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Constructive trusts over the family home: lessons to be learned from other Commonwealth jurisdictions?

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Ownership of the family home is usually not disputed until either the relationship between the spouses or cohabitants breakdown or there is a competing claim over the property by a third party. In such circumstances, determination of ownership rights becomes imperative. The Matrimonial Causes Act 1973 gives the courts adjustive powers to deal with disputes between spouses on the breakdown of the marriage.ⁱ Notwithstanding this, there may be circumstances where it will be necessary or desirable to determine property rights between spouses.ⁱⁱ Furthermore, the adjustive powers of the courts are not applicable to cohabitants. Thus, in the absence of legal co-ownership in the family home, cohabitants and spouses who cannot rely on the 1973 Act will have to establish an equitable interest in the property. The analyses relied on are primarily based on property law and trusts principles and, more particularly, imputed trusts and proprietary estoppel. Under trusts principles, imputed trusts are usually taken to refer to resulting and constructive trusts.

In dealing with disputes over ownership of the family home, the cases illustrate the tendency of the courts to blur the distinction between these two types of trusts. However, the historical origin of each is distinctly different. A resulting trust arises where, for example, title to the property is vested in A's name but the consideration was provided by B. Unless a contrary intention is proved, the property will be held by A on resulting trust for B to the extent of his contribution.ⁱⁱⁱ This causal connection between the financial contributions and acquisition of an equitable interest has been described as the 'solid tug of money'.^{iv} It becomes evident in the following discussion that the 'solid tug of money' is central in determining beneficial ownership of the family home. In contrast, constructive trusts have always been seen as arising by way operation of the law rather than the intentions of the parties. In the context of the family home, the courts have evinced a willingness to impose a constructive trust to prevent fraudulent or unconscionable conduct. Prior to **Lloyds Bank v Rosset**^v, it was evident that two lines of authority emerged from the cases. The first line of authority, illustrated by cases like **Gissing v Gissing**^{vi} and **Pettitt v Pettitt**^{vii}, was based on the 'solid tug of money', which followed closely the resulting trust analysis, in that, there had to be a direct referability between financial contributions and the acquisition of the property. In the absence of evidence to the contrary, the *prima facie* inference is that it is the common intention of the parties that any contributions made towards the total purchase price of the property would entitle the party making the contribution to a proportionate share in the property. The second line of authority is found in cases like **Eves v Eves**^{viii} and **Grant v Edwards**^{ix}. The constructive trust is imposed on the grounds of 'fairness' or 'justice' which suggests the courts' willingness to impose a constructive trust in situations where the claimant is able to

establish that the defendant has either explicitly promised to share the property or at least acknowledged in some way the intention to share and the claimant has, in reliance on this promise, acted to his or her detriment.^x

In **Rosset**, the defendant had made indirect contributions in the form of supervising building works and doing some redecoration on the husband's property. She attempted to resist the bank's claim on the grounds that, following **Williams & Glyn's Bank v Boland**^{ki}, the bank was bound by her equitable interest under a constructive trust since they had failed to obtain her consent to the mortgage. The House of Lords, in dismissing the defendant's claim, stated that a claimant may acquire a beneficial interest under a constructive trust only if two key elements are established: common intention to share and detrimental reliance. The claimant must establish the existence of an agreement, arrangement or understanding reached by the parties for the sharing of the property and that (s)he has acted to his or her detriment in reliance on such agreement, arrangement or understanding. In the absence of an express common intention, such intention may be inferred from the parties' conduct. In that respect, direct financial contributions to the purchase price, whether initially or subsequently towards mortgage payments, would readily justify such an inference.^{xii} It is, however, suggested that the common intention approach is inadequate in dealing with family property disputes primarily for two reasons. Firstly, **Rosset** reveals the inextricable 'solid tug of money' in founding a proprietary claim and shifts the emphasis back to financial contributions which are directly referable to the acquisition of the property. This is where a major weakness of the common intention approach lies. It fails to take into account the economic inequality between men and women which, in turn, affects their respective ability to acquire property.

This inequality is not just limited to the disparity of earnings between men and women but also affects women's access to the family wealth.

