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THE SEARCH TO ASCERTAIN THE PARTIES' IMPUTED INTENTIONS

Kernott v. Jones[1]

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I. Introduction

The division of an unmarried couple's beneficial interests in property following their separation remains a conundrum. In the House of Lords decision of *Stack v. Dowden*,[2] Baroness Hale remarked that the search is to ascertain the parties' shared intentions—actual, inferred or *imputed*. Yet the House of Lords did not explain exactly how such an intention could be imputed. Later cases applying *Stack* seem to have also neglected this possibility of imputation. The recent English Court of Appeal decision of *Kernott v. Jones* is important because it demonstrates that there are no less than three different ways to interpret this test in *Stack*. What is striking is that one of the three judgments had even taken into account events *after* the parties' separation when imputing their shared intentions. Although the Singapore courts have yet to consider whether or not to follow this approach in *Stack*, it is submitted that it is inevitable that this issue will come before our courts. *Kernott* makes clear the inherent difficulties in adopting the approach in *Stack* and the clarifications that our courts will need to make.

II. Facts and Decisions of The Courts

A. *The Facts of the Case*

As the Court of Appeal repeatedly described this case as a "cautionary tale",[3] the facts bear recounting, especially in a "multi-factorial" examination of the circumstances.[4]

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1 [2010] EWCA Civ. 578 [*Kernott*].

2 [2007] 2 A.C. 432 [*Stack*].

3 *Kernott*, at paras. 2, 61 and 90.

4 *Ibid.* at paras. 91 and 101. See also *Stack*, at para. 69.

Leonard Kernott and Patricia Jones met in 1980. Kernott later moved in to live with Jones in her caravan. They did not marry, and in June 1984, their first child, a daughter, was born.[5] In May 1985, Jones sold her caravan. Kernott and Jones then bought a house at 39 Badger Hall Avenue, Thundersley, Essex in their joint names for £30,000.[6] Jones contributed £6,000 from the sale of her caravan, while the balance of the purchase price was raised by an endowment mortgage.[7] In 1986, Kernott and Jones had a second child, this time a son. Jones worked as a hairdresser, whereas Kernott worked in summer as an ice-cream salesman, and in winter either claimed benefit or undertook work as a builder. Kernott gave Jones only £100 per week, and from that and her own earnings Jones paid for housekeeping, mortgage, outgoings and the premiums on their insurance policy.[8]

In November 1993, they separated, and Kernott moved out of their property. Jones assumed sole responsibility for the outgoings on the property and the maintenance of the children. Jones redecorated the property several times, replaced the flat roof on the extension, installed new gates, and replaced the fencing and the radiators.[9] In May 1996, Kernott bought himself a house in his sole name for £57,000.[10] More than 12 years after their separation, in May 2006, Kernott sought the repayment of his "half share", and in March 2008, Kernott purported to sever the "joint tenancy".[11]

Jones brought proceedings under the *Trusts of Land and Appointment of Trustees Act 1996*, seeking a declaration that she alone owned the entire beneficial interest in the property.[12] By the time her application came before the trial judge on 21 April 2008, the value of their property was agreed at £245,000.[13] The trial judge found that the parties' intentions had altered significantly over the years to the extent that Kernott had demonstrated that he had no intention until recently of availing himself of the beneficial ownership in the property, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated. Having regard to all the issues raised in *Stack*, the trial judge considered it "fair and just" that the value of the property should be divided as to 90% for Jones and 10% for Kernott.[14]

B. *The Appeal to the High Court Below*

Kernott appealed against the trial judge's decision, but his appeal was dismissed by the High Court.[15] In particular, the court noted that Baroness Hale's formulation in *Stack*[16] leaves in doubt how far Chadwick L.J.'s judgment in *Oxley v. Hiscock*[17]

