Etherton L.J. used the language of unconscionability to explain why the claim in unjust enrichment had proceeded so far. His Lordship cited cases on proprietary estoppel, as well as the decision of the Privy Council in *Blue Haven Enterprises Ltd. v Tully and Robinson* [2006] UKPC 17, in which Lord Scott thought that the claim in unjust enrichment hinged upon whether the circumstances in which the defendant was enriched placed him under an equitable obligation to compensate the claimant. The Court of Appeal in *Costello* did not need to endorse this approach or decide upon this point, but it is suggested that such reasoning is unsatisfactory. Unjust enrichment is a common law cause of action. Its development has hinged upon the identification of various unjust factors, of which unconscionability is not one. It would be better to focus upon the established grounds of restitution, such as mistake and failure of consideration, rather than mire this area of the law in the uncertainty inherent in unconscionability.

One final quibble. Etherton L.J. referred to "compensation for unjust enrichment" (at [31]), but to describe the award pursuant to unjust enrichment as compensatory is unhelpful. Unjust enrichment is not concerned with the claimant's losses but the defendant's gain. As a gain-based remedy – calculated by assessing the value of the defendant's enrichment – it should be characterised as restitutionary, not compensatory. Terminological clarity is lost if the award made for unjust enrichment is described as compensatory. However, the claimant's losses might still be relevant in limiting the amount of a restitutionary award to reverse unjust enrichment if there should be correspondence between the defendant's gain and the claimant's loss (see McInnes (1998) 57 C.L.J. 472).

Regardless of the language used, the thrust of the reasoning in *Costello* is undoubtedly right. Claimants who enter into contracts to benefit third parties should not later be able to sue those third parties where they cannot do so under any contract. Claimants must instead accept that their remedy lies in contract against the contract-breaker. Unjust enrichment must not usurp the contractual allocation of risk.

PAUL S. DAVIES

COHABITANTS' PROPERTY RIGHTS: WHEN IS FAIR FAIR?

STACK v Dowden [2007] UKHL 17, [2007] 2 A.C. 432 introduced significant changes to the law of trusts of family homes. *Stack* recognised that beneficial ownership presumptively mirrors legal ownership and discussed how, in cases where that presumption is rebutted, beneficial interests should be quantified. However, three questions remained.

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First, when should the court depart from the starting point that beneficial ownership reflects legal title? *Stack* held that challenging that assumption in joint-names cases was "not a task to be lightly embarked upon" (Lady Hale at [68]), but offered little detail as to the type of facts which would succeed. Second, are sole-name and joint-names cases different, other than the starting points being, respectively, sole or equal joint beneficial ownership? Third, are judges permitted to impute intentions to the parties which they never actually had? Lady Hale in *Stack* had referred to "the parties' shared intentions, actual, inferred or imputed", but also said that the court could not abandon the search for the parties' intentions "in favour of the result which the court itself considers fair" (at [60]–[61]).

Jones v Kernott [2011] UKSC 53, [2012] I.F.C. 45 had the potential to answer these questions. The parties started a relationship in 1980 and bought a house together in joint names in 1985. Ms. Jones paid the deposit and the bills; Mr. Kernott regularly gave money to Ms. Jones and made substantial improvements to the house. Their relationship ended in 1993, but an attempt to sell the house failed. Jones continued paying for the original house while Kernott started buying himself another home. There matters stayed until 2006 when Kernott initiated proceedings to claim an interest in the house. At trial, Kernott was declared to own 10% of the house; the High Court upheld that decision, but a majority of the Court of Appeal held that there was equal beneficial ownership. The Supreme Court reinstated the judge's order.

Regarding the third question, the Supreme Court was clear that it is sometimes permissible for the court to *impute* an intention to the parties at the quantification stage. The primary search is for the parties' actual intentions, whether expressed or implied. However, if the parties intend to own property in shares different from the legal title but it is impossible to find an express or inferred common intention as to the proportions, then when it comes to quantifying the beneficial interests "the court is driven to impute an intention to the parties which they may never have had" (Lord Walker and Lady Hale at [31]).