Secondly, the law fails to take into account the effects of sexual division of labour in these relationships. There is a close link between the sexual division of labour and women's economic position. Thus, this paper sets out to highlight the fact that, despite its appearance of neutrality, the common intention approach is gender biased and effectively discriminates against female claimants. The paper will also look to the experiences of other Commonwealth jurisdictions in dealing with family property disputes. Whilst there is an excellent discussion by Gardner in respect of the Commonwealth approaches to family property disputes^{xiii}, his analysis was not concerned with the issue of gender in these disputes. The purpose of this paper is to show how gender issues should be taken into account when dealing with family property disputes and failure to do so by any doctrine applied renders it inadequate to protect the interests of female claimants. It becomes evident in the subsequent discussion that not all of the Commonwealth approaches are free from gender bias and have managed to escape the inextricable 'solid tug of money'. The study is, however, useful in elucidating options which may be less gender biased by their willingness to take into account indirect contributions, particularly domestic contributions, to ground proprietary claims.

Limits of the 'Common intention' constructive trust

Under the **Rosset** formulation, there are two ways in which a claimant may obtain a share in the family home. The first requires the existence of an agreement,

arrangement or understanding between the parties for the sharing of property, coupled with acts of detriment on the claimant's part in reliance on such agreement. In the absence of such express agreement, the second alternative is to infer a common intention to share from the parties' conduct. In drawing such an inference, the emphasis of the courts is on the direct financial contributions of the claimant towards the acquisition of the property. **Rosset** does not appear to affect the **Gissing** type of resulting trust. Its impact is felt more within the second line of authority where constructive trusts are seen as remedial in essence. In such situations, 'fairness' and 'justice' alone appear to be insufficient grounds for the imposition of a constructive trust. Despite earlier authority wherein indirect contributions were recognised by the courts, the **Rosset** formulation gives little recognition to such contributions. Indirect contributions are excluded unless the claimant can show evidence of some notional common intention, that is, some express discussion or mention of property sharing between the parties. In such cases, the courts may be prepared to take into account indirect contributions if they are like those in **Eves** and **Grant v Edwards**. The factor which distinguishes those contributions from other forms of indirect contribution is that the courts perceive them as being contributions in money's worth and capable of valuation in economic terms. In all other circumstances, it may be difficult to link other forms of indirect contributions to the acquisition of the property which justify the imposition of a constructive trust.^{xiv}

To some extent, **Rosset** has created a certain confusion about the type of trusts which the courts are dealing with in these disputes. In both instances, the courts have labelled them as constructive trusts. The first category, however, borders on an

express trust while the second, with its emphasis on direct financial contribution, appears to blur the distinction between traditional resulting trusts and constructive trusts. The detrimental reliance requirement, therefore, appears necessary for overcoming the formality of s 53(1)(b) of the Law of Property Act 1925 and for bringing the matter out of the ambit of traditional resulting trusts. The requirement, however, is in itself problematic as it is unclear what the exact nexus is between common intention and detrimental reliance. As a result, **Rosset** has been criticised on a number of grounds, the first of which is the common intention requirement. **Rosset** is less than clear on the level of evidence required for finding the requisite intention. This has led the courts to fictionalise the intent and make contradictory findings in some cases.^{xv} Clarke argues that if the defendant finds some ‘excuse’ to fob off the claimant, this clearly evidences disagreement rather than agreement.^{xvi} The contradictory findings of the courts effectively convert the unilateral intention of one party (the claimant) into an agreement. Gardner further argues that the courts’ willingness to stretch the facts so as to find the necessary common intention to share ends up being nothing more than an exercise in ‘inventing’ agreements.^{xvii} This has led one judge to describing it as being a ‘phantom intent’.^{xviii}

Another criticism of **Rosset** stems from the requirement that, in the absence of an express agreement, the contributions must be financial and directly referable to the acquisition of the property so as to give rise to an inference of common intention. This condition effectively places little significance on indirect contributions even where such contributions are substantial. By ignoring indirect contributions, the main objection is that the principles effectively discriminate against women by making two basic assumptions.^{xix} The first is that spouses and cohabitants are treated as

strangers dealing with each other at arm's length, who will, therefore, 'bargain' for their respective shares over the family home. It imposes a commercial gloss to a relationship which is *prima facie* a personal one and the 'bargain' is interpreted as the first condition of common intention. The second assumption is that value cannot be attached to the domestic services provided by the claimant. The discriminatory effect of the law clearly manifests itself here, as it fails to take into account the effects of sexual division of labour in these relationships.^{xx} The typical family scenario of the husband being the only wage-earner and the wife being the full-time housewife and carer of the family is undoubtedly on the decline as increasing numbers of women join the labour market and are economically active. Despite this, it has been argued that this pattern, albeit less rigid than before, remains unchanged.^{xxi} Women are still primarily responsible for the domestic duties in the family. In 1995, the Equal Opportunities Commission reported that the economic inequality of women to men was closely linked to women's domestic responsibilities.^{xxii} For example, 23 per cent of women in their late 20s were outside the labour market because of domestic responsibilities compared to virtually none (about less than 1 per cent) for men in the same age group. The proportions of women in their 30s and 40s who were also unemployed because of domestic responsibilities were 23 per cent and 12 per cent respectively whereas the proportions of men in each of the same age groups were about half.^{xxiii}