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5 *Ibid.* at para. 8.
6 *Ibid.* at paras. 9 and 68.
7 *Ibid.* at paras. 10 and 68.
8 *Ibid.* at paras. 12 and 68.
9 *Ibid.* at paras. 13 and 69.
10 *Ibid.* at para. 14.
11 *Ibid.* at para. 15.
12 *Ibid.* at para. 16.
13 *Ibid.* at para. 18.
14 *Ibid.* at para. 19.
15 *Jones v. Kernott* [2009] EWHC 1713 (Ch.).
16 *Stack*, at para. 61.
17 *Oxley v. Hiscock* [2005] Fam. 211 [*Oxley*], at para. 69.

remains intact, and what role fairness has in the determination of these issues, if at all.[18] The court concluded that what Baroness Hale said was intended to qualify Chadwick L.J.'s judgment, not to contradict it. The court was of the view that what the majority in *Stack* held was only that the court should not *override* the intention, insofar as that appears from what they have said or from their conduct, in favour of what the court itself considers to be fair.[19] The court observed that:

> To the extent that the intentions of the parties cannot be inferred, the court is free … to impute a common intention to the parties. Imputing an intention involves, as Lord Neuberger points out, *attributing to the parties an intention which they did not have*, *or at least did not express to each other*. The intention is one which the parties "must be taken" to have had. It is difficult to see how this process can work without the court supplying, to the extent that the intention of the parties cannot be deduced from their words or conduct, *what the court considers to be fair*.[20]

The High Court identified as many as five further reasons for concluding that this was indeed what Baroness Hale meant in *Stack*.[21] On the facts, the court arrived at two conclusions. First, the parties' position after their split was that they maintained separate finances to an *even more* marked degree than the unmarried couple in *Stack*. The trial judge was right to infer from these facts that they no longer intended equal beneficial ownership, or to impute to them such a change in intention. Thus far there was no need for him to invoke fairness.[22] Secondly, the trial judge was right to *impute* to the parties an intention that their beneficial interests should be altered to take account of changes in the circumstances since the time they had parted. In the absence of any indication by words or conduct as to how they should be altered, the appropriate criterion was what the trial judge considered to be "fair and just".[23] Whilst the High Court was not sure that it would have arrived at exactly the same result, it held that the attribution of 90% to Jones was justifiable.[24]

C. *Different Views Within the Court of Appeal*

Although the Court of Appeal allowed the appeal, this was by a bare majority, with Jacob L.J. dissenting. Even between the judgments of Wall and Rimer L.JJ., it appears that there are significant differences in their respective interpretations of the same test in *Stack*.

1. *Wall L.J. did not consider imputing a shared intention to vary the interests*

In his leading judgment, Wall L.J. had not even considered the possibility of *imputing* to the parties a shared intention to vary their beneficial interests. Instead, he seemed

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[18] *Supra* note 15, at para. 28.
[19] *Ibid.* at para. 30.
[20] *Ibid.* at para. 31 (emphases added).
[21] *Ibid.* at paras. 32-36.
[22] *Ibid.* at para. 47.
[23] *Ibid.* at para. 49.
[24] *Ibid.* at para. 50. For a case comment on the High Court decision, see Nick Piska, "Ambulatory Trusts and the Family Home: *Jones v. Kernott*" (2010) 24(1) Trust L. Int'l 87.

content to allow the appeal simply on the basis that he could not *infer* such an intention. At the outset of his judgment, Wall L.J. formulated the primary issue as whether the court can, in the circumstances, properly infer an agreement post separation that the parties' beneficial interests in the property alter or become "ambulatory", thereby enabling it to declare that the beneficial interests in the property are held other than equally.[25] Wall L.J. added that if this question were answered in the affirmative, a subsidiary issue would arise as to whether the split 90% to 10% was correct on the facts. However, he did not propose to address this subsidiary issue, and instead proposed to concentrate on the primary issue above.[26]

Wall L.J. held that he could not *infer* such an intention from the parties' conduct, but did not go on to consider whether the court could *impute* to the parties such an intention. Instead, Wall L.J. added that:

> If this appellant and this respondent had truly intended that the appellant's beneficial interest in the property should reduce post separation, or if the property was to belong to the respondent when the appellant acquired his own house, *they should have so decided and acted accordingly* by adjusting their beneficial interests in the property. *I cannot spell such an intention out of their actions*.[27]

With respect, the omission of any references to imputing an intention is surprising, given that the court below had explicitly based its decision on the understanding that it could do just that.

