Hudson v Hathway [2022] EWCA Civ 1648 – disposition and detriment

This Court of Appeal decision regarding a 'joint names case' is of considerable importance. It concerned the beneficial interests of a formerly cohabiting couple in the home they had shared. The Court of Appeal emphatically upheld the determination of Kerr J on the first appeal and HHJ Ralton at trial that the beneficial interests had varied so that Jayne Hudson was the sole beneficial owner.

The headline practice points are:

- A beneficial owner or co-owner of real property may dispose of his interest (in compliance with section 53(1)(c) Law of Property Act 1925) to another person (whether a co-owner or not) by email (and, presumably, other electronic media), in the absence of any quid pro quo from or detriment incurred by the recipient. It must follow that a declaration of trust (complying with s53(1)(b)) may be made in like manner.
- The beneficial interests of joint proprietors – whether or not declared expressly – may only be varied by reason of unwritten and / or unsigned common intention where the common intention is relied on to by the party claiming the variation to their detriment, to an extent sufficient to give rise to a constructive trust
- An oral or unsigned agreement to vary the shares will be unenforceable in the absence of detriment, no matter how emphatic and deliberate
- The issue of whether sufficient detriment had been incurred is an evaluative decision for the trial judge, so that an appeal against it will rarely succeed
- In principle, it is possible to pursue a claim under a common intention constructive trust against a former partner's personal assets such as savings and shares

In a case bristling with legal issues the Court of Appeal's reasoning is of primary importance. I have used the following sub-headings.

(1) Background

(2) The far-reaching consequences of email negotiations

(3) Detriment is an essential requirement for an informal variation of beneficial interests; the judge's determination of sufficient detriment is an evaluative decision which the appeal court will rarely overturn

(4) *Jones v Kernott* revisited

(1) Background

Lee Hudson moved in with Jayne Hathway in about 1990 and in due course her home was put in joint names. They did not marry and had two sons. They sold their first home and bought a second in joint names, sold that and bought a third home (Picnic House) in 2007, in joint names with no declaration of trusts. Mr Hudson's earning in financial services soon overtook Ms Hathway's; she left financial services to work in the charity sector.

The presumption that Picnic House belonged to the couple jointly in equity as well as in law applied with some force, certainly until their separation in 2009, when Mr Hudson left and subsequently married. Ms Hathway and the sons stayed at Picnic House. The mortgage was converted to interest only and was paid, as before, from the joint bank account into which both their salaries were paid. Over the years Mr Hudson substantially paid the mortgage; his contributions far exceeded Ms Hathway's. In 2011 the house was blighted by an oil spill, making it very difficult to sell. In 2011, 2012, 2013 and 2014 the parties exchanged numerous emails concerning their property and finances, to which the Court applied close attention.

At first instance Ms Hathway contended for a constructive trust by which she was entitled to all the equity in the property, based on the parties' common intention and agreement, in reliance on which she had acted to her detriment. The judge found the parties shared a clear common intention that Ms Hathway would have the entire equity in the property, but rejected all the suggested detriments apart from one: desisting from making claims against assets other than real property in the sole name of Mr Hudson. Ms Hathway succeeded and was declared to be the sole equitable owner of Picnic House.

Mr Hudson appealed on the sole ground that the judge erred to decide that sufficient detrimental reliance ('detriment' for short) was made out. Ms Hathway cross-appealed on the grounds that, first - in a joint names case in the domestic consumer context without a declaration of trust – it was unnecessary to show detriment to give effect to a common intention to vary the joint beneficial shares. Secondly, the judge was right to find that she had acted to her detriment by foregoing a claim against Ms Hudson's 'other assets'.

Kerr J dismissed Mr Hudson's appeal. He agreed with Ms Hathway that, first, it was unnecessary to show detriment to vary the shares. Secondly, he declined to interfere with HHJ Ralton's decision on detriment. The judge did not err in finding that foregoing a weak claim to an interests in personal assets of Mr Hudson was sufficient, because Mr Hudson might well have been willing to part with some of them whether the legal claim was good or bad. His rejection of various other factors (e.g. paying mortgage instalments from January 2015) as detriment was an evaluative decision which was open to him.

Mr Hudson appealed to the Court of Appeal. The main reason why he obtained permission was to decide the point of principle: whether a constructive trust can arise simply as a matter of common intention without the need to show any detrimental reliance on that intention.