These assumptions render the effects of sexual division of labour remaining mostly invisible. In other words, the focus of the courts is on the claimant's income-generating activities and her domestic duties are incapable of giving rise to a common intention to share. The assumption of a domestic role clearly has a major

impact on the economic position of women. It affects their participation in the labour market, for example, the type of work and hours which they can take on and the wages which they can earn. This, in turn, affects their ability to make financial contributions towards the acquisition of property as these women will invariably have less or no economic resources of their own. Even where women are gainfully employed, the evidence suggests that women are generally less well paid than men. Morris^{xxiv} found that only 55 per cent of all women in the labour market were in full-time employment. The average hourly wage of female full-timers was generally about 79.9 per cent that of male full-timers whereas the average weekly wage was 72.3 per cent.^{xxv} In comparison, the average hourly wage of female part-timers was about 60 per cent of male part-timers and 75 per cent of female full-timers.^{xxvi} Morris argues that these findings reflect the overall weaker economic position of women. Thus, women's lack of economic resources means that it is generally harder for them to compete on an equal basis as men in acquiring assets. This has led to Eekelaar's observation that '[a] woman's place is often in the home, but if she stays there, she will acquire no interest in it.'^{xxvii} In family property disputes, the effects of sexual division of labour are clearly linked to the direct financial contribution requirement. This raises two problems: firstly, the financial contributions must be directly referable to the acquisition of the property, for example, towards mortgage payments and secondly, where indirect financial contributions are made, they must be substantial and necessary to relieve the defendant's income for repayment of the mortgage. It is unlikely that other forms of indirect contributions will suffice.

Notwithstanding its appearance of gender-neutrality, it has been argued that the practical effect of the financial contribution requirement is to place men in a more

favourable position than women.^{xxviii} Domestic services provided by women are generally disregarded by the courts as they refuse to see any connection between the provision of such services and the acquisition of the property. The combination of the ‘solid tug of money’ and the arm’s length dealing principle helps to reinforce the discrimination of women in these cases. Another argument often forwarded for rejecting domestic services is that such services are provided out of natural love and affection for the other family members. As such, these matters should remain unregulated within the private sphere of family. O’Donovan suggests that the deliberate non-interventionist approach of the state is merely a mask for passing control to other informal mechanisms. This private/public dichotomy allows domestic services to be ignored because they have no economic value in the public sphere.^{xxix}

A further argument raised is that the law fails to recognise the reality of domestic relationships. The arm’s length dealing principle runs diametrically opposite to the reality of such relationships. Gardner^{xxx} argues that any approach taken for the resolution of family property disputes which focuses on the parties’ thinking is inappropriate since the relationship between the parties is not one in which they would deal with each other by organised thinking in relation to their respective shares in the property. Furthermore, there is incongruity between judicial interpretation of the parties’ thinking and reality. Bottomley suggests that the cases indicate that the common intention requirement looks for specific evidence of the existence of a common intention rather than just mere expectation to share.^{xxxi} She argues that the need for such specificity reflects not only ‘a requirement of jurisprudential approach but also a mode of reasoning and language use which is

more conducive to men than women'. The 'language use' in such relationships also reveals that women 'too often read silence as positive assent and lack of specificity as covering a number of issues with equal firmness rather than evading the particular issue.'^{xxxii} This suggests that the parties may actually have very different views about what it takes to make an agreement to share. It further illustrates the problems which women face unless they change their way of thinking.^{xxxiii}

