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## Common Intention Constructive Trusts and the Role of Imputation in Theory and Practice: *Barnes v Phillips*

*Barnes v Phillips* [2015] EWCA Civ 1056; [2016] HLR 3

Andy Hayward\*

Following the Supreme Court decision in *Jones v Kernott*, imputation of fair shares now exists as a possibility in the quantification (but not acquisition) of beneficial ownership under a common intention constructive trust.<sup>1</sup> Crucially, though, fairness is always a *residual* option. In joint legal title cases, fairness can only be used once an express or inferred common intention to depart from equal sharing under the beneficial joint tenancy is found and, in addition, once an express or inferred common intention as to the parties' precise shares in the beneficial ownership cannot be identified by the court. This sanctioning of fairness in *Kernott* built upon earlier dicta by Chadwick LJ in *Oxley v Hiscock*<sup>2</sup> and developed the principles laid down in the House of Lords decision in *Stack v Dowden*.<sup>3</sup>

After *Kernott*, it was questioned whether the explicit permission to impute shares on the basis of fairness would prove all too tempting for the judiciary, particularly when it is remembered that these disputes are rarely 'flood-lit by clear evidence'.<sup>4</sup> In particular, would judges exploit the overly academic distinction between inference and imputation to reach the desired, residual option? It was inevitable that this issue would be litigated and this forms the basis of the Court of Appeal decision in *Barnes v Phillips*.<sup>5</sup>

### Facts and Legal Issues

Mr Barnes and Miss Phillips started a relationship in 1983 and began cohabiting in rented accommodation in 1989. Two children were born. In 1996 a property was purchased in joint names for approximately £135,000 and this was financed through a £25,000 deposit and a mortgage secured for the remainder. Mr Barnes was a self-employed businessman and primarily paid the mortgage repayments whereas Miss Phillips, a nurse, paid for the bills and other expenditure. Both contributed towards renovations to the property. During the course of their relationship, Mr Barnes bought three other properties in his sole name that he rented out to generate additional income. After experiencing financial difficulties, Mr Barnes encouraged Miss Phillips to consent to re-mortgaging the property and this eventually took place in 2005. In June 2005, the relationship broke down and Mr Barnes moved into one of his other properties. From this point in time to 2008, both contributed to the mortgage with Miss Phillips providing approximately £12,500 and Mr Barnes providing £22,000. In addition, the parties agreed that Mr Barnes would pay £250 per month to maintain the children. From 2008, Miss Phillips assumed sole responsibility for discharging the mortgage, caring for the children and covering expenditure in relation to the property. No accurate valuation occurred in 2008 but it was estimated that the property was now worth £497,500.

Miss Phillips made an application under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, which was heard by HH Judge Madge. Recognising that there was a conflict of evidence, HH Judge Madge believed Miss Phillips to be honest and truthful and

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<sup>1</sup> *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776.

<sup>2</sup> *Oxley v Hiscock* [2004] EWCA Civ 546; [2005] Fam 211.

<sup>3</sup> *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432.

<sup>4</sup> *Pettitt v Pettitt* [1970] AC 777; [1969] 2 WLR 966 at 803 per Lord Morris.

<sup>5</sup> *Barnes v Phillips* [2015] EWCA Civ 1056; [2016] HLR 3.

that Mr Barnes' evidence required independent corroboration for it to be accepted by the court. Although there had been unequal financial contribution to the purchase of the home, they were both joint tenants in law and in equity with each contributing to what was 'in effect, a marriage without a wedding ceremony'.<sup>6</sup> Despite some discussions in text messages, HH Judge Madge accepted that there was no real evidence that they had an actual common intention that their shares in the property would change. Nevertheless, as it was not possible to determine what the actual intentions of the parties were, each was entitled to a fair share. On that basis and in light of Miss Phillips assuming all responsibility for the mortgage and the property from 2008 onwards, Miss Phillips was awarded 85% and Mr Barnes received 15% of the beneficial ownership. Mr Barnes appealed on the basis of three points.<sup>7</sup> Firstly, that having found no agreement to vary beneficial ownership, it was not open to HH Judge Madge to impute to the parties that particular intention. Secondly, that the judge was plainly wrong to reach a division of 85/15 and, thirdly, it was wrong to take into account the lack of child support payments when determining quantum.