2. *Rimer L.J. did not interpret* Stack *as ever allowing the court to impute an intention*

Whilst Rimer L.J. also allowed the appeal, his approach is different. Unlike Wall L.J., he directly confronted the issue of whether the court can properly impute to the parties a shared intention to vary their respective beneficial interests. Rimer L.J. noted that the key feature of *Stack* is the task set for trial judges: searching for the parties' shared intentions—"actual, inferred or imputed". He then reasoned that since an "inferred" intention must also be an "actual" intention, Baroness Hale is presumed to have used the word "actual" as a synonym for "express", referring to an intention that the parties had expressly uttered, either orally or in writing. Where the parties have remained silent, the courts would have to investigate whether there is any basis for inferring an intention (which might perhaps be more conventionally regarded as an implied one).[28]

However, as for Baroness Hale's statement that the court must or can also look for the parties' *imputed* intention, Rimer L.J. admitted that he did not, with the greatest respect, understand what she meant. He then explained that it is possible that she was using the word "imputed" as a synonym for "inferred", "in which case it adds nothing". If not, it is possible that she was suggesting that the facts in any case might

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[25] *Kernott* at para. 6.
[26] *Ibid.* at para. 7.
[27] *Ibid.* at para. 62 (emphases added).
[28] *Ibid.* at para. 76.

enable the court "to ascribe to the parties an intention that they neither expressed nor inferentially had".[29]

At this point, it is submitted that an interpretation that gives a word some meaning at all is preferable to one that leaves a word meaningless and redundant. Yet Rimer L.J. held that the first interpretation is unlikely as it is "inconsistent" with Baroness Hale's repeated reference to the fact that the goal is to find the parties' intentions, "which must mean their real intentions". Further, Rimer L.J. added that the court could and would presumably only consider so imputing an intention if it had drawn a blank in its search for an express or an inferred intention but wanted to impose upon the parties its own assessment of what would be a fair resolution of their differences. Yet Rimer L.J. added that Baroness Hale's "rejection" of that as an option "must logically exclude that explanation". In his view, if Baroness Hale was using the word "imputed" in its ordinary meaning, it would be difficult to see how imputing to the parties a non-existent intention could stand with her emphasis that the burden of rebutting the presumed joint beneficial interest is a heavy one, and discharged only in very unusual cases. Rimer L.J. therefore concluded that:

> I accordingly do not myself interpret *Stack* as having intended to enable courts to find, by way of the imputation route, an intention where none was expressly uttered nor inferentially formed.[30]

With respect, it is submitted that Rimer L.J.'s judgment is not entirely persuasive. It is one thing to set aside a word in a binding authority that does not have sensible meaning, but quite another to simply ignore what Rimer L.J. himself admitted to be the word's "ordinary meaning". Whilst the court below had provided five further reasons for supporting the interpretation of the word "imputed" in its ordinary meaning, Rimer L.J.'s judgment seems to rest entirely upon the ordinary meaning of the word being inconsistent with his own reading of what was intended in the other parts of Baroness Hale's judgment.