The law further assumes that families function as egalitarian economic units whereby the parties have an equal say in both the allocation and management of the household income and decision-making. The parties can, therefore, 'bargain' for their respective shares in the property through the allocation of household income directly towards its acquisition. Any other form of allocation of the household income, especially the woman's income, will draw the conclusion of a non-sharing intent by the parties. Pahl notes the strong correlation between control of household finances and marital power and that a family's choice of management system is dependent on the household income level and who the main wage-earner is.^{xxxiv} She found that management of household finances is clearly distinct from control. The partner viewed by the parties as being in control of the household finances normally plays a more dominant role in decision-making, which is directly linked to marital power.^{xxxv} Low income families usually prefer the female-management system which places both management and control in the woman's hands. In contrast, higher income families usually adopt a male-controlled system, even where the parties have opted for a pooling or an independent management system.^{xxxvi} However, in low income families where finances are both female-controlled and managed, management is usually seen as a demanding chore rather than a source of power. In the absence of

any perception of control, these women rarely see themselves as participating in marital power. Pahl, therefore, concludes that the greater the woman's contributions towards the household income, the greater her participation in decision-making and control over the household finances.^{xxxvii}

She further notes that the earning patterns of the parties and the choice of management system have a direct effect on the family's spending pattern. The general tendency is to utilise the woman's income for the day-to-day needs of the family, such as food for the family, clothing for herself and the children, rather than acquisition of assets.^{xxxviii} In comparison, the man would usually be responsible for all other major bills, more particularly, repair and maintenance costs of the family home and mortgage payments. Utilising the woman's earnings towards household expenses renders these contributions economically invisible since her earnings are ignored as pin money and absorbed into the household pool for covering family expenses and non-essentials. Such contributions, being classified as indirect, will not suffice to ground a proprietary claim under the current principles unless the woman is able to establish an existing agreement to share.

A further criticism of the common intention approach lies in the link between common intention and detrimental reliance. Although the basis for establishing a beneficial share is clearly the parties' common intention, that in itself is insufficient to make a claim successful. The courts may not necessarily be prepared to give effect to such intention in the absence of evidence that the claimant has acted on that intention in some way.^{xxxix} Establishing the requisite nexus between common intention and detrimental reliance is, however, not an easy task, as can be seen

from the three contrasting approaches taken by the judges in ***Grant v Edwards***. Nourse LJ adopted the ‘but for’ test which requires a causal connection between the agreement and the claimant’s acts in establishing the requisite detrimental reliance. Mustill LJ, on the other, took a contractual approach. The claimant’s acts must be referable in some way to the agreement reached between the parties, in that, the acts were carried out in exchange for a share in the property.^{xi} The ‘joint lives’ approach taken by Browne-Wilkinson V-C appears to be the least stringent. Once the common intention is established, any acts carried out by the claimant towards the parties’ ‘joint lives’ will be treated as evidencing the requisite link. Given that the judges’ statements are *obiter*, it is difficult to state categorically which test is authoritative.

This nexus question raises the further issue of what acts would suffice as detrimental reliance. This will depend on which test the courts will take in determining the issue. The narrower the test adopted, the higher the evidentiary requirements for establishing the requisite nexus between common intention and detrimental reliance and the acts which would justify the imposition of a constructive trust.^{xii} The choice of test can also lead to differences in judicial construction of acts tantamount to detriment. The ‘but for’ test is more susceptible to value judgments by the judiciary regarding the type of activities which couples are reasonably expected to carry out in the course of a domestic relationship. In contrast, the contractual approach leaves greater autonomy to the parties to ‘bargain’ for which activities to be taken into account. The ‘joint lives’ approach appears to be the most flexible, allowing room for a wider range of activities to be taken into account as detriment.^{xiii} It appears arguable that domestic services may be seen as sufficient acts of

detriment under the 'joint lives' test but not the other two tests. However, given the judicial attitude towards domestic services, it is unlikely that the courts will be prepared to recognise purely domestic services as being sufficient acts of detrimental reliance under any of these tests.^{xliii}

Recently in **Midland Bank v Cooke**^{xliv} and **Drake v Whipp**^{xlv}, the Court of Appeal found, in each instance, that the claimant had made direct financial contributions towards the acquisition of the family home in the form of contributions towards the initial deposit. In **Midland Bank v Cooke**, the court stated that, in the absence of an express agreement to share and where the claimant has established an equitable share in the property through direct financial contributions towards the acquisition of the property, the whole course of conduct between the parties must be taken into account to determine the parties' respective shares in the property. In that respect, assessment of the claimant's share need not be limited to strict resulting trust principles and may be based on constructive trust principles. A similar approach was taken in **Drake v Whipp**. The upshot of these cases is that, once a sufficient direct financial contribution has been made so as to enable the courts to draw an inference of sharing intent and get a claim off the ground, there is wider discretion for the courts to take into account other forms of contributions, direct or indirect, as acts of detrimental reliance. It further appears that the courts have the discretion to 'side-step' a strict resulting trust analysis and award a share to the claimant, which may be larger than her initial direct financial contribution, through a constructive trust.