The Court of Appeal raised of its own motion the issue of whether emails sent by Mr Hudson amounted to a disposition of his beneficial interest in Picnic House compliant with section 53(1)(c) of the Law of Property Act 1925 and adjourned to give the parties time to make written submissions on the issue. The Court ruled that Mr Hudson did make an affective disposition, disposing of the appeal (strictly speaking).

As the 'detrimental reliance' point had been fully argued, the Court (per Lewison LJ) considered it appropriate to decide it – and ruled emphatically that detrimental reliance is required by the overwhelming weight of authority both before and after *Stack v Dowden* and *Jones v Kernott*. Moreover, to hold that an oral agreement, disposition or declaration of trust was binding without more would directly contradict two statutory provisions - seemingly ss.53(1)(a) and (c) of the Law of Property Act 1925: whose effect for present purposes (when taken together with section 53(2) of the Act) is to prevent the creation or disposition of a beneficial interest save by the operation of a constructive trust.

(2) The far-reaching consequences of email negotiations

As Lewison LJ summarised it [all emphases added]:

> 8. On 9 November 2011 Ms Hathway emailed Mr Hudson. Her email read in part:
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> "**Your shares** are the main matter outstanding…. I hope we are both adult and reasonable enough to reach some sort of **compromise**?"
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> 9. The email was subscribed "Jayne Hathway".
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> 10. Mr Hudson replied on the same day: "My thoughts on this are that **anything accrued while we were together is for us to come to an agreement on**, which I think fits with what you are saying."
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> 11. The email was subscribed "Lee"; and his full name given. On 24 August 2012 Mr Hudson wrote:"**We'll sort who deserves what in regards to our joint assets (house, shares, savings e**tc) when we're in a position to liquidate it all, which obviously depends on when you are ready."
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> 12. The email was subscribed "Lee Hudson".
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> 13. In July and August 2013, Mr Hudson and Ms Hathway agreed terms set out in emails. In an email of 30 July (but not sent to Ms Hathway until the following day) he said:
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> "So here it is. We were never married. **You have no claim over what is mine**. What I consider ring-fenced is what I get from my years of personal graft. They are not up for discussion. I'm

not agreeing to give you any. …. The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house … again I don't want it; keep it. **Which leaves the house**, a bad asset which is preventing all of us [from] moving on with our lives…. You know what, I want none of the proceeds of that either. **Take it**. Buy yourself somewhere you can afford to live….

14. The email was subscribed "Lee".

15. Ms Hathway replied on the same day. She said:

"Can't see any point in putting "my side" of the argument. Not because I don't feel that I have a valid case to make, but because it is clear that it would be pointless."

16. On 12 August 2013 she emailed again: "So that we can move forward and get to a point of completely severing our financial connections, **your suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments. Is that right? If so, then I will accept this** and will do everything I can to get the house ready for sale as soon as the situation with the oil spill is resolved."

17. He replied on 9 September: "Yes, that's right. … Under this arrangement, **I've no interest whatsoever in the house**, so whilst I will continue to contribute, I won't do so forever."

18. This email was subscribed "Lee".

19. In the autumn and winter of 2013 there was some discussion about Mr Hudson's buying the house. But as his email of 15 December 2013 made clear what was under discussion was his purchase of the **whole house** and not simply a half share in it.

20. Time passed and …. in May and July 2014 he referred in emails to how much time had passed "since **we came to a deal**". In his email of 2 July 2014 he added:

"If you want to continue to "wait" on the house to maximise your gain (means nothing to me if it sells for a pound or a million) then that needs to be your decision and your responsibility."

21. On 24 August 2014 he wrote: "Remember the House is of **no value to me: the deal** from one year ago which was supposed to be finalised 6 months ago gave you <u>all</u> liquid assets, including the proceeds of the house sale. I don't care what it sells for. "

22. In January 2015, he ceased contributing to the mortgage. Ms Hathway took over the payments. It was cheaper than renting. The two sons, now young adults, remained at Picnic House with her.

23. The trial judge found that the parties had clearly reached a deal, but at that stage it was accepted that the deal did not satisfy the formalities for transferring legal title, an equitable interest or a declaration of trust.

The Court ruled, per Lewison LJ, that section 36(2) of the Law of Property Act 1925 makes it clear that a beneficial joint tenant may release his interest to the other joint tenants. Case law made it clear that no particular form of words is required for a release, albeit that section 53(1)(c) of the Act imposes formal requirements for the disposition of an equitable interest as set out below.