3. *Differences between the majority judgments of Wall and Rimer L.JJ.*

Significantly, Wall and Rimer L.JJ. also arrived at different conclusions as to whether Baroness Hale's approach is consistent with Chadwick L.J.'s approach in *Oxley*. Seeing this as the "critical question",[31] Wall L.J. noted that Baroness Hale had cited with approval Chadwick L.J.'s judgment,[32] and had gone on "expressly to agree" with Chadwick L.J., *inter alia*, that the question as to the *extent* of the parties' respective shares may have to be answered by inference from their subsequent conduct.[33] Wall L.J. concluded that there is "no tension" between *Stack* and *Oxley* when applied to the facts of this case.[34] In contrast, Rimer L.J. noted that Baroness Hale had said in *Stack* that it is not open to the court to abandon the search to ascertain the parties' shared intentions in favour of the result which the court itself considers fair, and thus

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[29] *Ibid.* at para. 77.
[30] *Ibid.* at para. 77.
[31] *Ibid.* at para. 31.
[32] *Ibid.* at para. 36.
[33] *Ibid.* at para. 39.
[34] *Ibid.* at para. 59.

"so rejecting the approach favoured by Chadwick L.J." in *Oxley*.[35] In support, Rimer L.J. noted that Baroness Hale even referred to an extract from a Law Commission paper as "the preferable way" of expressing the thought by Chadwick L.J.. This difference in opinion can perhaps explain why Wall L.J. did not consider *imputing* to the parties a shared intention to vary their beneficial interests. It may well be that Wall L.J. interpreted Baroness Hale's approach as consistent with Chadwick L.J.'s approach in *Oxley*, in that the *intention to share* can only be express or inferred, but where this intention is found, the court may then *quantify the extent* of the interest by way of *imputation*. In fact, this is precisely the subsidiary issue that Wall L.J. had chosen not to address in his judgment.[36]

4. *Jacob L.J. found it possible to impute a shared intention and deferred to the trial judge*

Finally, the dissenting judgment by Jacob L.J. was succinct, and the essence of his reasoning runs in a series of steps. First, the courts below (especially the trial judge) did not apply the wrong legal test. Secondly, given that the correct legal test was applied, a test which involves drawing an inference from the primary facts, considerable deference should be given to the primary fact finder, the trial judge. Since the decision reached by the trial judge was not "perverse", it should stand.[37] Jacob L.J. would dismiss the appeal. As to the trial judge's statement that he had to consider what was fair and just between the parties having regard to the whole course of dealing between them, Jacob L.J. pointed out that this passage was not free-standing. Jacob L.J. observed that it followed repeated references to *Stack* and the need to discern the parties' intentions, and that the trial judge was not abandoning *Stack*. Instead, what the trial judge was saying in context was that the parties' shared intentions "must be taken to be (they can be 'inferred or imputed') … that they should each have a fair and just share".[38] Jacob L.J. concluded that it is possible to infer or impute a shared intention to the parties that their interests were to vary over time, and that the trial judge, having seen and heard the parties, was in a better position to decide the matter—and particularly the intentions of the parties—than the Court of Appeal.[39] Jacob L.J. made it clear that, following *Stack*, the courts can now infer or impute to the parties a shared intention that their beneficial interests are to vary over time.

III. Application of *Stack* to Imputing a Shared Intention

As seen from above, all three judgments within the Court of Appeal adopted different interpretations to the majority decision in *Stack*. In summary:

1. Rimer L.J. held that Baroness Hale's *dicta* cannot be interpreted as ever allowing courts to impute to the parties an intention that they neither expressly nor inferentially had.

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[35] *Ibid.* at para. 71.
[36] *Ibid.* at para. 7.
[37] *Ibid.* at para. 87.
[38] *Ibid.* at para. 97.
[39] *Ibid.* at para. 109.

2. Jacob L.J. interpreted Baroness Hale's *dicta* most literally to mean that courts may now impute to the parties a shared intention even to vary their beneficial interests.
3. Wall L.J. made no mention of whether the courts may impute an intention, but implicit in his view that Baroness Hale had approved Chadwick L.J.'s approach in *Oxley* was that where the court can find an intention to *vary* the parties' beneficial interests, it could then impute to them an intention as to the *quantification* of the extent of the interests.