### **The Court of Appeal Decision**

In the Court of Appeal, Lloyd Jones LJ (with whom Longmore and Hayden LJJ agreed) dismissed Mr Barnes' appeal. In relation to the argument that HH Judge Madge was not open to impute to the parties an intention to vary, Lloyd Jones LJ set out the relevant principles from paragraph 51 in *Kernott* and noted that where there was no common intention to vary beneficial ownership, the parties would remain joint tenants in equity until severance occurred.<sup>8</sup> Furthermore, there needed to be express evidence or evidence inferred through conduct of an intention to share unequally and it was not open for the court at this stage to impute that intention. Despite arguments made by Mr Barnes' counsel to the contrary and even after conceding that 'one person's inference will be another person's imputation',<sup>9</sup> Lloyd Jones LJ believed that HH Judge Madge had not confused the terminology of inference and imputation.

Nevertheless, Lloyd Jones LJ was critical of HH Judge Madge's methodology noting that a key paragraph of his judgment was 'very unclear'.<sup>10</sup> As Mr Barnes was self-represented, it was thought that HH Judge Madge may have used 'lay person's language' to explain the legal tests but, in spite of this fact, the reference to 'actual common intention' was deemed to be a reference to an express agreement which did not encompass an inferred intention.<sup>11</sup> Lloyd Jones LJ viewed this as problematic because actual common intention was a term 'wide enough to include both express and inferred intention'.<sup>12</sup> By HH Judge Madge then moving to imputation of precise shares, a gap in the judicial reasoning occurred because he had:

'...moved directly from considering whether there was an express common intention to vary shares in the property to considering in what shares the parties now hold the property, from concluding that there was "no specific agreement" to considering what intention must be imputed as to the shares. A critical step in the process is simply not addressed in the judgment.'<sup>13</sup>

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<sup>6</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [13].

<sup>7</sup> Mr Barnes also appealed on an additional procedural point that is outside the scope of this note.

<sup>8</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [20].

<sup>9</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [23].

<sup>10</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [27].

<sup>11</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [14] reproducing [37] of HH Judge Madge's decision.

<sup>12</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [27]. This interpretation of actual intention was also used in *Stack* [2007] UKHL 17; [2007] 2 AC 432 at [126] per Lord Neuberger and in *Jones* [2011] UKSC 53; [2012] 1 AC 776 at [51] per Lord Walker and Lady Hale.

<sup>13</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

Despite a key methodological stage being ‘totally absent’,<sup>14</sup> Lloyd Jones LJ opined that HH Judge Mudge was ‘well aware’ of the structure laid down in *Kernott* as he had reproduced it in the preceding paragraphs of his judgment.<sup>15</sup> After clarifying HH Judge’s methodology, Lloyd Jones LJ used inference, as opposed to imputation, to find that the parties intended to alter the beneficial ownership. In particular, the fact that Mr Barnes kept multiple separate properties in his sole name coupled with him receiving all of the financial benefits of the remortgage revealed that when the relationship broke down there was an intention to vary ownership. Further evidence of this was found in Mr Barnes’ decision to stop mortgage repayments in 2008.

In addition, Lloyd Jones LJ rejected the related appeal point that it was plainly wrong for HH Judge Mudge to reach an 85/15 division of the beneficial ownership. In light of Mr Barnes obtaining around 25% of the equity in the property following the remortgage alongside him stopping mortgage repayments, imputation of an 85/15 division was ‘entirely appropriate’.<sup>16</sup>

The final ground for appeal was that the judge was wrong in law to take into account supposed lack of child support payments. This argument was also rejected for being out of line with recognising the importance of the domestic context as emphasized in *Stack*.<sup>17</sup> Whilst the court was to be alert to the risk of double liability, as increasing a share to one party for the other’s non-payment will not relieve the latter of their outstanding contributions to the Child Support Agency, the court was entitled to take this factor into account in light of the ‘very wide terms’ in which the domestic context was expressed.<sup>18</sup> In short, they formed part of the ‘financial history’ of the parties.<sup>19</sup>

## Analysis

Despite being a relatively brief judgment, *Barnes* touches upon many specific facets of the modern implied trust framework. At a general level, it exposes the difficulties produced when ‘the unattainable precision of property law collides with the casual inarticulacy of home sharing’.<sup>20</sup> This collision is particularly noticeable in three key areas: the judicial methodology employed, the strength of the presumption of beneficial joint tenancy and the appreciation of the domestic context. Cumulatively, the Court of Appeal’s interpretation of these three issues in *Barnes* reveals a disjuncture between the theoretical basis of these principles and their practical application by the judiciary.