Section 53(1)(c) provides:

> A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

The Court held that the release of his interest by one joint tenant to another joint tenant would amount to a "disposition" and that the emails of 30 July and 9 September 2013 amounted in point of form to a "disposition". Furthermore they complied with the statutory formalities. Plainly the emails were "writing". A "signature" has been held to include a printed name, a name on a telegram form or a rubber stamp. After considering the recent authorities concerning email signatures, Lewison LJ said at [67-68]:

> there is a substantial body of authority to the effect that deliberately subscribing* one's name to an email amounts to a signature. … I would hold, therefore, that Mr Hudson's emails of 31 July and 9 September 2013 were "signed" for the purposes of section 51(1) (a) and (c) of the Law of Property Act 1925.
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> It follows … that by those emails Mr Hudson released his beneficial interest in Picnic House to Ms Hathway.

* Lewison LJ's review of the case of *Neocleous v Rees [2019] EWHC 2462 (Ch)* showed this included an automatically generated subscription. It seems an "electronic signature" is not required.

Importantly, it is submitted, a constructive trust was not required to give effect to the release. The email release had the same effect, for example, as a formally executed deed by which one co-owner transfers all their beneficial interest to the other co-owner for no consideration. The other takes without needing to show anything whether by way of reliance, detriment or quid pro quo.

There seems to be no reason in principle why other forms of social media such as WhatsApp or Twitter may not be used to declare (s53(1)(b)*) or dispose of (s53(1)(c)) a beneficial interest. There is little doubt that examples will soon come before the courts – together with further consideration of what amounts to a signature. However, on the authority of *Hudson v Hathway*, even the clearest oral or unsigned release of a beneficial interest would fail for lack of formality, absent a constructive trust.

* Section 53(1)(b) provides:

> A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.

At this stage, the advice to a cohabiting client seeking advice following relationship breakdown must be: be very careful on email and social media and let me see anything which you and your ex-partner have sent each other. Note should also be taken that s.53(1)(c) allows for the disposition of the beneficial interest to be made by the beneficiary's agent.

Furthermore, it is well-established that a joint tenant may alienate his beneficial interest inter vivos, severing his joint tenancy. It would follow from *Hudson* that a joint tenant may dispose of his beneficial interest to a third party (not formerly entitled to the property at all) by email. The ramifications are very significant, particularly given that no form of wording is required to effect a disposition.

(3) Detriment is an essential requirement for an informal variation of beneficial interests and a judge's determination that a party has or has not demonstrated sufficient detriment is an evaluative decision which the appeal court will rarely overturn

Lewison LJ undertook an extensive review of the authorities relating to constructive trusts concerning a shared home, including *Stack v Dowden [2007] 2 AC 432* and *Jones v Kernott [2012] 1 AC 776.*. The authorities make it entirely clear that in order to establish a beneficial interest by way of a (common intention) constructive trust, sufficient detrimental reliance on the common intention is required.

Stack and *Jones* each saw the highest court in the land determine that, in the case before the court, cohabitants who had purchased property in their joint names held it in unequal shares, notwithstanding the presumption that they would be joint tenants in equity as well as law.

In *Stack* the inference which the House of Lords drew from the parties' whole course of dealing was that they were to be taken to have intended to hold shares of 65:35%, seemingly from the time of the purchase onwards. In *Jones* the inference which the Supreme Court drew firmly was that the parties had changed plan some two years after their separation, so that after Mr Kernott had purchased another property for himself, the logical inference was that they intended that he would have the sole benefit of any capital gain in his new home, while Ms Jones would have the sole benefit of any capital gain in the former family home.

Lewison LJ said at [107- 108]:

> 107. I do not ……. detect in either *Stack v Dowden* or *Jones v Kernott* any intention on the part of the court to abrogate the longstanding principle that what makes an unenforceable agreement or promise enforceable in equity is detrimental reliance. The principle of detrimental

> reliance was not challenged in either case, and that is why it was unnecessary for the court to deal with it. …
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> 108. In my judgment it would have been astonishing if Lord Walker and Lady Hale intended to overrule a long-standing principle that detrimental reliance is necessary to crystallise a common intention constructive trust and to depart from two decisions of the House of Lords affirming that proposition without saying so. … If that had been their intention, they would have needed to explain how a mere oral agreement (without more) overcame the statutory formalities laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 53(1) of the Law of Property Act 1925. Apart a brief tangential mention of section 53(1)(b) (not section 53(1)(a) or (c) in paragraph [55] of Lady Hale's speech in *Stack v Dowden*, they are not referred to in any of the majority speeches or judgments.