Given the constraints of **Rosset**, the outcome in both these cases is salutary in that it manages to mitigate the harshness of **Rosset** and the courts appear to evince a

willingness to see justice done in such cases.^{xlvi} However, it is submitted that, despite the appearance of the courts' willingness 'to do justice', both cases continue to illustrate the inextricable 'solid tug of money'. The position remains that much depends on whether there has been a sufficient financial contribution to found a claim and even then, it remains unclear how much weight will be given to purely domestic contributions as acts of detrimental reliance. At first glance, **Hammond v Mitchell**^{xlvii} may appear to be a case in point that the courts are manifesting a greater willingness to accept non-financial contributions as being sufficient acts of detriment for a claim to succeed. However, the claimant was able to establish the existence of a common intention and there is no indication of the court's willingness to be overly generous in accepting indirect contributions as being sufficient acts of detriment in the absence of such express intention. It may be further argued that the provision of unpaid services in the plaintiff's business and the claimant's support for his highly speculative business ventures were seen as sufficient acts of detriment as they were, to some extent, capable of being valued in economic terms.^{xlviii} It is submitted that the case cannot be relied on as being authority for the proposition that the courts would be prepared to let a claim succeed purely on the basis of indirect contributions unless there is some notional agreement to share.

A further problem of linking common intention with detrimental reliance is that the courts appear to treat the doctrines of constructive trusts and proprietary estoppel as interchangeable. At first glance, there seems to be certain similarities between the two doctrines. The requirement of agreement, arrangement or some understanding between the parties to share, coupled with the need for detrimental reliance, appears similar to the requirement of assurance, reliance and detriment in estoppel.

However, theoretically, there are two important distinctions between constructive trusts and proprietary estoppel. The first relates to the time of creation of the interest and secondly, the type of interest created. In constructive trust cases, once the requisite elements have been established, there is little discretion in terms of awarding shares in the property. It is an ‘all or nothing’ approach whereby the claimant receives what the parties had agreed to or was promised or nothing. In contrast, the courts have a wider discretion in estoppel cases to award a remedy which is the ‘minimum necessary to do justice’^{xlix} and is not limited to a proprietary one.^l Furthermore, common intention is required for the imposition of a constructive trust whereas the unilateral conduct of the defendant leading to an expectation of a share in the property on the claimant’s part is sufficient to ground an estoppel claim. Thus, detriment serves a different purpose in each case. This distinction is crucial and re-emphasises the importance of the proprietary nature of trusts in these disputes. In trust cases, detriment gives the claimant a proprietary interest which is enforceable against third parties, whereas detriment in estoppel cases is merely a factor which the courts take into account in deciding whether it would be unconscionable for the owner to resile from his assurance or encouragement and if so, the appropriate remedy to be granted. Until the court’s decision, the claimant has no interest in the property but only a mere equity.^{li}

The approach of the courts has evidenced a blurring of the distinction between constructive trusts and proprietary estoppel. Firstly, the common intention requirement is less stringent than it first appears. The courts have evinced a willingness to impose a constructive trust in cases where there is no evidence of an actual agreement to share but merely some assurance or even an excuse being

given to the claimant. Secondly, notwithstanding the purported ‘all or nothing’ approach, the quantification of the claimant’s share has become increasingly discretionary.^{lii} This raises the question of whether the shift towards estoppel is desirable. Eekelaar observes that the common thread is that the claimant has been led in some way by the defendant to hold a reasonable belief that (s)he is to have a share in the property.^{liii} He argues that estoppel is a more attractive alternative as the doctrine allows greater flexibility for domestic services to be taken into account as acts of detrimental reliance.

