

Corporations & Right of Survivorship

- **Corporations cannot own land due to survivorship principle**
- This **now altered by s28 PLA** – **allows a body corporate to own land as a joint tenant** in the same way as individuals.
    - **S28(2)** specifically allows **right of survivorship to apply** so that property devolves to other joint tenant in body corporate

Forfeiture Rule – qualifies the right of survivorship

- A **public policy rule** that qualifies the capacity to take under the right of survivorship CB 16.8

- **Forfeiture Rule** – **The right of survivorship is subject to a public policy rule known as the 'forfeiture rule'**
- **No JT can benefit from killing another**
    - You would have to be convicted of killing
- Where this occurs, right of survivorship applies but JT holds enlarged portion on constructive trust for benefit of deceased estate – *equity steps in.*
- Re Stone: CB 1099 Discusses this

(2) Tenancy in Common

- Tenancy in common is another form of co-ownership
- It is the **'base' form of co-ownership**
- **No need for four unities → only need to establish unity of possession**
- If not a joint tenancy AND unity of possession then MUST be a tenancy in common
- Mendes da Costa and Nullagine p CB 1100

Creation of Co-ownership

- Where base requirement of **4 unities exist** – **can create either JT OR tenancy in common**.
- **Focus on Intention.**
- First **consider express words** in **deed of conveyance** or **transfer**.
- **If no express reference**: **implied words** ie words of severance which indicate an intention to create proportionate will ALWAYS imply a tenancy in common
- **Words of Severance** – words indicating intention to divide eg 'amongst', 'respectively' etc

***Robertson v Fraser*:**

- Lord Hatheley concluded ' …so that C should participate with A and B' codicil – 'participate' was a word of severance.
- ***'Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy.'***
    - The reason for this is that division is the core foundation of tenancy in common.

(A) Creation at COMMON LAW

- <u>Where no express or implied words – presumptions will operate</u>
- **Common Law Presumption: Joint Tenancy**
    - *This presumption is reinforced by the Statutory presumption under **TLA s.30(2)***
- **Rationale:** Historical – easier to collect feudal dues from joint tenants
- Investigation of title easier if a joint tenancy

Common Law (& Statutory) Presumption *ONLY* apply where not rebutted by express or implied words of severance (an intention to divide)

- What we know is that presumptions can be rebutted! Presumptions operate to provide guidelines / a starting point – they don't represent the ultimate solution because the facts may indicate to the contrary.

Public Trustee v Pfeiffle

- *(NSW SC – but has been subsequently endorsed in the HC)*
- Entered into a property division agreement.
    - *Did this division agreement override the presumption?*
- There was no explicit articulation of the nature of the relationship.
- What form of co-ownership did parties intend?
- Common law presumption of JT held by Ormiston J to be **rebutted because of the reference to 'one half interest.'**
- **Natural meaning given to words.**
- *This case has a comprehensive overview of creation of joint tenancy under common law and tenancy in common in equity (how they have evolved and how courts navigate this area)*

RULE - CB 16.15

- *(NSW SC – but has been subsequently endorsed in the HC)*
- Ormiston J: "…it is **inappropriate to create a joint tenancy and the totality of the rights** of each joint tenant **by a limitation or gift granting to each a moiety** (a proportionate half in land interest) **or half (or other share or interest)**.
- **A limitation or gift of that kind**, or indeed any transaction in those terms which purports to bring into existence concurrent interests in land or other property**, is consistent only with the creation of a tenancy in common.**"
- *It has to be about what the parties wanted, not about what the parties presume.*

(B) Creation IN STATUTE

- The statutory presumption **reinforces the common law presumption**.
- **Statutory Presumption: TLA s30(2)** deems 2 or more registered joint proprietors of land to hold as joint tenants.
- **Will only apply where:**
  (1) Torrens and
  (2) where **registered**.
- The exact meaning of the 'joint proprietors' examined in ***Aoun Investments***.

***Aoun Investments CB 1117* examined s100 Real Property Act 1900 (NSW).**

- Held that the wording did not apply to severalty (form of co-ownership in Eng where joint tenants could exclude others)
- **Gzell J concluded meaning of 'joint proprietors' in s100 was obscure**.
- Noted the difficulties in NSW context with s26 *Conveyancing Act* 1919.