Unless and until the decision in *Hudson v Hathway* is revisited by the Supreme Court or further explained by the Court of Appeal, it is clear authority that - whether or not the beneficial interests in a joint names case are declared at the time of purchase - a party seeking to argue they have varied by virtue of the parties' common intention must prove not only the common intention asserted, but also that the party acted to their detriment in reliance on the common intention to an extent sufficient to justify the establishment of a constructive trust.

That being so, it does not seem that there is a sound basis to justify the existence of an 'ambulatory' constructive trust in a joint names case, such as would vary according to variations in the parties' common intention regarding their beneficial interests, unsupported by detrimental reliance.

Detriment – an evaluative decision

As Lewison LJ himself put it in *Fage v Chobani [2014] EWCA Civ 5* at [114], summarising the effect of previous decisions, appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. Lewison LJ made it clear in *Hudson v Hathway* (at [171]) that this will include the evaluative decision of the trial judge as to whether the criterion of sufficient detriment has been made out in a given case .

On 27 November 2020 the Court of Appeal (*O'Neill v Holland* [2020] EWCA Civ 1583) unanimously confirmed that the claimant's detrimental reliance on the relevant common intention remains an essential ingredient of a claim to a beneficial interest under a constructive trust in a sole name case. In that case the claimant had agreed to the transfer of the property from her father to her partner, rather than to her alone or to the couple, as originally planned.

This left Ms O'Neil with the burden of establishing a constructive trust to establish her beneficial interest. As Henderson LJ put it for the Court at [62]:

> Detriment' in this context is a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant. Although the facts which constitute the detriment need to be pleaded, their characterisation is ultimately a matter for the court, in the light of all the evidence adduced at trial.

On the first appeal Kerr J agreed with Ms Hathway's counsel at [98] that the judge's decisions on detriment were not just primary findings of fact but were evaluative i.e. they extended to the judge's considered assessment of the quality and character of the primary facts and whether they sufficiently amounted to a detriment.

He did not agree with the submission of Mr Hudson's counsel that the beneficiary must show an objective state of affairs leaving her in a substantially worse position than she would otherwise have been in. He ruled (at [75]) that: "Henderson LJ was not seeking to state a general proposition of law to that effect; he was dealing with the facts of the case before the court."

Kerr J went on to rule (at [99] that it was open to HHJ Ralton to decide that foregoing a weak claim to an interest in personal assets of Mr Hudson was sufficient detriment, as set out above. The judge found as a fact that both parties perceived that she might have had a claim (per Lewison LJ at [164]).

In the Court of Appeal Lewison LJ cited paragraph 62 of *O'Neill v Holland*, as set out above, in the section of his judgment headed: "Was detrimental reliance established ?" He made no comment on Kerr J's qualification of the dicta of Henderson LJ set out above.

Mr Hudson's counsel argued that Ms Hathway's foregoing of her potential claims against his personal assets did not amount to detriment, since she had no viable claim against them and did not attempt to articulate one.

Ms Hathway accepted in her first witness statement that she was not entitled to invoke the court's redistributive powers, e.g. under the Matrimonial Causes Act 1973. But, said Lewison LJ at [167], it was not difficult to see what her claim would have been. Ms Hathway's witness statements referred to her understanding that assets secured during the relationship were joint assets however they were held legally and that she and Mr Hudson would pool assets.

This understanding had already been expressed in her email to Mr Hudson of 9 November 2011, to which he appeared to agree in his reply of that day. Further, he referred to the house, shares, savings etc as joint assets in his email of 24 August 2012. Ms Hathway's Defence and Counterclaim pleaded in part:

> "[Ms Hathway] desisted from making any claim against [Mr Hudson] in respect of assets held in his sole name but acquired during the course of the parties' relationship."

It is plain, said Lewison LJ at [169], that Ms Hathway would have claimed the parties had a common understanding that assets accumulated during the relationship were joint assets and that, in reliance on that understanding, she had acted to her detriment in the ways that she had described, so that a constructive trust had arisen. The claim was no longer possible, because she had released her cause of action by her email of 12 August 2013.