However, as clear as this discussion of imputation was, for a majority of the court the point was technically obiter. Lord Walker, Lady Hale and Lord Collins considered that the facts supported an *inferred* intention to share the house 90:10. Only on the minority approach of Lords Kerr and Wilson did *imputing* form part of the ratio: their Lordships considered it impossible to infer any common intentions on the facts, but imputed an intention to share in 90:10 proportions. The minority also thought it ambitious to use *Stack* as authority to justify "fair" outcomes which the parties never intended, given *Stack*'s clear warning against imposing "the result which the court itself considers fair". Indeed, it is noteworthy that the majority in *Jones* (at [32])

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relied on the "fairness" approach of *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211 which had been criticised in *Stack*. Nonetheless, the Justices unanimously agreed that quantifying beneficial interests by imputing intentions is permitted at the quantification stage if the search for expressed or inferred intentions fails. The only dispute was whether it was necessary to impute on the facts of *Jones*.

Also obiter to its decision, the Supreme Court addressed the second question, the relationship between sole-name and joint-names cases. Lord Walker and Lady Hale pointed out (at [17]) that "the starting point is different" in the two situations because beneficial ownership presumptively reflects legal title. However this factual difference need not imply any difference in the analytical process. In both cases, the court would seem to follow these steps:

(1) Assume that beneficial ownership mirrors legal ownership.
(2) Search for evidence of an expressed or implied common intention that the beneficial ownership is different from (1). If there is no such intention, the answer is as (1); if there is, go to (3). Note that imputed intention seems not to suffice at stage (2), though Lord Wilson wondered whether perhaps it should (at [84]).
(3) Ask whether the evidence in (2) is sufficient to justify departing from (1). If the evidence is not sufficient, the answer is as (1); if it is, go to (4).
(4) Ask whether the evidence, expressed or implied from the parties' whole course of dealing as regards the property, reveals a common intention as to the proportions in which the property is shared. If there is, give effect to that intention; if not, go to (5).
(5) Look at the whole course of dealing between the parties as regards the property and decide what proportions are fair in the light of that conduct.

The answer to (1) will, of course, be different in sole-name and joint-names cases. The level of the hurdle in (3) seems also to be different, perhaps explaining the Supreme Court's reluctance to equate sole-name and joint-names cases fully: in joint-names cases, only "very unusual" facts will satisfy the test (Lady Hale in *Stack* at [68]; *Fowler v Barron* [2008] EWCA Civ 377, [2008] 2 F.L.R. 830), whereas in sole-name cases the task seems easier (*Midland Bank v Cooke* [1995] 4 All E.R. 562). This difference at stage (3) suggests a bias towards finding (partial) shared ownership as the final outcome: it is easier to disprove sole ownership in a sole-name case than to escape (equal) joint ownership in a joint-names case (although in both *Stack* and *Jones* the presumption was rebutted).

However, the first question remains unresolved – when will beneficial ownership be different from legal title? *Stack* set the hurdle

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of stage (3) high in joint-names cases, but gave little guidance about the kinds of facts which might succeed in the task. While *Jones* helpfully clarifies the process of quantifying beneficial interests (stages (4) and (5)) if the presumption at stage (1) is rebutted, it fails to answer the crucial prior question of what evidence counts in rebutting that presumption (stages (2) and (3)). *Jones* tells us how the quantification process works, but not when it is needed, and without that information many difficulties arising from *Stack* are likely to remain.

ROBERT H. GEORGE

SEVERANCE OF A JOINT TENANCY: A LAND LAW "WHODUNNIT?"

Quigley v Masterson [2011] EWHC 2529 (Ch) raised the classic severance dispute. P, one of two former joint tenants, died. P's daughter, Q, argued that the joint tenancy had been severed before P died so that his share of the property passed to his estate. M, the surviving joint tenant, argued that there had been no severance so that she became solely entitled to the property by survivorship. However, the rather unusual circumstances produced a twist in the tale.

P and M lived together from 1978 until 2001, when their relationship broke down and M moved out of the house of which they were joint tenants at law and in equity. From 2003 P's mental health started to deteriorate; and in March 2008 a consultant psychiatrist found that he was unable to manage his affairs. Since P was no longer able to grant a power of attorney, Q applied to the Court of Protection for a financial order, authorising her to sell the house and to divide the proceeds between P's estate and M. Subsequently, Q and M, unable to agree who should be appointed as P's deputy, each made an application for appointment. In February 2009 the court ordered that M should have conduct of the sale of the house but that Q should be made P's deputy for P's other property and affairs. A formal more detailed order, appointing Q as P's deputy, was made in March 2009, one week before P died.

Following P's death M applied to have the registered title to the house updated to reflect her view that, by virtue of the operation of survivorship, she was now sole proprietor both at law and in equity. Q objected on the ground that the equitable joint tenancy had been severed so that P's share would pass to his grandchildren under his will. The Deputy Adjudicator to HM Land Registry held that there had been no severance but he granted limited permission to appeal to the High Court.

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