The problem with *Kernott* is that it has exacerbated the confusion in interpreting *Stack* as to whether (and if so, how) the courts can impute to the parties an intention.

A. *Evaluating the Different Interpretations of the Same Approach in* Stack

It is submitted that Rimer L.J.'s interpretation of *Stack* is problematic. Apart from the obvious difficulty that it leaves the word "imputed" redundant, in essence, this is no different from the dissenting views of Lord Neuberger, who rejected the imputing of an intention as impermissible.[40] If Rimer L.J. was correct in that Baroness Hale did not intend the word "imputed" in its *ordinary meaning*, then to what was Lord Neuberger objecting so vigorously?

In his defence, Rimer L.J.'s view is not without reason. After all, it is hard to see how an imputed intention can ever be the result of a "search" for the parties' shared intentions. Baroness Hale also repeatedly said that the court must not "impose its own view of what is fair", which would sound similar to the process of imputation.[41] However, even if some parts of Baroness Hale's judgment do not appear to be entirely uniform, on balance it is not for the lower courts to ignore the ordinary meaning of words from a decision of the House of Lords. In addition, the sustained criticism against *Stack* suggests that it is widely regarded as having suggested the possibility of imputation to this area of the law.[42]

As between Wall and Jacob L.JJ., it is clear that the latter's dissenting judgment is the most faithful to the ordinary meaning of the words used by Baroness Hale in *Stack*. This is in spite of the fact that at times, Jacob L.J. seemed almost sympathetic towards the dissenting views of Lord Neuberger.[43] On the other hand, even a literal interpretation is not without its difficulties. In essence, Jacob L.J. would dismiss the appeal, simply because the trial judge's decision was not perverse.[44] However, this view presupposes that the trial judge has considerable discretion to impute to the parties intentions which they may have never had. This goes beyond even the High Court's position that the courts can impute an intention but only *to the extent* that the intention of the parties cannot be inferred.[45]

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[40] *Stack* at para. 127.
[41] *Ibid.* at para. 61. However, see *Jones v. Kernott*, *supra* note 15 at paras. 30-31.
[42] William Swadling, "The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed" (2007) 123 L.Q.R. 511.
[43] *Kernott* at para. 89.
[44] *Ibid.* at para. 109. See also para. 7, *per* Wall L.J.; *G v. G* [1984] 1 W.L.R. 645.
[45] *Supra* note 15 at paras. 30-31.

It is submitted that Wall L.J.'s judgment is the closest to "orthodoxy", in that it is a two-stage approach, *i.e*. the court still has to find the parties' intention to vary their beneficial interests before it may impute an intention as to the quantification of the extent of those interests. The difficulty with this view, however, is that it appears that Baroness Hale may have gone *beyond* Chadwick L.J.'s approach in *Oxley* when suggesting that intentions can be "imputed". If Wall L.J. was correct, and all Baroness Hale had done was merely to approve Chadwick L.J.'s approach, why then was there a proliferation of academic criticism against the radical extension of the law in *Stack*?

