IN THE UPPER TRIBUNAL **Appeal No. CIS/1294/2016 & CH/1291/2016**

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The Secretary of State's appeal does not succeed.

The decisions made by the First-tier Tribunal on 20 September 2015 under reference SC160/14/01965 & SC124/15/00529, following a hearing at East London on 26 August 2015 did not involve the making of any material error of law.

Therefore those decisions continue to have effect and, during the periods covered by the decisions of the London Borough of Tower Hamlets dated 24 June 2014, and of the Secretary of State dated 4 June 2014, the claimant's entitlement to (respectively) housing benefit and income support fell to be calculated on the basis that her capital did not exceed £6,000.

REASONS FOR DECISION

Introduction

1. The London Borough of Tower Hamlets ("LBTH") and a decision maker acting on behalf of the Secretary of State both decided that the claimant had capital in excess of £16,000 and that therefore (respectively) she was not entitled to housing benefit ("HB"), which she had claimed on 3 September 2013, or to income support ("IS") from and including 23 May 2014.

2. The claimant appealed against both those decisions and, on 20 September 2015, following a hearing on 26 August 2015, the First-tier Tribunal ("FTT"), issued a combined decision notice and written statement of reasons allowing the appeals and valuing the claimant's capital at less than £6,000. As £6,000 is the lower capital limit for both IS and HB, the effect of the FTT's decision was that the claimant's entitlement to both those benefits was unaffected by her capital.

3. The Secretary of State now appeals to the Upper Tribunal against the FTT's decisions in both appeals with the permission of District Tribunal Judge Tootell. As a result of case management directions given by Upper Tribunal Judge Knowles (as

she then was) LBTH is the first respondent to those appeals and the claimant is the second respondent.

Factual background

4. The judge set out his principal findings of fact in the following terms:

> "A the [claimant] was born on 21 03 1970
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> B she is a single claimant for IS purposes with two minor children, H… and V…
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> C she is a single claimant for HB purposes
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> D she claimed… IS on 01 10 2008 and… HB on 05 09 2013
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> E she gave her address as … ("number 6")
>
> F number 6 was a property owned by [LBTH]
>
> G the [claimant] was the secure tenant of number 6
>
> H her occupation of number 6 began many years ago
>
> I she was said to be in possession of capital assets in excess of the permitted maximum
>
> J the capital was in the form of a property at …("number 57")
>
> K the [claimant] bought number 57 in December 2005
>
> L number 57 was purchased with funding from a mortgage and also from Mr N… G… ("Mr G")
>
> M a restriction was placed on number 57 by… Mr G in April 2006
>
> N the [claimant] vacated number 6 temporarily in 2009 due to infestation
>
> O that vacation was known to the [the Secretary of State and LBTH]
>
> P she had an intention to return to live at number 6
>
> Q she had no intention to surrender the tenancy at number 6
>
> R the [claimant] returned to occupy number six in August 2013".

5. Elsewhere in his written statement of reasons, the judge also made the following additional findings of fact:

(a) No. 57 was registered with HM Land Registry as a freehold property, the Lease being for a period of 93 years from 2003 (paragraph 11);

(b) No. 57 was not bought as a family home (paragraph 24). Rather, the purchase was a commercial venture (paragraph 25);

(c) No. 57 was registered in the claimant's sole name because she was the instigator of the purchase (paragraph 11);

(d) The purchase price of No. 57 was £365,000 and the full cost of the property inclusive of stamp duty and expenses was £377,728.09 (paragraphs 12 and 13);

(e) The claimant provided £250 towards that total of £377,728.09 (paragraph 14);

(f) The balance of the £377,728.09 was funded by a payment of £67,263.09 from Mr G and an interest-only mortgage advance from the West Bromwich Building Society (paragraph 15);

(g) "The terms of the loan were unusual in that they prohibited the borrower from living [in] and occupying number 57 because this was a "buy to let" loan. Crucial to the investment structure of the loan was that number 57 would be let to third parties. Intending to let number 57, the object of the [claimant] was that rental income would offset the monthly interest payments to the lender. That target was not hit because of "voids" when there were no tenants and other times when the property was in need of repair or other attention" (paragraph 15).

(h) Mr G and the claimant did not marry and cohabited "for about a week". There was no long-term substance to the relationship.

(i) No written agreement was created between the claimant and Mr G at the time of the purchase because they failed to reach a consensus about its terms. The claimant accepted that Mr G considered his contribution to the purchase price as affording him partial ownership but the extent of his interest was never clarified (paragraph 18). Attempts to sell No. 57 were unsuccessful as the claimant and Mr G were unable the division of the proceeds of sale (paragraph 19).

(j) Mr G's application for the restriction claimed an interest in No. 57 'because he was "a beneficiary under a Trust of Land on the basis that he made a direct substantial financial contribution … including providing the registered proprietor […] with the deposit to enable the property … to be purchased"' (paragraph 21).

6. As the grounds of appeal to the Upper Tribunal assert that the FTT's decision was reached "in the face of all the evidence to the contrary", it is convenient to say at this point that, in my judgment, all those findings of fact were amply supported by the evidence.

7. In particular, there is clear documentary evidence of Mr G's contribution to the purchase price of No. 57. Although the judge did not specifically mention it—and he did not need to do so because it was not in dispute—the original mortgage advance was £310,215.00. When one deducts that from the £377,728.09 needed to complete the purchase, one gets £67,513.09. If one then deducts the £250 that was contributed by the claimant, one is left with £67,263.09. Mr G transferred that sum to the solicitors acting for the appellant on 16 December 2005, shortly before the purchase was completed on 20 December 2005.

