

Cohabitees and Property : A Cautionary Tale

Thus spoke Lord Justice Wall in the introduction to the appeal case *Kernott v Jones*.

Ms Jones and Mr Kernott bought a property 1985. Ms Jones put in the deposit and the remainder was raised by way of mortgage. The house was conveyed into their joint names. There was no Cohabitation Agreement or Declaration of Trust at Land Registry detailing what would happen to the house if they split up. Ms Jones did nothing to specify that if they ever split up, she should get more than 50% back from the equity, in return for having paid the deposit.

They refurbished the property : two children came along. Until they split up in 1993, they shared the mortgage and household bills. Mr Kernott then moved out. Ms Jones paid the bills – including the mortgage – with no help from Mr Kernott : he made very little contribution to the children’s maintenance.

Some 12 years after they separated, the matter came before a court to have the shares in the house determined. Ms Jones felt or assumed that since she had paid the mortgage and kept the house afloat for the past 12 years that she should have the lion’s share ; that might seem “only fair”, to an objective person. The court agreed and decided she was entitled to 90% and Mr Kernott to 10%. The judge felt that he could *infer* from their behaviour a “common intention” to do something other than split the equity 50/50. The logic was that by leaving and not making any mortgage payments, Mr Kernott had somehow signalled to the world at large that he no longer had an equal interest in the property : and conversely, that by shouldering the burden of payments Ms Jones had “earned” the right to have more of the equity.

None of this had been expressly discussed by the couple : there was nothing in writing to substantiate either party’s claims. Nevertheless, the judge had concluded that he had the power to impute to them both a common intention that they no longer owned the property 50/50. He was achieving “fairness” by doing so.

The Court of Appeal has now said that that decision was wrong. The courts cannot retrospectively *assume* that a couple had a common intention to own a house in different shares to those noted on the title deeds, in the absence of substantial evidence : a judge cannot go behind a joint tenancy and in order to achieve “fairness”, ascribe to people motives and intentions which they themselves never bothered to express clearly and formally. Ms Jones’ mistake appears to have been that there were no discussions about the house at or after separation ; in the absence of any evidence at all as to how the couple each thought of the matter, there can be no “common” intention. Ms Jones with hindsight should have raised the possibility of a Separation Agreement or a transfer of the title into her sole name.

What many cohabiters don't realise is that there is no principle which allows a court to be "fair" to them both, as it aims to do in a divorce case : cohabiters do not have the same legal protection or options that a married couple have when it comes to dividing up their property. Instead, they are left with strict property laws.

The law as it currently stands, as set out in a case called *Stack v Dowden*, is that ownership of property follows the way in which the legal title is vested. In other words, if you choose to own a house on a joint tenancy basis, you each own 50% of the net value : that is what you are stuck with, regardless of who pays what. It matters not if you pay for a huge extension and swimming pool, which quadruples the value of the property, or if you pay all of the mortgage repayments because your partner has lost his or her job - unless you do something to make clear that 50/50 is no longer how you both want to own the property, you are entitled to 50%.

With more couples choosing to cohabit than remarry (and friends or family choosing to buy together to pool their resources) legal advice is easy:

- Don't bury your head in the sand - think about what you want from the property if things go wrong
- Is 50/50 how you want to own the property? If not, tell your conveyancer who can record different shares on the title register
- Consider executing a Cohabitation and Separation Agreement to set your intentions out in a clear and unambiguous fashion : these agreements now carry considerable weight with the courts if there is a subsequent dispute