B. *The Inherent Difficulties in Applying the Approach in* Stack

In all fairness, *Kernott* is not the only decision applying *Stack* that has been regarded as "problematic". In *Laskar v. Laskar*,[46] Lord Neuberger, sitting in the Court of Appeal, interpreted Baroness Hale's distinction between the commercial and domestic contexts controversially to restrict the scope of *Stack*. Even though the property was jointly purchased by a mother and her daughter, Lord Neuberger reasoned that since the purpose of the purchase was for rental income and capital appreciation, it would not be correct to apply the reasoning in *Stack*.[47] In *Fowler v. Barron*,[48] the Court of Appeal applied *Stack* to a property jointly purchased by a cohabiting couple and arrived at a presumption of equal beneficial ownership. Yet in spite of the fact that Mr. Barron's financial contributions far outweighed Ms. Fowler's (to the extent that it was considerably more unequal than in *Stack*), and that Mr. Barron listed his actual intentions in a will, the court held that unlike Ms. Dowden in *Stack*, Mr. Barron failed to rebut this presumption of equal beneficial ownership.[49] In this regard, even the facts in *Stack* itself were arguably not "exceptional" so as to justify rebutting the very same presumption.[50] Seen in this light, *Kernott* is just the most recent of many cases that have exacerbated the uncertainty caused by *Stack*. This is not to say that *Stack* is in itself intrinsically unworkable. Quite the contrary, the decision has since been commended for its communitarian approach to property disputes over cohabitated homes.[51] From the family law perspective, *Stack* may also represent a more flexible approach than the previous resulting trust analysis, which could prejudice the party that does not earn income.[52] Especially since the UK Government has chosen not to take any action in response to the Law Commission's proposals in this regard,[53] it may well be that *Stack* is a necessary decision after all. As one commentary noted,

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[46] [2008] 1 W.L.R. 2695.

[47] *Ibid.* at para. 17.

[48] [2008] EWCA Civ. 377.

[49] *Ibid.* at paras. 43-47.

[50] Martin Dixon, "The Never-ending Story—Co-ownership after *Stack v. Dowden*" (2007) 71(3) *The Conveyancer and Property Lawyer* 456.

[51] Matthew Harding, "Defending *Stack v. Dowden*" (2009) 73(4) *The Conveyancer and Property Lawyer* 309.

[52] Ruth S. Yeo, "The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman" (2010) 24(2) Int'l J.L. Pol'y & Fam. 123.

[53] Law Commission, *The Financial Consequences of Relationship Breakdown*, Report No. 307 (2007). See, however, the UK Government's response, online: <http://www.justice.gov.uk/news/announcement060308a.htm >.

its purpose was not to revisit *Stack* since "it decides what it decides and that is now the law"; its purpose was to suggest that *Stack* "is all things to all judges".[54] It is thus submitted that *Stack* could be clearly incorrect, or it could even be clearly correct, but it should not be anything else, *i.e*. lacking in clarity. Ultimately, since the majority judgment in *Stack* does somewhat vacillate between the concepts of fairness and intention, there will invariably still be differences in the interpretations of the word "imputed" in Baroness Hale's judgment. One might say that this is a mere semantic debate, given that the court still has to *find* an intention. Yet it is circular, as it was precisely because of the issue of *how* to find such an intention that Baroness Hale had introduced the formulation of "actual, inferred or imputed" in the first place. The difference between *inferred* and *imputed* intentions is eloquently set out in Lord Neuberger's dissenting judgment.[55] One commentator has argued that this distinction is important, and that the confusion in *Stack* was caused by the majority "clothing" an approach based on fairness in the fig leaf of intention.[56] Even if we seek a return to the straightforward task of *finding* an intention, we may now find ourselves irreversibly shackled by this formulation in *Stack*. It is submitted that unless this unnecessary subterfuge between fairness and intention is authoritatively clarified, it may lead to confusion in the lower courts for many years to come.[57]

C. *Whether the Court May Take Into Account Post Separation Events*

What is also striking about *Kernott* is that Jacob L.J. may have unwittingly extended the law in *Stack* to take into account not only events after the parties' purchase of property, but also events after the parties' *separation*. It seems that the Court of Appeal was fixated on the question of whether the court can infer or impute an intention to the parties to vary their beneficial interests, without really considering which events can be taken into account. From the outset of Wall L.J.'s judgment, the issue was framed as such:

> [C]an the court properly infer an agreement *post separation* that the parties' beneficial interests in the property alter or … become "ambulatory", thereby enabling the court—as here—to declare that, as the date of the hearing before the court, the beneficial interests in the property are held other than equally?[58]

Yet the House of Lords in *Stack* did not once indicate that *post separation* events can be taken into account when inferring or imputing a shared intention. The closest to this can be found in Baroness Hale's judgment, where she held that:

> There may also be reason to conclude that, whatever the parties' intentions at the outset, *these have now changed*. An example might be where one party has

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[54] *Supra* note 50 at 460.