The First-tier Tribunal's decision

8. On the basis of those findings of fact, the Judge concluded (at paragraph 33) that the claimant held her interest in No. 57 on a resulting trust for Mr G. He continued:

> "This was the legal outcome of the dealings between them, whether or not they gave purposeful consideration to it. That being the situation, any beneficial interest in number 57 was held by the appellant for Mr G and she held nothing for herself (save perhaps for the £250 she originally put up. Even if that were grossed up on an actuarial basis, it would not reach the capital limit for benefit purposes)."

The Upper Tribunal's decision

9. The FTT did not need to distinguish between the two possible justifications for its decision because it was only concerned with whether the claimant's capital exceeded £6,000 and, on either analysis, it did not. As I explain below, her interest is to be taken as being 0.04% of the equity No.57. At the period, under consideration, it would have been worth between £400 and £600, depending on the valuation of No. 57 as a whole.

10. However, I am concerned with whether the FTT's decision was legally correct. I therefore do have to consider both possible justifications because they cannot both be correct.

11. I agree with the alternative basis for the FTT's decision in which the claimant's interest in No. 57 is proportionate to the £250 she contributed. The FTT did not err in law in reaching its decision on that basis.

12. I have therefore upheld the FTT's decision and refused these appeals.

13. I do not agree with the FTT's primary analysis that the claimant held the entire beneficial interest in No. 57 on trust for Mr G. However, any legal error in that analysis did not affect the outcome before the FTT and was therefore immaterial. I have therefore discounted that analysis and, in what follows, I have assumed that the FTT's decision was made on the alternative basis.

The grounds of appeal

The Jones v Kernott challenge

14. The Secretary of State appeals on the ground that the FTT's conclusion that the facts gave rise to a resulting trust, was incompatible with the decision of the Supreme Court in *Jones v Kernott* [2011] UKSC 53. In particular, she says that:

> "A decision that rested the entire beneficial ownership in Mr G would take no account of the intentions of the claimant and Mr G. in purchasing No. 57. This was to provide them with a joint income in the form of rental payments from tenants. It would take no account of the financial contribution of the claimant in terms of substantial mortgage repayments, [g]round rent, council tax and other expenses. Lord Collins in Jones v Kernott final paragraph (66) perhaps sets the standard for any decision attributing the proceeds of any sale:
>
> > "Nor will it matter in practice that at the first stage, of ascertaining the common intention as to the beneficial ownership, the searches 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."
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> And in his summary (paragraph 68, point iv) Lord Kerr concluded:
>
> > "iv) Where the intention as to the division of the property cannot be inferred, each is entitled to that share which the court considers fair. In considering the question of what is fair the court should have regard to the whole course of dealing between the parties"."

15. LBTH supports the Secretary of State's appeal and has drawn attention to a number of aspects of the evidence before the FTT.

16. I will call this, the only stated ground of appeal, "the *Jones v Kernott* challenge".

Did the claimant contribute to the acquisition of No. 57 after the purchase was completed?

17. The acquisition of a property that has been purchased with the aid of a mortgage is normally a process, rather than an event. As the capital borrowed under the mortgage is repaid, the equity in the property increases. If the proportion in which the co-owners repay the mortgage is different from the proportion in which they contributed to the original purchase price, then the beneficial interests in which the property is held may change over time.

18. When giving case management directions Judge Knowles raised the issue of whether, even if the resulting trust approach adopted by the FTT were correct, the judge had erred in law by failing to take into account the contributions made by claimant after the purchase (*i.e.,* to the mortgage, ground rent and service charges) when calculating her share.

The statutory declaration issue

19. In addition, Judge Knowles raised the issue whether the FTT "ought arguably to have either directed the parties to produce the statutory declaration of [Mr G] made in April 2006 or considered adjourning so that it could be produced. It may have shed some light on his intentions when the property was purchased and was arguably a key piece of potential evidence."

The "What became of the compensation?" issue

20. Finally, Judge Knowles raised the following issue:

> "… the tribunal stated that it had no need to consider [any] capital disregard as the [claimant] had no capital to assess. I note that she received a sum of £9,342.36 as compensation for an infestation in 2013 …. That capital warranted further investigation since it is arguable that there is no reason to disregard the sum which should have been treated as providing tariff income of £1 per week for each complete £250 in excess of £6,000 …. The tribunal arguably erred in law by not investigating this matter."

Reasons for the Upper Tribunal's decision

"Legal" ownership and the decision in *CH/715/2006*

Legal and beneficial ownership

21. There is no question that the claimant is the legal owner of No. 57. However, in cases where property is held on trust, it is the beneficial ownership, not the legal ownership that counts for the purposes of income-related benefits.

22. Lawyers use the phrase “legal owner” in at least two ways.

23. The first is probably closest to how a non-lawyer might use the term. Suppose, for example, that I find an expensive diamond earring lying on the pavement. I advertise the fact that I have found it and a woman contacts me claiming to be the owner. For whatever reason, I doubt her claim and will not return the ring to her without a court order. The judge, finding in her favour (because she has the matching earring and there is compelling evidence that she lost the one in my possession, shortly before I found it), may say that she is the “legal owner” of it. However, in those circumstances, what the judge means is she is the owner and I am not. The word “legal” is almost redundant: all it denotes is that the judge has arrived at that conclusion by applying the law.

24. But lawyers also use the phrase “legal owner” in a second way, and one in which the word “legal” does more work. There are cases in which the ownership of an asset is split so that more than one person can be said to own it. In such cases the “legal owner” has all the formal rights of ownership—so, for example, if the property is land or shares it will be registered in the legal owner’s name—but does not have the right to benefit from the property. In such cases, the legal owner holds the property as a trustee or nominee for the “beneficial owner”.