(C) Creation IN EQUITY

- **Only applies to particular instances where it would be unfair to presume joint tenancy**.

- Operates in equity via the **imposition of a trust** so that joint tenants at law but beneficial entitlement is held in a different capacity
- Primarily arises over commercial relationships where investment purpose suggests a proportionate share to be fairer
- **How the presumption in equity operates:**
    - It is of course completely different to the presumption at law
    - It is a **presumption of tenancy in common**
    - So we presume, where equity applies, **that despite the legal presumption of JT, that is rebutted because equity is superimposed on that framework, and presumes tenancy in common.**
    - What it does is it **uses the constructive trust.**
- If one partner dies, the interest that they held is held now on trust for his or her estate rather than going automatically over to the control of the remaining partner under the right of survivorship.
- **The constructive trust precludes the application of the right of survivorship**
- There is an **important distinction between a resulting trust and a constructive trust**:
    (a) Resulting trust arises presumptively (arises automatically – so say as soon as an unequal contribution occurs, then equity deems it to be held in the form of a presumptive resulting trust).
    (b) Constructive trust is construed by the Court (depends on discretionary capacity of the court).
- What the COA ruled in ***Delehunt v Carmody*** is effectively saying is that the resulting trust can still apply where you have got background information which reveals an intention for there to be a tenancy in common and you use the resulting trust as a device to achieve this (Category 3).
- **Commercial context??**

Three Established situations where it is unfair:

1. **Unequal contribution to purchase price, mortgagee purchase or partnership purchase**
2. **Mortgagees/Business partners: investment objectives**
3. **Other circumstances where beneficial entitlement intended.**

1. UNEQUAL CONTRIBUTIONS = A Presumptive Resulting Trust

- Situation where:
    - Ordinary purchase, two people who decided that easiest way to acquire a property was to join their funds (not in a relationship) and to purchase together.
    - One person has contributed more to the deposit than the other (Person A contributes 75% of deposit, and the other 25%).
    - Then they both jointly enter into the mortgage
    - From ***Calverly v Green*****, we know that the definition of purchase price includes deposit and mortgage liability** – it **doesn't include mortgage repayments.**
    - There has been more on the part of A than B in terms of the deposit.
    - Let's say that the parties don't say anything – s.30(2) will then presume a JT

- **BUT equity will say no – because you have contributed more to the deposit, that additional amount is going to be the subject of the imposition of a trust**.
- The trust here is a resulting trust.

***Delehunt v Carmody*: High Court → Seminal Decision**

Facts:

- C and D contributed equally to deposit and purchase price of house
- There was an agreement to hold equal shares. However there was no indication of co-ownership (i.e. whether held as JT or tenancy in common).
- C died intestate and Mrs C (ex-wife) granted property and ordered D to vacate.
- D argued joint tenancy – right of survivorship.
- **Crt of Appeal:**
  - Held resulting trust/s26 therefore tenancy in common in equal shares.
  - Said that **even though you have an equal contribution to purchase price** there can still be a tenancy in common in equal shares if the context is consistent with that and that can be reflected through the imposition of a tenancy in common which operates against the statutory assumption of a JT.
    - In effect, the parties hold, despite the statutory assumption of JT, as tenants in common in equal shares pursuant to a resulting trust.
  - What the COA is effectively saying is that the resulting trust can still apply where you have got background information which reveals an intention for there to be a tenancy in common and you use the resulting trust as a device to achieve this.
  - **So this is an example of category 3.**
- **HC rejected appeal / agreed with COA.**
- **Gibbs CJ:** Noted that **resulting trust existed**: Legal title in C's name but C and D contributed equally. If unequal shares, then T in C per Calverley v Green. But if equal shares equity presumes a joint tenancy (but slight circumstances may rebut this)
- BUT s26 rebuts this presumption so that they hold as tenants in common despite beneficial presumption of joint tenants.