### The Judicial Methodology

The first issue is the Court of Appeal’s interpretation of HH Judge Mudge’s application of the law. To displace the presumption of beneficial joint tenancy, there needs to be an express intention or an inferred intention based on conduct. Imputation is impermissible at this stage and, in theory, belongs only at the quantification stage and, furthermore, *only* once an express or inferred agreement as to the size of shares cannot be found. This point was explicitly noted by Lewison LJ in *Geary v Rankine*, a Court of Appeal decision handed down shortly after *Kernott*.<sup>21</sup>

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<sup>14</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

<sup>15</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

<sup>16</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [37].

<sup>17</sup> See *Stack* [2007] UKHL 17; [2007] 2 AC 432 at [69].

<sup>18</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [41].

<sup>19</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [41].

<sup>20</sup> A Briggs, ‘Co-ownership and an Equitable Non Sequitur’ (2012) 128 *Law Quarterly Review* 183, 183.

<sup>21</sup> *Geary v Rankine* [2012] EWCA Civ 555; [2012] 2 FCR 461. For comment, see K Lees, ‘*Geary v Rankine*: money isn’t everything’ [2012] *Conveyancer and Property Lawyer* 412.

In *Barnes*, HH Judge Madge noted in paragraph 37 that there was no ‘actual common intention’<sup>22</sup> or ‘no specific agreement’ between the parties to vary shares.<sup>23</sup> As a result of this finding, he then noted in paragraph 38:

‘...so this is a case where it is not possible to ascertain by direct evidence or by inference what the parties’ actual intention was as to the shares they would own in the property after the split. That means that the Claimant and Defendant are each entitled to that share which the court considers fair, having regard to the whole course of dealing between them in relation to the property. I have to impute the parties’ intention by considering what is fair.’<sup>24</sup>

At face value, there appears to be a clear omission here. In paragraph 37, it was probable that HH Judge Madge was referring to an express agreement, particularly in light of his analysis of text messages between the parties that revealed, albeit in a fragmented manner, that no agreement had been reached. Lloyd Jones LJ acknowledged that this was indeed the case.<sup>25</sup> Jumping then to imputation of precise shares in paragraph 38 shows that consideration of whether conduct could have generated an inference of a common intention to depart from equal sharing was simply ignored.

The fact that HH Judge Madge shifted too readily towards imputing fair shares is controversial but perhaps not surprising. What is more concerning is the ease in which the Court of Appeal sought to minimise that oversight and revise the steps undertaken by the judge. Firstly, Lloyd Jones LJ stated that the first instance judge was ‘well aware of the structure laid down in *Jones v Kernott*’<sup>26</sup> as he had ‘set it out in great detail in his judgment’.<sup>27</sup> It is true that HH Judge Madge did articulate the *Kernott* framework but nevertheless it is perhaps obvious to point out that a judge knowing a test is not the same as a judge, in fact, applying a test. Secondly, and again suggestive of endorsing imputation of shares on the basis of fairness, the Court of Appeal inferred that a step had actually been concluded after previously stating the exact opposite. Despite noting that this ‘critical step’ was not addressed,<sup>28</sup> the Court of Appeal concluded that HH Judge Madge:

‘...must have appreciated that there would be no point in discussing the shares in which the property is held following variation if no common intention to vary had been established’.<sup>29</sup>

This reasoning is open to challenge. Of course a degree of deference should be given to the first instance judge who has seen and heard the litigants but here, and almost like an act of imputing intentions *to the judge* as opposed to the parties, additional steps in HH Judge Madge’s analysis were simply assumed by the court. This approach is problematic on many levels but suggests that the judicial treatment of the distinction between inference and imputation, particularly in the lower courts, is not being rigorously policed.<sup>30</sup>

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<sup>22</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [14] reproducing [37] of HH Judge Madge’s decision.