25. As the name suggests, it is the beneficial owner who is entitled to the benefit of the property. So, if he is the beneficial owner of shares, and a dividend is declared he will normally be entitled to that income, even though it will actually be paid to the legal owner. If the shares are sold, he will be entitled to the proceeds of sale and he will often be entitled to require the legal owner to transfer the property into his (the beneficial owner’s) name.

26. In a case like that, it is the beneficial ownership—not legal ownership (in the second sense)—that is relevant to entitlement to IS and HB.

27. Of course, in most cases the legal owner and the beneficial owner are the same person. Let us go back to the woman who is the “legal owner” of the earring. If she happened to be claiming IS or HB, then the earring would form part of her capital (although it might, perhaps, be disregarded capital on the basis that it was a personal possession). But that is because she is *also* the beneficial owner. In that theoretical case between her and me, no-one is suggesting that ownership of the earring was split: the dispute was about whether all the ownership is hers.

28. This case is different. There is no dispute that the claimant has at all material times been the registered proprietor of No. 57. However. Mr G provided by far the bulk of the purchase price and has asserted that he has an interest in the property under a trust of land. If that is correct—and the FTT found that it was—then the claimant held No. 57 on Trust for herself and Mr G and only the claimant’s share in the beneficial ownership of that property counts as her capital for IS and HB.

29. In other words, the fact that the claimant was the registered proprietor of No. 57 is not conclusive that she was also the beneficial owner of the property.

CH/715/2006

30. I confess to being the unwitting cause of some of the confusion that has arisen on this issue, both in this appeal and in many other social security cases before the FTT.

31. Sitting as a Deputy Social Security Commissioner in 2007, I gave a decision about the formation of express trusts (*CH/715/2006*). LBTH cited that decision to the FTT in this appeal and the judge distinguished it: that is, he ruled that it did not apply in this case.

32. In *CH/715/2006*, as I said at paragraph 6 of the decision under the heading, *The Issue*, the issue concerned

> "the **beneficial** ownership of the sums standing to the credit of a joint 30-day savings account held in the joint names of the appellant, his wife and his daughter, DF, at a bank in central London". (the emphasis does not appear in the original).

33. What had happened in CH/715/2006 was that the appellant had decided to dispose of his estate while he was still alive instead of making a Will. It is perhaps ironic that his decision was motivated by a desire to avoid "legal expenses[,] hassle, [and] complications". That process included "the disposal of £60,000 to my children … in a private legacy". By the time of the local authority's decision, that £60,000 was represented by the money in the joint 30-day savings account referred to above. The appellant referred to the effect of that arrangement as being the creation of a "Trust" and, although he accepted that the Trust might not be legally-enforceable, he maintained that that circumstance "in no way makes the setting up of a private trust illegal or … inapplicable".

34. If the appellant had successfully created a Trust in favour of his children, then he would have won his appeal. That is because the beneficial ownership in the money in the Trust would have passed to his children and, although he would have continued to be the legal owner (or one of the joint legal owners), he would no longer have been the beneficial owner of it. Capital of which a claimant is not the beneficial owner does is not the claimant's capital for the purposes of IS and HB.

35. However, the appellant in *CH/715/2006* had **not** successfully created such a Trust.

36. In order to create an express Trust (which was the type of Trust that was in issue in *CH/715/2006)* the law requires that a number of things should be certain and that, in turn requires that some minimal formalities should be observed. The appeal tribunal had decided that no legally-binding Trust had been created and, on appeal to the Commissioner, I decided that that decision was not materially in error of law.

37. It followed that the appellant had not succeeded in splitting the legal and beneficial interests in the money in the account and therefore retained both interests.

Because he was still the *beneficial* owner of that money (as well as being one of the legal owners) that money was his capital and excluded him from entitlement to HB.

38. Re-reading *CH/715/2016*, 11 years after I gave the decision, I regret I still cannot see what I could have said to make it clearer that the case was about whether the appellant had succeeded in divesting himself of his (allegedly former) *beneficial* ownership of the money in the account (in which case it did not fall to be taken into account in the calculation of his entitlement to HB) or had failed to do so (in which case it did). For example, I said at paragraph 10(b):

> "The appellant's apparent acceptance that "no legally enforceable trust has been set up" would, if taken at face value, provide a sufficient reason on its own for dismissing his appeal. Ownership is a legal matter. A "trust" that is not legally-enforceable is not a trust at all.
>
> It is not in dispute that the appellant was both the legal and beneficial owner of the money before he set up the alleged trust. If he did not succeed in setting up a trust (i.e., a trust that the law would recognise and enforce) then, as a matter of law, he is still the legal and beneficial owner of that money.
>
> If the appellant's statement that the setting up of a private trust is not "illegal or … inapplicable" was intended to mean that making the sort of arrangement he claims he has made is not contrary to the criminal law, then that is true. However, the absence of criminality is not sufficient on its own to make the family arrangement he entered into effective to transfer the beneficial ownership of the money from him to his daughters. At the risk of labouring the point, the appellant's evidence is that he intended to make a gift to his daughters. If he was succeeded in setting up a trust then he also succeeded in making that gift. If he did not, then no gift was made and he retains ownership of the money in the Account.
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> The issue is therefore, again, whether the appellant's evidence has proved the existence of a trust."

39. However, having agreed with the appeal tribunal (and the appellant) that "no legally enforceable trust [had] been set up", I incautiously concluded with words of consolation, because the appellant was outraged at what he perceived to be allegations of dishonesty against him.