[55] *Stack* at paras. 125-126.

[56] Nick Piska, "Intention, Fairness and the Presumption of Resulting Trust after *Stack v. Dowden*" (2008) 71(1) Mod. L. Rev. 114. See also Simon Gardner, "Family Property Today" (2008) 124 L.Q.R. 422.

[57] For a parallel, see the reliance on the language of "constructive notice" in presumed undue influence cases after *Barclays Bank plc v. O'Brien* [1994] 1 A.C. 180, until it was authoritatively clarified in *Royal Bank of Scotland v. Etridge (No. 2)* [2002] 2 A.C. 773.

[58] *Kernott* at para. 6 (emphasis added).

> financed … an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.[59]

Again there is no mention of post separation events, and it seems as though the House of Lords had not envisaged that as a possibility. Whilst this may seem innocuous at first glance, on second thought, it is likely instead that, on the contrary, the House of Lords had *not* intended for post separation events to be taken into account. As Baroness Hale had pointed out in *Stack*, as between married couples, the court has "comprehensive redistributive powers" under the *Matrimonial Causes Act 1973* if the couple divorces.[60] However, all *inter vivos* disputes between unmarried cohabiting couples are still governed by the ordinary law.[61] Baroness Hale referred to the Law Commission's paper, and held that since legislative reform is unlikely, "the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament".[62]

It is clear that the intention in *Stack* was to extend to courts presiding over cases with *unmarried* cohabiting couples the comprehensive redistributive powers available in cases involving married couples as provided by statute. The *Matrimonial Causes Act 1973* lists the matters to which a court may have regard in deciding how to exercise its powers,[63] and significantly it makes no mention of post separation events. It follows that if cases involving married couples do not take into account the events after their separation, why should it be any different for unmarried cohabiting couples? Further, since the separation of an unmarried cohabiting couple is not finalised by divorce decree, would the parties not potentially be in "ambulatory limbo"? It is respectfully submitted that applying *Stack* to take into account post separation events would appear to be extending the law without having regard to the lacuna for which it was first created to fill.

IV. Conclusion

Of the many cases that have applied *Stack*, *Kernott* is the first to directly address the issue of whether, and if so how, such intentions can be imputed to the parties. Yet in the Court of Appeal, there were no less than three different ways to interpret the same test in *Stack*. The dissenting judgment had even extended *Stack* to take into account post separation events when imputing the parties' shared intentions. Does *Stack* empower the court to impute to the parties "shared" intentions that they never had? Does this imputation apply only to the quantification of the extent of their interests, or also to whether or not to vary their beneficial interests? Can the court now take into account post separation events, even if it might not have such discretion in the case of married couples? *Kernott* may have raised more questions than it had set out to answer. Unless the law is authoritatively clarified, *Stack* will likely continue to confuse trial judges, lower courts and litigants alike. Following the landmark Singapore Court of Appeal decision of *Lau Siew Kim v. Yeo Guan Chye Terence*,[64]

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[59] *Stack* at para. 70 (emphasis added).
[60] *Ibid.* at para. 43.
[61] *Ibid.* at para. 44.
[62] *Ibid.* at para. 46.
[63] *Matrimonial Causes Act 1973*, s. 25
[64] [2008] 2 S.L.R. 108.

our courts have yet to have the opportunity to reconsider this area of the law. In deciding whether or not to follow *Stack*, it is submitted that *Kernott* makes clear the inherent difficulties of the approach. Since the Singapore courts are so far not constrained by any binding authority, if this approach is indeed adopted, our courts will have an opportunity to authoritatively clarify the law.