3. OTHER CIRCUMSTANCES WHERE BENEFICIAL ENTITLEMENT INTENDED

- ***This operates as an umbrella which reflects that equity will always have the capacity in a unique situation to step in and provide the relief that is required.***
- ***Malayan Credit*: tenancy in common as intended despite presumptive application for JT**
  - Tenants entering into a commercial lease arrangement.
  - Occupying 38% and 62% of the leasehold area respectively.
  - Separate property bills paid.
    - They paid in proportion to their share.
  - Parties did not specify whether they co-owned the lease as a JT or tenancy in common.
  - We know the presumptive application legally is JT.

- **Question:** Whether the circumstances and commerciality of the arrangement (always a good indication of equity stepping in) meant that it a JT or a tenancy in common?
- **Lord Brightman:** Tenancy in Common – equity can apply where grantees hold the premises for their several business purposes.

Lord Brightman: <u>Factors Relevant for category 3:</u>

(a) Commercial lease was to serve separate purposes
(b) Proper division of space
(c) Meticulous measurement of areas for which the parties were to occupy
(d) Fees paid in unequal shares
(e) <u>Commercial context</u>

- JT is a reflection of the personal relational context – where the parties are joining together in a joint endeavour, and were not intending to have specific proportionate shares, they were wanting to have a combination of the whole.
- This is not the case with a commercial context.
- **It does not make any sense to say that your business partner will inherit your portion of share in the property – as you have invested to gain profit → there is an overriding commerciality associated with the acquisition.**

- "In the opinion of their Lordships, the payment of rent and service charge in unequal shares, the payment of the stamp duty and the survey fee in unequal shares, and the unequal contributions to the deposit payable under the terms of the lease which was to be outstanding for the whole period of the lease, are comparable to the payment of purchase money in unequal shares. All the circumstances point decisively to the inference that the parties took the premises in equity as tenants in common in unequal shares."

***Trustee Cummins* (2006) High Court – Changes the application of the presumed resulting trust to an unequal contribution to purchase price**

Joint tenancy is consistent with the underlying character of a matrimonial relationship.

- **The issue of creating alternative equitable presumptions, in particular in a relational context.**
- Cummins was a prominent barrister who had not paid income tax for his whole life.
- Due to his tax debts, he became bankrupt and his estate was administered to the Appellants [Trustees of the Property of Cummins] as trustees.
- Prior to this, Cummins had transferred his joint tenancy in land to his wife (*note that legislation applies to pre-bankruptcy transfers anyway*), the Respondent argued that **even in the case that the transfer of the joint-tenancy failed, she held the majority of the property because she originally paid for most of it**, and **thus her husband's share in the joint tenancy is held on a resulting trust for her.**
- <u>There are two competing factors:</u>
  - (1) the pure monetary contribution (she contributed more than he did) → so this generates an equitable tenancy in common.

    - **(2) competing with this, is the fact that they were husband and wife – a marital property, so does the relational context rebut the presumption which is generated purely on the basis of financial contribution?**
- **So this ultimately comes down to, do we say that how much you put into a property is irrelevant if you're going to get married?**

- The Appellants sought a declaration that Cummins' transfer to the Respondent was void against them in bankruptcy.
- Also, **any presumption of a resulting trust was rebutted**, as Cummins clearly intended to hold the land as a joint tenant with the Respondent.
    - There is no doubt that there is a **policy background** here – the HC is clearly not wanting to say that you are able to use the equity jurisdiction to effectively avoid paying tax.

- **The core issue: was whether title had vested with the Respondent under a resulting trust, or whether Cummins remained a joint tenant, and rebutted the presumption of advancement.**

The High Court has said:

- The attempt to sever the joint tenancy and transfer the property to the Respondent was in violation of s 121 of the Bankruptcy Act and therefore void.

- **Usually**, unequal contribution does indeed mean that a resulting trust will arise as per ***Calverley v Green***.
- When 2 people have purchased in unequal shares and the property is in joint names, there **is a presumption** that they hold the property in proportions in which they contributed.
- ➢ **However**, when it's a **husband and wife**, the **contributions are less relevant** and **instead it can be assumed that each are a joint-tenant** (owning equal share) rather than tenants in common (each owning as per their contribution).
- Cummins saw himself as joint tenant (and only tried to change for the purposes of avoiding tax).
- **There is no reason here why equity should intervene** (with a resulting trust) **to disturb the legal title** shown in the registry (ie, that they are both joint-tenants).
- ***'There is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common. The subsistence of the matrimonial relationship...supports the choice of joint tenancy with the prospect of survivorship...'***
- The Appellant trustees were successful

it is very much a **contextual based determination**

If you're married, then the vicissitudes of financial contribution are a natural component of that, you expect you that you will get a component of a whole – you don't expect proportionate interests.