40. What I said was:

> "19 I would add one thing by way of conclusion. The appellant has stated that [the local authority] have accused him and his daughters of lying and have cast aspersions on his integrity. Whilst I cannot speak for [the local authority], I wish to

> make it clear that I make no such accusation and cast no such aspersions. I am satisfied that the appellant and his family entered into a private arrangement in 1987, that they believed (albeit incorrectly) that the legal word "trust" was apt to describe that arrangement and that in 2005 they also believed, as a result of the arrangement, that the appellant's four daughters were, at least morally although possibly not legally, the owners of the money in the [a]ccount in equal shares.
>
> 20 The law that governs entitlement to benefit is only concerned with *legal* ownership. As I have explained, that means that a private arrangement such as that made by the appellant will only have the effect of divesting him of beneficial ownership if it creates a Trust that the law recognises and will enforce. Although a Settlor's intentions are an important factor to be taken into account when considering whether a trust has come into existence, the law requires—and requires for good reasons—that any person asserting the existence of a trust should be able to prove that those intentions were expressed with a sufficient level of certainty before it recognises that a trust has been created. In this case, the appellant either did not express his intentions in a sufficiently certain manner or has not retained the evidence that would enable him to prove that he did so. The effect, as the tribunal correctly concluded, is that, again as a matter of law, the money in the disputed account continues to belong to the appellant. His belief to the contrary, though no doubt honestly held, is mistaken."

41. *CH/715/2006* was an unusual case on its facts and established no new legal principle. It was a case about the certainties required to create an express trust and not about whether legal or beneficial ownership is taken into account when calculating entitlement to income-related benefits. What I said about the certainties was no more than the practical application of legal propositions that can be found in any undergraduate textbook on the law of Trusts. I therefore did not even consider it worth putting on the website maintained by the Commissioners' office at the time.

42. Despite that, for about once a month on average during the past 11 years, local authorities—including LBTH in this case—have been ripping the first sentence of paragraph 20 of *CH/715/2006* from the context provided by paragraph 19 (and by the rest of paragraph 20) and citing it to the First-tier Tribunal as authority for the proposition that it is the legal ownership of property, as opposed to the beneficial ownership, that is relevant to entitlement to income-related benefits.

43. *CH/715/2006* is not authority for that proposition, and I would like to take this opportunity of politely asking those local authorities to stop.

44. Taken in the context provided by the preceding paragraph, the emphasised word "legal" in the first sentence of paragraph 20 is a reference back to the words:

> "the appellant's four daughters were, at least morally although possibly not legally, the owners of the money"

in paragraph 19. The distinction being drawn was between "legal ownership" and "moral ownership", not between "legal ownership" and "beneficial ownership". In other words, I was using the phrase "legal ownership" in the first of the senses discussed at paragraphs 22-29 above, not the second. The suggestion that that I was saying that beneficial ownership was irrelevant is not even consistent with what I said in sentence that followed immediately afterwards.

45. Moreover, the appellant in *CH/715/2006* had always been the legal owner (using that phrase in the second sense) of the disputed property. If only legal ownership—as opposed to beneficial ownership—was relevant, then that would have been the end of the matter. The local authorities who have relied on paragraph 20 as authority for the proposition that beneficial ownership is irrelevant for benefit purposes might perhaps have asked themselves why, if that were the case, I had defined the issue in *CH/715/2006* as being about the *beneficial* ownership of the money in the account and spent the preceding seven pages discussing whether the appellant had succeeded in divesting himself of such *beneficial* ownership.

46. Before leaving *CH/715/2006,* I should also explain that it was a case about the creation of an *express* trust, *i.e.,* one created by an overt (though not necessarily written) declaration of trust. That is not the only way in which a trust can arise. In particular, there are occasions on which Trusts can arise by operation of law. Such trusts fall into two categories, resulting trusts and constructive trusts.

47. In this case, it is common ground that there is nothing that could be treated as an express declaration of Trust. It is a case of resulting trust or nothing. *CH/715/2006* does not apply in those circumstances. The FTT was correct to distinguish it.

Resulting trusts

48. A concise explanation of resulting trusts may be found at paragraph 21-020 of *Snell's Equity* (33rd edition. Sweet & Maxwell, London, 2014):

> "A resulting trust arises by operation of law, though in response to a legal presumption about the intentions of the person who transfers the property which becomes subject to the trust. If A transfers property to B when it is unclear whether A intends B to have the beneficial interest in it, then B may hold the property on resulting trust for A. The trust arises by operation of law to give effect to a presumption that A did not intend B to take the property beneficially."

That principle is long-established. In *R(SB) 49/83*, Mr Commissioner Hallett stated that "the principle that purchase of land in the name of another gives rise to a resulting trust for the true purchaser has been settled for centuries" and cited two cases from the seventeenth and eighteenth centuries as authority. The most recent

authoritative statement of the principle was made by Lord Browne-Wilkinson, speaking for the majority of the House of Lords, in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 708:

> "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) *or in the case of a joint purchase by A and B in shares proportionate to their contributions*. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer …. (B) …" (my emphasis).

49. However, at least in family cases, that statement must now be read in the light of the decision of the majority of the House of Lords in *Stack v Dowden* [2007] UKHL 17, as clarified by the decision of the Supreme Court in *Jones v Kernott* [2011] UKSC 53.

50. It is instructive to note the facts of those two cases.

51. In *Stack v Dowden*, the couple were unmarried. However they had lived together for 19 years and had four children together. Except as regards the purchase of the second home in which they lived. they maintained separate finances. However, that home was registered in their joint names. The evidence showed that Ms Dowden's contribution to the purchase of that property substantially exceeded Mr Stack's. When the couple separated, the trial judge held that the proceeds of sale of that property should be divided in equal shares. The Court of Appeal allowed Ms Dowden's appeal and divided the proceeds 65% to 35% as Miss Dowden had asked (it considered that her share was at least 65%) and the House of Lords unanimously upheld that order, although it divided 4:1 on the reasons for doing so.