<sup>23</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [14].

<sup>24</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [16] reproducing [38] of HH Judge Madge’s decision.

<sup>25</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [27].

<sup>26</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

<sup>27</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

<sup>28</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

<sup>29</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [29].

<sup>30</sup> See N Piska, ‘Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*’ (2008) 71(1) *Modern Law Review* 114.

To an extent, this insouciance could be unavoidable. As the distinction between inference and imputation is so fine, trying to adhere to the methodology of paragraph 51 in *Kernott* becomes unrealistic when applied in practice. In addition, it may be cumbersome to apply because paragraph 51 forces the judge into an exploration of two separate and artificial questions; namely, whether there was a common intention to share unequally and, if yes, whether there was a common intention as to unequal shares. It could be argued that litigants do not address their minds to the former legalistic question and, perhaps, instead think of entitlement under the latter question using the language of shares. When litigants discuss shares (but obviously have no express common intention as to them), this presupposes the surmounting of the first hurdle, which in turn, opens up the potential for a judge to impute. Thus, using the language of ‘shares’ as opposed to ‘sharing’ may encourage the judge to use imputation, which, as *Barnes* states, is ‘entirely appropriate’ at this latter stage.<sup>31</sup>

Collapsing these distinctions, as evidenced in *Barnes*, encourages discussion of the vexed issue of whether imputation should be used from the outset; that is, when displacing the beneficial joint tenancy in joint legal title disputes, or, acquiring an interest in sole cases as governed by *Lloyds Bank v Rosset*.<sup>32</sup> Counsel for Miss Phillips argued that the present state of the law does not bar the use of imputation at this stage. After acknowledging that Lord Wilson in *Kernott* left this point open believing it would ‘merit careful thought’,<sup>33</sup> Lloyd Jones LJ rejected these submissions as running counter to the majority reasoning in that case. This rejection is consistent with other post-*Kernott* cases such as *Geary, Aspden v Elvy*<sup>34</sup> and *Capethorn v Harris*<sup>35</sup> that reserve imputation to the final stages of quantum but how far it is convincing is debatable as *Barnes*, like the earlier case of *Midland Bank v Cooke*, involved parties explicitly stating that they never formed any intentions.<sup>36</sup>

Nevertheless, there is perhaps some logic to imputation being impermissible when displacing the beneficial joint tenancy. If imputation was permitted here it would challenge the common intention foundation of the constructive trust because the courts would have to show that there was no evidence to displace the presumption of beneficial joint tenancy and then would create intentions for the parties. It would force the court into manufacturing intentions or to cobbling together interpretations as to conduct and thereby straining inference in a bid to ensure fidelity to the requirement of common intention.<sup>37</sup> Lloyd Jones LJ’s observation in *Barnes* that ‘the scope for inference in this context is very extensive indeed’ may even reveal a preparedness on the part of the courts to perform this role and potentially manufacture intentions.<sup>38</sup> So, whilst the two-stage approach of analysing unequal ‘sharing’ and quantifying ‘shares’ may be overly technical, there could be a rationale underpinning it that aligns with why the courts treat questions of acquisition and quantification differently. This means that the issue is perhaps judicial interpretation of the test, not necessarily the test itself.

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<sup>31</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [24].

<sup>32</sup> *Lloyds Bank Plc v Rosset* [1991] 1 AC 107; [1990] 2 WLR 867. See, generally, B Sloan, ‘Keeping up with the Jones case: establishing constructive trusts in “sole legal owner” scenarios’ (2015) 35 *Legal Studies* 226.

<sup>33</sup> *Jones* [2011] UKSC 53; [2012] 1 AC 776 at [84].

<sup>34</sup> *Aspden v Elvy* [2012] EWHC 1387; [2012] 2 FLR 807. For comment, see J Lee, “‘And the waters began to subside’’: imputing intention under *Jones v Kernott*’ [2012] *Conveyancer and Property Lawyer* 421.

<sup>35</sup> *Capethorn v Harris* [2015] EWCA Civ 955; [2016] HLR 1.

<sup>36</sup> *Midland Bank Plc v Cooke* [1995] 4 All ER 562; (1995) 27 HLR 733.