Joint tenancy is consistent with the underlying character of a matrimonial relationship.

Presumption of advancement: if you make an unequal contribution to purchase price, and can prove that it was intended to be a gift – then that will rebut the resulting trust. *This is not the case here.*

Unequal Contribution: Stack v Dowden (UK – use as comparison & has been quotes in Aus courts)

- Parties unmarried.
- Lived together for many years and had 4 children.
- Family home was 190,000 pounds. 128,813 from D and 65,025 from loan to both parties (one endowment policy only in D's name).
- D paid 38,435 off loan and S paid 27,000.
- Utilities all in D's name.
- Separate bank accounts and investments.
- S left property.
- D remained with children.

- **Usually:** Contribution to purchase price in unequal shares: resulting trust and tenants in common.
- **But Baroness Hale said *'The presumption of resulting trust is not a rule of law'***
- **Look to overall circumstances**. Cannot intend different co-ownership depending on outcome
- Tenancy in Common in equity approved – **despite domestic context**: equity usually applies to commercial arrangements Cases where beneficial entitlements under resulting trusts differ from legal interests (ie presumptive jt) are 'very unusual' in a domestic context
    - *if you legally have a JT then the idea that in equity you are going to have a tenancy in common, that is unusual for equity to say no and dictate differently. She said its not fair, but it is not impossible*

- The conclusions in Lady Hale's opinion were directed to the case of a house transferred into the joint names of a **married or unmarried** couple, where **both are responsible for any mortgage**, and where there is **no express declaration of their beneficial interests (JT or TiC)**. In such cases, she held that **there is a presumption that the beneficial interests coincide with the legal estate. Specifically, "in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved"** (at [58])
    - ***So she is saying, that either married or unmarried – JT, UNLESS, the circumstances make it very clear that this was not what was intended.***

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

    - *This point is a very good one – it articulates further on the issues raised in Cummins.*
    - *It is so often that people contribute unequal amounts. So too many people could raise this issue if you say that the mere fact of contribution to purchase price rebuts the presumption of JT.*

- Thirdly, **the task of seeking to show that the parties intended their beneficial interests to be different from their legal interests was not to be "lightly embarked upon**. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake.

- Fourthly, however, **if the task is embarked upon (and you are to say equity applies and it is a TinC), it is to ascertain the parties' common intentions as to what their shares in the property would be, in the light of their whole course of conduct in relation to it**.
    - *Look at common intentions*

- The parties' common intentions might change over time, producing what Lord Hoffmann referred to in the course of argument as an "'ambulatory' constructive trust": For example, where one party had financed or constructed an extension or major improvement to the property, so that what they had now was different from what they had first acquired
- **The principle in Stack v Dowden is that a "common intention" trust, for the cohabitants' home to belong to them jointly in equity as well as on the proprietorship register, is the default option in joint names cases.** The trust can be classified as a constructive trust, but it is not at odds with the parties' legal ownership. Beneficial ownership mirrors legal ownership.
- "In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case.

Post Stack v Dowden:

Jones v Kernott [2012] 1 All ER 1265

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

proceedings, 39 Badger Hall Avenue, Thundersley, Essex, was bought in their joint names.