52. The facts in *Jones v Kernott*, were as stated at paragraphs 37-39 of the joint judgment of Lord Walker and Lady Hale:

> "37. 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.
>
> 38. The purchase price was £30,000. This was relatively cheap because the house had belonged to the elderly mother of a client of Ms Jones. 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.
>
> 39. 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."

53. On those facts, the County Court awarded Miss Jones 90% of the proceeds of sale of 39 Badger Hall Avenue and Mr Kernott 10%. That decision was upheld on appeal by the High Court. However, on further appeal, the Court of Appeal, by a majority, allowed Mr Kernott's appeal. It decided that the parties were entitled to the proceeds of sale in equal shares. Finally, the Supreme Court allowed Miss Jones' appeal and restored the 90%/10% split originally ordered by the County Court judge.

54. In doing so, the Supreme Court set out a list of the principles that were to apply in "family home" cases. That list was as follows:

> "*Conclusion*
>
> 51. In summary, therefore, the following are the principles applicable in a case such as this, 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.
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> (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

[As this decision will be read by people who are not legally-qualified, I should explain that the phrase "joint tenants" in this context has a technical legal meaning and is not a generic reference to any co-owner. To summarise, the distinction being drawn by the Supreme Court is between "joint tenants", who always own a property equally, and "tenants in common" who may own a property in equal shares but do not necessarily do so.]

(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" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(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": Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "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.

(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 either intended (as in case (3)) or fair (as in case (4)).

52. This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of

> joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.
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> 53. 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."

55. For completeness, paragraph 69 of *Stack v Dowden* (to which reference is made in point (3) of paragraph 51 quoted above) is in the following terms:

> "69. In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual."

The Jones v Kernott challenge

56. Although he did not refer to the case by name, the judge effectively distinguished *Jones v Kernott* on the basis of his finding that No. 57 was not bought as a family home but rather as "a commercial venture" (although "an investment" might have been a better choice of words).

57. That finding was fully supported by the evidence. Indeed, I do not consider that any other conclusion was properly open to the judge. No. 57 was purchased at a time when the claimant and Mr G were not cohabiting. Neither the claimant nor Mr G intended to live there and the claimant, at least, was prohibited from doing so by the covenant in the buy-to-let mortgage. The claimant's home was, and was intended to continue to be, at No. 6, where she had security of tenure as a council tenant

58. Moreover, the claimant, her children and Mr G cannot be regarded as ever having been a family. The trivial period of cohabitation ("about a week") was perhaps an attempt to become a family. But that attempt failed before it had even been given a reasonable time to succeed. The contrast between the facts of this appeal and the facts of *Stack v Dowden* and *Jones v Kernott,* which involved parties who had cohabited for years before the purchase of the disputed properties, could not be more stark.

59. It is therefore clear that this appeal is not a "case… 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" or a case that is "concerned with a family home which is put into the name of one party only" (see paragraphs 51 and 52 of *Jones v Kernott*).

60. However, the *Jones v Kernott* principles also apply in some other types of case.

61. In *Wodzicki v Wodzicki* [2017] EWCA Civ 95 at 25, the Court of Appeal accepted on the authority of its earlier decision in *Gallarotti v Sebastianelli* [2012] EWCA Civ 865 that the *Jones v Kernott* "approach may be applied outside the precise confines of a co-habiting couple, notwithstanding the terms of the judgments in that case". There are nevertheless limits on the types of case to which that approach may be extended. In *Wodzicki* itself the Court held that it was not applicable to a dispute between a woman and her father's late wife where there was "nothing close about the relationship between the [parties]". In both *Wodzicki* (at paragraph 25) and *Gallarotti* (at paragraph 26) the Court was influenced by the implausibility on the facts of those cases of the supposition that one party intended to make a gift to the other.

62. In my judgment, the current state of the law is that *Jones v Kernott* applies where a couple in an intimate relationship (whether married or unmarried), or (as in *Gallarotti*) two or more people who are friends, decide to buy a house or flat in which to live together in circumstances where the relationship is built on trust and it is unlikely that the parties intended to hold each other to a detailed financial account. I derive that principle from the discussion in paragraphs 19-21 of the judgment of Lord Walker and Lady Hale in *Jones v Kernott* always bearing in mind that that discussion was primarily directed to cases in which both parties are registered as legal proprietors of the property.

63. If that is correct, the simple answer to the *Jones v Kernott* challenge is that this appeal is not a "family home" case in that sense.

64. No. 57 was an investment and was not intended as a home for either the claimant or Mr G. Mr G was prepared to advance a large sum of money to the claimant without any formalities and in circumstances in which, had the claimant been dishonest, she could have resold No. 57 without his knowledge and pocketed his share of the proceeds of sale. To that extent, at least the relationship was one of trust. However, nothing in the evidence suggests that the claimant and Mr G did not intend to hold each other to account in respect of No. 57. The claimant told the judge that they had tried and failed to reach an agreement as to their respective interests in the property. Following that failure, Mr G registered a restriction in the proprietorship register relating to No. 57 at HMLR.