It might have been argued, he went on, that HHJ Ralton analysed the suggested elements of detriment in over-granular detail, picking them off one by one instead of standing back and looking at them in the round. He might also have viewed with more favour Ms Hathway's payment of mortgage instalments from January 2015 (payment of mortgage instalments being important in *Jones v Kernott* and *Barnes v Phillips [2015] EWCA Civ 1056*). However, his decision on detriment was not perverse.

It is submitted that the following factors among others will apply to the evaluation of detriment including the issue of whether it was sufficient to cause a constructive trust to crystallise:

the court has wide scope to draw upon the available evidence to assist its evaluation of whether detriment was incurred and to what extent;

the court may (and probably should – per Lewison LJ at [155]) look at detriment 'in the round', rather than analysing it in granular detail;

the appeal court will be slow to interfere with the evaluative decision of the trial judge.

While it may or may not be possible to argue that a finding of detriment is flawed on the ground that the beneficiary did not show an objective state of affairs leaving her in a substantially worse position than she would otherwise have been in, what is clear is that a successful appeal on the issue of detriment will have to show a fundamental flaw in the judge's evaluative decision-making process.

(4) *Jones v Kernott* revisited

In *Jones v Kernott* the Supreme Court focussed on the parties' common intention as determinative of their beneficial interests to such an extent that it might be understandable to read the decision as allowing for a change in the beneficial interests without a requirement of detriment giving rise to a constructive trust in order to displace the presumption in *Stack v Dowden* that the equitable interest reflects the joint legal interests. That presumption was described in clear terms in *Jones* (at [25] below) as a presumption as to the parties' intention, rebuttable by proof of contrary intention.

On one view, the essence of the Supreme Court's and House of Lords' reasoning in the two cases was expressly based on unequal shares arising by reason of the parties' common intention (as inferred), without reference to detriment. No express reference is made to the formation of a constructive trust having played an active role in the results in either *Stack v Dowden* or *Jones v Kernott.*

As Kerr J put it on the first appeal at [58]:

> It is striking that no mention is made of detriment in that statement of the principles [in *Jones* at [51]] that apply; nor elsewhere in either *Stack v Dowden* or *Jones v Kernott*, apart from the mention in Lord Neuberger's dissenting judgment in the former, at [124]. It is the more striking because in the latter case the Supreme Court justices were revisiting the same territory with the objective of clarifying and settling the law.

In *Jones,* from paragraphs [3] to [54] Walker and Hale JJSC expressly sought to clarify the decision in *Stack v Dowden* and apply those principles to the case before them. The following is a necessarily incomplete survey of their dicta (emphases added).

> [17] The starting point is different [in sole name cases and joint name cases] because the claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed a "common intention" constructive trust. The claimant whose name is on the register starts … with the presumption (or assumption) of a beneficial joint tenancy.
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> [25] The time has come to make it clear, in line with *Stack v Dowden* (see also *Abbott v Abbott* [2008] 1 FLR 1451) that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. **The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention**, which may more readily be shown where the parties did not share their financial resources.
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> [30] The decision in *Stack v Dowden* produced a division of the net proceeds of sale … in

shares roughly corresponding to the parties' financial contributions over the years. The majority reached that conclusion by inferring a common intention: see Lady Hale's opinion at [92]. Only Lord Neuberger reached the same result by applying the … resulting trust doctrine, (which involved, it is to be noted, imputing an intention to the parties).

[48] In this case, there is no need to impute an intention that the parties' beneficial interests would change, because the judge made a finding that the intentions of the parties did in fact change. … He did not go into detail, but the inferences are not difficult to draw.

... This home was put on the market in late 1995 but failed to sell. Around that time a new plan was formed. The life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on [the property]. The logical inference is that they intended that his interest ... should crystallise then. Just as he would have the sole benefit of any capital gain in his own home [and] Ms Jones would have the sole benefit of any capital gain in [the former family home]. In so far as the judge did not in so many words infer that this was their intention, it is clearly the intention which reasonable people would have had had they thought about it at the time. But in our view it is an intention which he both could and should have inferred from their conduct.

[49] A rough calculation on this basis produces a result so close to that which the judge produced [90:10% shares in the property in Ms Jones' favour; new property solely Mr Kernott's] that it would be wrong for an appellate court to interfere.

It would doubtless be interesting to see another attempt made to argue that joint beneficial interests arising by reason of the *Stack* presumption may be varied by reason of common intention alone. However, the party arguing for an increased share would be well-advised to set out their case on detrimental reliance and constructive trust also.

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