- The purchase price was £30,000. The deposit of £6000 was paid from the proceeds of sale of Ms Jones' mobile home. The balance was raised by way of an endowment mortgage in their joint names. Mr Kernott paid £100 per week towards the household expenses while they lived at the property. Ms Jones paid the mortgage and other household bills out of their **joint resources.** In March 1986 they jointly took out a loan of £2000 to build an extension. Mr Kernott did some of the labouring work and paid friends and relations to do other work on it. The judge found that the extension probably enhanced the value of the property by around 50%, from £30,000 to £44,000. Their second child was born in September 1986.
    - *This all seems to show equity would mirror law and it would be JT*
- **Mr Kernott moved out** of the property in October 1993. The parties had lived there together, sharing the household expenses, for eight years and five months. Thereafter Ms Jones remained living in the property with the children and paid all the household expenses herself. Mr Kernott made no further contribution towards the acquisition of the property and the judge also found that he made very little contribution to the maintenance and support of their two children who were being looked after by their mother. This situation continued for some 14 and a half years until the hearing before the judge.
- The Badger Hall Avenue property was put on the market in October 1995 for £69,995, but was not sold. This may be some indication of its market value at that time but no more than that. At some date which is not entirely clear, the parties agreed to cash in a joint life insurance policy (not, of course, the endowment policy supporting the mortgage) and the proceeds were divided between them. The judge held that this was to enable Mr Kernott to put down a deposit on a home of his own. This he did in May 1996, when he bought 114 Stanley Road, Benfleet, for around £57,000 with a deposit of £2,800 and a mortgage of £54,150. The judge observed that he was able to afford his own accommodation because he was not making any contribution towards the former family home, nor was he making any significant contribution towards the support of his children. The judge also found that "whilst the intentions of the parties may well have been at the outset to provide them as a couple with a home for themselves and their progeny, those intentions have altered significantly over the years to the extent that [Mr Kernott] demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property on which he concentrated".
- At the time of the hearing before the judge in April 2008, 39 Badger Hall Avenue was valued at £245,000. The outstanding mortgage debt was £26,664. The endowment policy supporting that mortgage was worth £25,209. On the basis that they had contributed jointly to the endowment for eight years and five months and that Ms Jones had contributed alone for fourteen and a half years, it was calculated that Mr Kernott was entitled to around £4712 of its value, which would leave Ms Jones with £20,497. 114 Stanley Road was valued at £205,000, with an outstanding mortgage of £37,968 (suggesting that this was a repayment rather than an endowment mortgage). If the whole of the endowment policy was used to discharge the mortgage, the net worth of 39 Badger Hall Avenue would be £243,545. If the

mortgage on 114 Stanley Road was an ordinary repayment mortgage, the net worth of 114 Stanley Road would be £167,032.

The circumstances significantly changed over the years, where Mr K demonstrated no intention of availing himself of the beneficial interest of the property – he stopped paying for it. He funded the purchase of new property from a loan on the new property, and ignored it – did not involve himself in the upkeep and repair.

- **Held**: **Where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.**
  - **(1)** The **starting point** is that **equity follows the law** and **they are joint tenants both in law and in equity.**
  - (2) That **presumption can be displaced** by **showing:**
    - **(a)** that the **parties had a different common intention at the time when they acquired the home, or**
    - **(b) that they later formed the common intention that their respective shares would change**.
  - (3) **Their common intention is to be deduced objectively from their conduct**: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party.
  - (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"
  - (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 intended.
  - (6) The assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case.
    - i. *When it is a matrimonial family home that both parties are acquiring, however, they can be relevant in circumstances where the position alters.*

So while *Jones v Kernott* applied *Stack v Dowden*, it came to a different conclusion because of the fundamental differentiation in terms of that shift in trajectory halfway through the relationship.

- At the outset, their intention was to provide a home for themselves and their progeny. But thereafter their intentions did change significantly. He did not go into detail, but the inferences are not difficult to draw. They separated in October 1993. No doubt in many such cases, there is a period of uncertainty about where the parties will live and what they will do about the home which they used to share. This home was put on the market in late 1995 but failed to sell. Around that time a new plan was formed. The life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on 39 Badger Hall Avenue. The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise then. Just as he would have the sole benefit of any capital gain in his own home, Ms Jones would have the sole benefit of any capital gain in Badger Hall Avenue. Insofar as the judge did not in so many words infer that this was their intention, it is clearly the intention which reasonable people would have had had they thought about it at the time. But in our view it is an intention which he both could and should have inferred from their conduct.
- A rough calculation on this basis produces a result so close to that which the judge produced that it would be wrong for an appellate court to interfere.