65. In such a case, it remains permissible for a court or tribunal to take a resulting trust approach. In *Stack v Dowden* at paragraph 32, Lord Walker stated that:

> "The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership."

and in *Jones v Kernott*, the Supreme Court stated (at paragraph 31):

> "… we accept that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. However, there are at least two exceptions. The first, which is not this case, is where the classic resulting trust presumption applies. Indeed, this would be rare in a domestic context, but might perhaps arise where domestic partners were also business partners: see *Stack v Dowden*, para 32 …"

Subsequently, the Court of Appeal has applied a resulting trust approach as one of the routes by which it reached its decision in *Geary v Rankine* [2012] EWCA Civ 555 at paragraph 18. And in *Wodzicki* at paragraph 28, the Court of Appeal upheld a decision of the County Court that took a resulting trust approach in a family dispute.

66. It is therefore clear that, although the final sentence of paragraph 53 in *Jones v Kernott* (quoted at paragraph 54 above) hints that the application of "the classic resulting trust presumption" might be due for reconsideration in cases that do not involve family homes, no such reconsideration has yet taken place.

67. It is not for the FTT or the Upper Tribunal to undertake that reconsideration. In cases where the resulting trust approach still applies, judges in both Tribunals remain bound by the decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*, to hold that, except in *Jones v Kernott* cases, "where A

makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested … in B alone …, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions".

68. That is what the judge decided in this appeal. He did not err in law by doing so.

69. Unlike *Jones v Kernott*, this is not a case in which the claimant and Mr G were registered with HM Land Registry as the joint legal proprietors of No. 57.

70. Rather, that property was registered in the sole name of the claimant. So the first point the FTT needed to decide was whether Mr G had any beneficial interest in it at all.

71. However, a common intention that Mr G should have such an interest can readily be inferred from the fact that, ignoring the mortgage for the moment, Mr G contributed 67,263.09/67,513.09ths—99.6%—of the purchase price in circumstances in which there was no evidence suggesting that the money advanced was a loan or a gift. And, in any event, inference was unnecessary because the claimant accepted in her oral evidence that a joint beneficial interest was intended.

72. The 99.6% figure is rounded down to one decimal place, which favours the Secretary of State and LBTH by slightly increasing the claimant's share at the expense of Mr G's.

73. As there was a common intention that Mr G should have a beneficial interest, the next issue is the extent of that interest. Again, the question is whether the claimant and Mr G had a common intention as to how the beneficial ownership should be shared.

74. At this point what is being looked for is an actual agreement between the parties on the point. In some cases, the evidence may permit a finding that an express agreement was made, either in writing or by word of mouth. In others, it may be possible to infer from the evidence as a whole, and in particular the parties' conduct, that such an agreement was concluded.

75. If it is possible to establish such a common intention, then that will be sufficient to rebut the presumption that the parties should hold the property on a resulting trust that reflects their respective contributions to the cost of its acquisition. Instead, the beneficial interests will reflect the common intention.

76. However, in this case, at paragraph 16 of the statement, the judge accepted the claimant's evidence that she and Mr G had not reached a consensus. He found that the purchase of No. 57 had been initiated by the claimant acting alone and that "[o]nly very shortly before the completion of the purchase did [the claimant] find a significant financial shortfall which obstructed the successful completion of the purchase and at that time she turned to Mr G for help". It is implicit in those findings that original intention to buy an investment property was the sole intention of the claimant. When that proved to be impossible, Mr G advanced the money needed to

complete the purchase. But the claimant and Mr G did not agree before completion what their respective shares in the property were to be in the light of the changed circumstances. And they were unable to do so afterwards.

77. As the evidence did not permit the judge to find or infer an actual common intention that would rebut the presumption of resulting trust—the FTT was bound to hold that, at least immediately following the purchase, the claimant held the legal interest in No. 57 on a resulting trust for Mr G and herself and that their beneficial interests in the property were in proportion to their respective contributions to the purchase price.

78. In other words, she held 99.6% of the beneficial interest on trust for Mr G and 0.04% of that interest on trust for herself.

79. Suppose, however, that this had been a case in which *Jones v Kernott* applied.

80. The first step, *i.e.,* asking whether Mr G had any beneficial interest in a property of which the claimant was the sole legal owner, would lead to the answer, yes, for the reasons given at paragraph 71 above.

81. Having reached that answer, paragraph 52 of *Jones v Kernott* would have required the judge to proceed as set out in paragraphs 51(4) and (5).

82. Under the first of those paragraphs, the judge would have been required to ask what share would be "fair having regard to the whole course of dealing between them in relation to the property".

83. It is hard to see how any answer can be given to that question other than that the beneficial ownership should be shared in the proportions in which they contributed to the purchase price. The judge would have had in mind the reminder in paragraph 51(5) that financial contributions are relevant but there are many other factors which may enable the court to decide what shares were fair. However, at the time the purchase of No. 57 was completed and the beneficial interests crystallised, there were no other such factors in this case. The claimant and Mr G were not cohabiting, their relationship was still developing (although it was not to develop much further) and No. 57 was an investment property, not their intended home. And, bearing in mind what was said in *Wodzicki* and *Gallarotti* (see paragraph 61 above) it is implausible that Mr G intended to make the claimant a gift of the £67,263.09 that he contributed to the purchase price, or of any significant part of that sum, or of his rightful share in the income from the property (as to which see below).

84. Therefore, even if—contrary to what I have decided—the law required the FTT to apply *Jones v Kernott* in this case, the judge would have reached the same outcome as he in fact reached by taking a resulting trust approach. Any error of law that might have been involved in omitting to apply *Jones v Kernott* would therefore have been immaterial.

85. Having established that the FTT did not err in law as regards the distribution of the beneficial interests in No. 57 immediately following the purchase, I turn to consider whether it erred by failing to consider whether that distribution changed as a

result of events between the purchase and the period covered by the decisions under appeal.

Did the claimant contribute to the acquisition of No. 57 after the purchase was completed?