<sup>37</sup> See Lord Kerr’s observation in *Kernott* at [72] noting that ‘it would be unfortunate if the concept of inferring were to be strained so as to avoid the less immediately attractive option of imputation’.

<sup>38</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [30] echoing Lord Walker and Lady Hale in *Jones* [2011] UKSC 53; [2012] 1 AC 776 at [34] that ‘[i]n this area, as in many others, the scope for inference is wide’.

Appellate courts enforcing the paragraph 51 framework by keeping inference and imputation separate may be one route to clarify the law. An alternative approach would be actually using imputation at an earlier stage in the process. Adopting this position may be problematic if true allegiance to common intention is desired, but, if the courts in the future are to avoid repeating the suspect judicial reasoning undertaken in *Barnes*, a greater honesty in how results are reached may be useful. After all, common intention is a suspect basis for legal intervention<sup>39</sup> and it is widely known that ‘agreements are in reality found or denied in a manner quite unconnected with their actual presence or absence’.<sup>40</sup> The work of Gardner<sup>41</sup> is supportive of the view that there is a preference towards achieving what could be deemed a ‘fair’ result in these cases and that courts have been imputing intentions to parties for quite some time. Using the recent case of *Bhura v Bhura*,<sup>42</sup> Gardner supports the candour of Mostyn J who collapses the distinction between acquisition and quantification by asking one simple question: what are the parties’ beneficial shares?<sup>43</sup> Welcoming this interpretation, Gardner views this as ‘an unusually visible manifestation of an otherwise semi-underground, but quite well-established approach’.<sup>44</sup> So whether imputation should be *explicitly* permitted at the acquisition stage for sole legal disputes or when displacing the beneficial joint tenancy is a difficult question to answer but what is certain from *Barnes* is that a more rigorous interpretation of the paragraph 51 test is needed.

### The Strength of the Presumption of Beneficial Joint Tenancy

The second issue noticeable in *Barnes* relates to the supposed strength of the presumption of beneficial joint tenancy. The combined effect of *Stack* and *Kernott* was that joint legal title generated a strong presumption of beneficial joint tenancy that could be displaced only in ‘exceptional’<sup>45</sup> or ‘unusual’ cases.<sup>46</sup> Whilst equity had always followed the law, this was an important reversal on the earlier position whereby sharing under a beneficial joint tenancy was rarely ‘determinative’ and could easily be displaced in favour of an unequal tenancy in common.<sup>47</sup> Thus a common intention, objectively deduced from words or conduct, whether at the time of acquisition or post-acquisition, was needed to dislodge presumptive sharing.<sup>48</sup> The rationale for this change was to discourage litigation, recognise that the operation of survivorship may be appropriate or desirable in an interpersonal relationship and, in theory (yet perhaps not in practice), provide legal certainty.<sup>49</sup>

There is no mention whatsoever in *Barnes* of the strength of the presumption or the reasons behind its introduction. One explanation for this omission could be the reliance by HH Judge Mudge and Lloyd Jones LJ on paragraph 51 of *Kernott*, which omits any reference to the high

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<sup>39</sup> See N Glover and P Todd, ‘The Myth of Common Intention’ (1996) 16 *Legal Studies* 325 and U Riniker, ‘The Fiction of Common Intention and Detriment’ [1998] *Conveyancer and Property Lawyer* 202.

<sup>40</sup> S Gardner, ‘Rethinking Family Property’ (1993) 109 *Law Quarterly Review* 263, 264.

<sup>41</sup> See S Gardner, ‘Family Property Today’ (2008) 124 *Law Quarterly Review* 422 and S Gardner & K Davidson, ‘The Future of *Stack v Dowden*’ (2011) 127 *Law Quarterly Review* 13. See also M Pawlowski, ‘Imputing Intention and the Family Home’ [2016] *Family Law* 189.

<sup>42</sup> *Bhura v Bhura* [2014] EWHC 727 (Fam); [2015] 1 FLR 153.

<sup>43</sup> S Gardner, ‘Heresy – or Not? – in Family Property’ [2015] *Conveyancer and Property Lawyer* 332, 339.