86. The claimant was the sole legal owner of the property and, therefore, as between herself and the mortgagees, was solely responsible for the mortgage. It is therefore likely that she actually paid the mortgage.

87. However, at first, as the FTT found, the outgoings on the property were to be paid out of the rent received from the tenants. Given the FTT's conclusion as to the respective beneficial interests at the time of the purchase, 99.6% of that rent belonged beneficially to Mr G and 0.4% belonged beneficially to the claimant. Therefore, to the extent, that the outgoings were paid from the rent, they did not alter the proportion in which the claimant and Mr G were contributing to the purchase of the property.

88. As Judge Knowles pointed out, there is evidence in the papers that the claimant paid the mortgage and outgoings from her own resources and borrowed money from relatives to do so. However, that evidence relates to the period from 2009 to August 2013 during which the claimant and her children were living at No. 57 rather than No. 6 because the latter property was infested.

89. There was no evidence that the claimant paid the mortgage from her own resources when she was not living at No. 57. The FTT found that the mortgage went into arrears, which were then capitalised, because the monthly interest payments were not met during periods when there were no tenants or during which No. 57 was in need of repair.

90. In my judgment, the FTT did err by failing to consider how the arrangements for the payments of the outgoings on No. 57 changed after the claimant went into occupation in 2009. However, the error was immaterial because the payments she made during that period were wholly referable to her occupation of the property rather than to the acquisition of a greater interest in it. In particular, the mortgage was an interest only mortgage. None of the mortgage payments she made increased the equity in No. 57. By occupying No. 57 herself, the claimant made it impossible to rent the property out. So it was only fair that she should pay the outgoings from her own resources. Had she not done so, Mr G. could have claimed an occupation rent under section 13 of the Trusts of Land and Appointment of Trustees Act 1996.

91. Therefore, had the FTT considered the point expressly, it could not legitimately have concluded that the payments made by the claimant when she was in occupation of No. 57 changed the proportions in which she and Mr G owned the beneficial interests in that property.

The statutory declaration issue

92. The restriction that Mr G had placed on the Proprietorship Register of No. 57 was registered on 13 April 2006 and was in the following terms, which are standard:

> "RESTRICTION: No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court."

Contrary to what LBTH say they were advised by a member of staff at HMLR, for practical purposes, that restriction prevented the claimant from selling No.57. From Mr G's perspective, that was the whole point of registering it.

93. The restriction was registered pursuant to an application made in Form RX1 under section 43 of the Land Registration Act 2002 and rule 92 of the Land Registration Rules 2003. In panel 13 of that Form, in response to the question:

> "State brief details of the applicant's interest in the making of the entry of the restriction…"

Mr G's solicitors wrote:

> "The Applicant has an interest in the property which is the subject of this application, as a beneficiary under a Trust of Land, on the basis that he made direct substantial financial contributions to the property in question, including providing the registered proprietor with the deposit to enable the property in question to be purchased."

Panel 6 of the Form records that a statutory declaration made by Mr G on 12 April 2006 was lodged with the application.

94. It is now suggested, although it was not suggested before the FTT, that the judge should have adjourned the hearing so that a copy of that declaration could be obtained from HMLR and produced in evidence.

95. The judge was aware of the existence of the statutory declaration. He refers to it in paragraph 20 of the statement. He noted that no party had produced it and expressed uncertainty about whether HMLR would have provided a copy if requested to do so and whether it would have made any difference to the outcome. He also referred (at paragraph 21) to the contents of panel 13, which are quoted above.

96. It is comparatively rare for courts and tribunals of the first instance, such as the FTT, to have all the evidence that they would like when they make a decision. The corollary of that is that it is almost always possible to identify further evidence that could be obtained.

97. Whether or not to obtain such evidence is a matter of judgment as to which course of action will further the overriding interest of dealing with the matter fairly and justly. In particular, as would have been the case had the FTT adjourned so that a copy of the statutory declaration could be produced, obtaining further evidence will almost always lead to delay. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Procedure Rules"), which establishes the overriding objective in the FTT, states (at paragraph (2)(e)) that “dealing with the matter fairly and justly includes … avoiding delay so far as compatible with the proper consideration of the issues”.

98. By 26 August 2015, these appeals had already been postponed once and adjourned once and the decisions under appeal had both been taken more than 14 months previously. The correct course for a tribunal that knows of the existence of evidence that is not available to it but which might affect the outcome, is to hear all the other evidence that is available to it and then, having done so, to determine whether it is compatible with fairness and the proper consideration of the issues to decide the appeal on the basis of the existing evidence rather than adjourn to obtain the further evidence.

99. In my judgment, the judge in this appeal was justified in reaching his decision without a further adjournment:

(a) The existence of the statutory declaration was plainly stated on the Form RX1. All of the parties were professionally represented. If any party had believed that the statutory declaration might have been of paramount relevance, that party could have obtained a copy from HMLR and produced it to the FTT. No party did so.

(b) Similarly, none of the parties asked the judge to adjourn so that a copy of the statutory declaration could be obtained.

In those circumstances, and as this was not a case in which LBTH or the Secretary of State were obliged to produce the statutory declaration under rule 24(4) of the Procedure Rules, it was not unfair for the judge to have proceeded as he did.

(c) What the law required the judge to attempt to find was the common intention of the parties as to their respective beneficial interests in No. 57. The statutory declaration would, at most, have told him what Mr G’s intention had been at the time he made the advance. It is more probable that it would have told him what Mr G had been advised was the legal effect of the events surrounding the purchase of No. 57. But the judge already had evidence from the claimant that there was no common intention as to who should have what interest in the property and that subsequent attempts to sell it failed because the parties could not agree on how the net proceeds of sale should be divided. The judge was entitled to take the view that the statutory declaration was unlikely to contribute further to the proper consideration of the common intention issue.

(d) That view is reinforced by the fact that it is possible to infer the substance of what was said in the statutory declaration. Mr G’s application to register a

restriction was successful. It can therefore be assumed that the statutory declaration vouched for the truth of his account that he was "a beneficiary under a Trust of Land, on the basis that he made direct substantial financial contributions to the property". Further, Mr G was relying on the fact of his financial contribution to the purchase price as establishing his beneficial interest in No. 57. It is inherent in that position that the *extent* of the beneficial interest for which he contended must have been in proportion to that contribution.

(e) It also reinforced by Mr G's subsequent conduct. The evidence before the FTT showed that Mr G was demanding payment of a sum that, on the claimant's figures, was more than 100% of the equity in the property in order to remove the restriction. There can be no doubt that, at least with the benefit of legal advice, Mr G considered himself to own virtually the entire beneficial interest in the property.

I therefore do not consider that the FTT erred in law by omitting to adjourn so the statutory declaration could be produced.

The "What became of the compensation?" issue

100. On 11 December 2013, LBTH wrote to the claimant and asked (among other things):

> "We have been advised by our Rents section that you have received compensation for an infectation *[sic]* at your current [address]. Please advise what you intend doing with the remaining £9,342.36?"

101. On 5 January 2014, the claimant replied by email as follows:

> "I am told there have been some deductions and the amount is approximately £8,000. The money will be used to pay off some of my debts and to pay the costs incurred as a result of appealing this case.
>
> I am assuming that you do not need any documentation provided in the light of the information detailed above. Please could you confirm that this is the case."

102. On 8 January 2014, LBTH wrote again to the claimant. The letter raised further queries about some of the other matters set out in the email of 5 January but was silent on the issue of the compensation payment. So far as I can see from the papers, that issue was never raised again in correspondence and no party asked the FTT to consider it.

103. I therefore judge that what became of the compensation the claimant received was not an issue that was raised by the appeal. On the evidence as a

whole, it appeared that LBTH accepted what the claimant had told them about how it would be used, so it was not "clearly apparent from the evidence" that the point was in dispute (see the decision of the Court of Appeal in Northern Ireland in *Mongan v Department of Social Development* [2005] NICA 16 reported as R4/01 (IS) at paragraph 16 as approved by the Court of Appeal of England and Wales in *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495 at paragraph 28). Therefore the judge did not have to consider the unless one of the parties asked him to do so, which they did not.

104. It follows that the FTT did not err in law by omitting to deal with the issue.

105. The decision of the FTT that the claimant had less than £6,000 during the period under consideration has now been subsumed into this decision (see the decision of the Tribunal of Commissioners in *R(I) 9/63* at paragraph 19). If the Secretary of State and/or LBTH now wish to pursue the issue of what happened to the compensation and are able to establish that, because of the compensation, the claimant's capital exceeded £6,000 for any non-trivial period of time, it is open to them to supersede my decision on the basis that it was made in ignorance of, or was based upon a mistake as to, some material fact (*i.e.,* under regulation 6(2)(c)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 or regulation 7(2)(d)(i) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001).

106. However, given the age of the case and the likelihood that any overpayment of HB (at least) would be irrecoverable, I do not encourage them to take this course. I remind them that if they do so, it is for them to establish the existence of grounds for supersession and what the terms of the superseding decision should be.

Conclusion

107. In summary:

(a) The claimant wanted to buy an investment property. She almost certainly intended originally that she would be the sole legal and beneficial owner of the property.

(b) However, she did not have the money to make good on that intention.

(c) Mr G stepped in and paid 99.6% of that part of the purchase price that was not met by the mortgage.

(d) The claimant was only able to contribute 0.04%, £250.

(e) No part of the mortgage has since been repaid. Rather the principal sum due under the mortgage has increased through the capitalisation of arrears of interest.

(f) To the extent that the outgoings on No. 57 were met at all, they were met either through rent paid by the tenants (which belonged to Mr G and the

claimant in the same 99.6/0.04 ratio) or, during the period in which she lived there, through payments made by the claimant to reflect her exclusive occupation of a property of which she owned less than 1%.

(g) The property was never intended as a family home and there was no long-term substance to the romantic relationship between the claimant and Mr G.

(h) The claimant and Mr G never agreed how the beneficial interest should be divided.

(i) On those facts, it can be inferred to a high standard of proof—higher than the balance of probabilities, which is all that is necessary—that Mr G did not intend to make a gift to the claimant of the £67,263.09 that he contributed to the purchase price, or of any significant part of that sum, or of his rightful share in the income from the property.

108. It will be recalled that the Secretary of State's grounds of appeal remind the Upper Tribunal that, in the words of Lord Collins in *Jones v Kernott* (see paragraph 14 above) "[i]t would be difficult … 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".

109. It would be unfair and unjust to Mr G to treat him as having made a gift to the claimant that he clearly did not intend to make.

110. More relevantly, for present purposes, it would be unfair and unjust to calculate the claimant's entitlement to IS and HB as if she had received a gift from Mr G that she has not in fact received.

111. The FTT decided that the law did not require either of those outcomes. It applied a resulting trust approach, which led it to conclude that, having contributed to the equity in No. 57 at a ratio of 99.6/0.04, Mr G and the claimant owned the beneficial interest in that equity in the same proportion.

112. In my judgment, it was legally open to the FTT to take that course and its decision was fair, just and correct. Moreover, the FTT would inevitably have reached the same conclusion had it applied the principles established in *Jones v Kernott*.

113. For all the above reasons, my decision is as set out on page 1 above.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

19 January 2018