<sup>44</sup> S Gardner, ‘Heresy – or Not? – in Family Property’ [2015] *Conveyancer and Property Lawyer* 332, 339.

<sup>45</sup> *Stack* [2007] UKHL 17; [2007] 2 AC 432 at [33] per Lord Walker.

<sup>46</sup> *Stack* [2007] UKHL 17; [2007] 2 AC 432 at [68]-[69], [92] per Baroness Hale.

<sup>47</sup> *Pettitt* [1970] AC 777; [1969] 2 WLR 966 at 814 (Lord Upjohn). See also *Bernard v Josephs* [1982] Ch. 391; [1982] 2 WLR 1052 at 402 per Griffiths LJ.

<sup>48</sup> See *Jones* [2011] UKSC 53; [2012] 1 AC 776 at [51].

<sup>49</sup> See A Hayward, ‘Finding a Home for ‘Family Property: *Stack v Dowden* and *Jones v Kernott*’ in N Gravells, *Landmark Cases in Land Law* (Hart 2013).

burden involved in displacing the presumption. Another reason could be the factual parallels between *Barnes* and *Kernott*, in particular, the fact that Mr Kernott left the property for 13 years that enabled the Supreme Court in that case to affirm displacement of the presumption in favour of a 90/10 division. Nevertheless, even if the presumption may not act as a deterrent to litigation in practice as almost all post-*Stack* cases have involved displacing the presumption of beneficial joint tenancy,<sup>50</sup> the fact it is not discussed in *Barnes* may reveal that a measure intended to provide a clear starting point might have failed. Can it really be said post-*Barnes* that challenging the presumption of beneficial joint tenancy is ‘not a task to be lightly embarked upon’?<sup>51</sup> In addition, the possible downplaying (or even demise?) of the strong presumption of beneficial joint tenancy may militate towards achieving what could be seen as a ‘fair’ outcome. The beneficial joint tenancy was conceptualised by the majority in *Stack* as a way to recognise sharing that often existed in cohabiting relationships. With that position now questionable, the paragraph 69 factors used to divine a common intention and displace equal sharing will come even further to the forefront. This drive towards exceptionalism has existed since *Stack* but, following *Barnes*, in a contest between the presumption itself and the factors used to displace that presumption, the factors have clearly prevailed.

Ultimately, paragraph 51 in *Kernott* was an attempt by the Supreme Court to make the inclusion of fairness acceptable in this context by placing it at the final stage of a judicial methodology; a fall-back position to be used when all else fails. This residual use of fairness can be regarded as a necessary tool to ensure that a court reaches a result on sparse and conflicting evidence and Pawlowski has noted that its use is ‘eminently sensible and practical’ where express or inferred intentions are not visible.<sup>52</sup> Problematically, what *Barnes* shows is that these distinctions can collapse into one another and, more importantly, that the court may be prepared to assume compliance with the requisite methodology.

#### The Appreciation of the Domestic Context

Another cause for concern in *Barnes* is the treatment of Mr Barnes’ failure to pay child support. Cases have been reluctant to accept this as a source of information in the divination of intentions. In *Holman v Howes*,<sup>53</sup> a case decided prior to the sanctioning of fairness in *Kernott*, Lloyd LJ stated that they were ‘plainly irrelevant’ and if used would introduce the asking of an impermissible question namely what would be fair in the circumstances.<sup>54</sup> Deputy Judge Nicholas Strauss QC in *Kernott* noted that they were a ‘possibly controversial factor’ but, in light of the sensitivity to context endorsed by *Stack*, they were a relevant financial circumstance of the case.<sup>55</sup>

Therefore the approach adopted in *Barnes* of taking these contributions into account may be consistent with *Stack* but it does raise the risk of double liability. This point was acknowledged yet dismissed, unpersuasively, by the court in *Barnes* noting that, even after taking them into account, they were of ‘very limited significance’.<sup>56</sup> This approach shows holistic analysis and perhaps greater sensitivity to context than displayed in recent Court of Appeal decisions such as *Curran v Collins*<sup>57</sup> and *Graham-York v York*.<sup>58</sup> Nevertheless, the

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<sup>50</sup> With the key exception of *Fowler v Barron* [2008] EWCA Civ 377; [2008] 2 FLR 831. See A Hayward, ‘Family Values in the Home: Fowler v Barron’ [2009] *Child and Family Law Quarterly* 242.

<sup>51</sup> *Stack* [2007] UKHL 17; [2007] 2 AC 432 at [68] per Baroness Hale.

<sup>52</sup> M Pawlowski, ‘Imputed intention and joint ownership - a return to common sense: Jones v Kernott’ [2012] *Conveyancer and Property Lawyer* 149, 156. See also J Mee, ‘Pettitt v Pettitt and Gissing v Gissing’ in C Mitchell, *Landmark Cases in Equity* (Hart 2012).

<sup>53</sup> *Holman v Howes* [2007] EWCA Civ 877; [2008] 1 FLR 1217.

<sup>54</sup> *Holman* [2007] EWCA Civ 877; [2008] 1 FLR 1217 at [32].

<sup>55</sup> *Jones* [2009] EWHC 1713 (Ch); [2010] 1 All ER 947 at [50].

<sup>56</sup> *Barnes* [2015] EWCA Civ 1056; [2016] HLR 3 at [41].

<sup>57</sup> *Curran v Collins* [2015] EWCA Civ 404; [2016] WTLR 235.

questioning of their relevance demonstrates that the court is confronted again with the tension between permissible and non-permissible factors. In short, are the courts determining intentions based on a course of dealings *in relation to property* or evaluating the parties' relationship, more generally? As Dixon predicted following *Stack*:

‘...[i]t is unclear how a trial judge is to separate a course of dealings between the parties which goes to the acquisition of the land (allowable), from a course of conduct which goes to the success of the relationship or simply reflects the normal obligations of everyday life (disallowable).’<sup>59</sup>

With *Barnes* taking the failure to pay these contributions into account, one cannot help but wonder whether this context-specific analysis is becoming more of an estimation of party fault. These undercurrents were present in *Stack* and *Kernott* through Mr Stack's exclusion from the home for domestic violence and Mr Kernott lengthily absence from the family home. However, on balance, it is arguable that in *Barnes* there is a sufficient basis to distinguish child support payments from other less obvious sources of information when divining intentions as they do form part of the financial history between the parties. The monetary link is key and thus Probert is probably correct in her opinion that, despite the ‘rhetoric’ of taking into account the whole course of dealings between the parties, ‘it is clear that financial contributions are still accorded more significance than others in quantifying interests in the family home’.<sup>60</sup>

## Conclusions

Property lawyers that held reservations as to the framework created by *Stack* and *Kernott* may feel vindicated after the Court of Appeal decision in *Barnes*. The imposition of a ‘heavy’ burden on the claimant when displacing the beneficial joint tenancy is logical if there is a genuine commitment to abating litigation and providing a clear starting point.<sup>61</sup> Nevertheless, in practice, this may not appear to be the case nor is the strength of the presumption addressed in *Barnes*. Crucially, the key issue appears to be permitting the imputation of fair shares *but only* when conventional trust analysis fails. Theoretically, this residual option makes perfect sense as it offers the courts the ability to adopt a reasonable solution that is cognisant of the domestic context based on the parties' evidence. Yet conventional trust analysis does invariably fail (or the court deems that it has) and, unsurprisingly, courts engage perhaps too readily in the controversial process of imputing fair shares. On paper, the structured methodology in paragraph 51 in *Kernott* works; the issue is that the precise distinctions between express, inferred and imputed intentions remain exceedingly difficult to apply in practice.

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<sup>58</sup> *Graham-York v York* [2015] EWCA Civ 72; [2015] HLR 26. See S Greer & M Pawlowski, ‘Imputation, fairness and the family home - *Graham-York v York* [2015] 6 *Conveyancer and Property Lawyer* 512.

<sup>59</sup> M Dixon, ‘The Never-Ending Story – Co-ownership after *Stack v Dowden*’ [2007] *Conveyancer and Property Lawyer* 456, 458.

<sup>60</sup> R Probert, ‘Equality in the Family Home? *Stack v Dowden* [2007]’ (2007) 15 *Feminist Legal Studies* 341, 348.

<sup>61</sup> *Fowler* [2008] EWCA Civ 377; [2008] 2 FLR 831 at [51] per Toulson LJ.