Hayton^{liv} has, on the other hand, argued in favour of the assimilation of constructive trusts with proprietary estoppel on the grounds that the theoretical distinctions between the two doctrines are illusory and the courts should stop ‘pigeon-holing circumstances into constructive trusts and proprietary estoppel’.^{lv} The purpose of the court’s intervention is to protect the claimant’s detrimental reliance, rather than compel the other party to give effect to the expectation of a share. This entails assessing the parties’ relationship to ascertain whether there are circumstances which make it unconscionable for the defendant to assert his legal title absolutely.^{lvi} With unconscionability as the underlying principle, Hayton argues that the courts will have greater flexibility to take into account both a wider range of contributions (including domestic services)^{lvii} and remedies (personal and proprietary).^{lviii} The constructive trust, being remedial in nature, has prospective effect and poses no threat to the existing rights of third parties. Whilst recognising the merits of this argument, Halliwell^{lix} highlights that it remains unclear how receptive the courts are to the notions of unconscionability and unjust enrichment being the underlying principles of estoppel. This willingness does not appear to be evident across the

board.^{lx} She notes that the approach of the English courts has become too rule-oriented and '[c]oncentration on the rules may constitute as much a symptom as a cause.'^{lxi} The courts have moved away from analysing the remedial aspects of trusts and considering the principles underlying equitable intervention. This may be partially due to the fact that, as the common intention analysis involves only two conditions, they have to be easily identifiable, thereby making the analysis less flexible, with less scope for looking into the facts of each case to decide whether relief should be granted. Consequently, domestic services are considered as insufficient acts of detrimental reliance.^{lxii} Importing estoppel principles into constructive trusts may not necessarily increase the likelihood of success for the claimant who is relying solely on domestic services.^{lxiii} This is where the link between common intention and detrimental reliance becomes significant. It remains necessary for the claimant to establish the requisite intention to share and a sufficient nexus between that intention and her conduct to qualify as detrimental reliance.

The discussion so far shows that gender bias is evident in this area of the law. It remains invisible because the law recognises formal equality between the parties to own property. This is reflected by seemingly neutral concepts in the common intention approach, such as intention and the referability rule which emphasises financial contributions. Yet these concepts work in an insidious way to discriminate against women because they fail to take into account the effects of sexual division of labour on the earning capacity of women and how this will, in turn, limit their control and decision-making role in respect of the household finances. The evidence reveals that the trend is towards a male-controlled system, especially where the

man's income is higher than the woman's. Given the parties' unequal access to the family wealth, women will generally find it harder than men to satisfy the requirements of the common intention approach. The significance of these arguments appears as well in the discussion on the assimilation of constructive trusts with estoppel. The main argument favouring assimilation is the flexibility of estoppel to take into account indirect contributions, especially non-financial contributions, as sufficient acts of detrimental reliance. Thus, by shifting towards estoppel, claimants may dispense with the onerous task of establishing the requisite common intention. However, it is submitted that an assimilation of constructive trusts with estoppel will not remove the gender bias in the common intention approach unless the analysis is prepared to take into account how sexual division of labour and the economic disparity between men and women will impact on the type of contributions which each party can make towards the relationship. The purported flexibility of estoppel depends very much on a generous judicial treatment of non-financial contributions as sufficient acts of detriment.

The Commonwealth approaches

It has been argued so far that the common intention approach is unsatisfactory as it places women at a disadvantage as a result of the effects of sexual division of labour in domestic relationships. This raises the question of what changes should be made in order to render the law less gender bias. Falling short of legislative intervention, it would appear that equity is still the more appropriate legal instrument to deal with family property disputes. However, in view of the arguments raised against the common intention approach, should the English courts emulate other

Commonwealth jurisdictions in adopting alternative doctrines to deal with these disputes? In reviewing the doctrinal bases of the Commonwealth approaches, Gardner came to the conclusion that those approaches were equally problematic as the common intention approach.^{lxiv} The common thread in the various doctrines applied is the parties' thinking which, Gardner argues, is inappropriate as parties in a domestic relationship normally deal with each other on the basis of trust and collaboration rather than organised thinking. He suggests that the principles to be applied in family property disputes should be reformulated to incorporate these values, thereby enabling the courts to obtain the desired results without the need for manipulating facts and fabricating common intention.

It is, however, submitted that, if put to the test, trust and collaboration may be equally vacuous concepts, susceptible to value judgment by judges as to what types of conduct may be reasonably expected of the parties in a trusting and collaborative relationship so as to amount to detriment. This approach will not be too different from the quasi-marital approach which the courts are presently taking wherein redress is given to a claimant whom the court views as being comparable to the 'good wife'. Gardner's analysis fails to take on the challenge of gender bias and its impact on the economic position of the parties. The discourse must take into account these issues in order for less gender biased principles to be formulated. Based on the empirical evidence of the effects of sexual division of labour and the economic disparity of men and women, the aim at this juncture is to investigate whether adopting all or any of the Commonwealth approaches will necessarily render the English law in this area more (or less) gender bias than the common intention approach.

(a) **Australia – unconscionability**

The Australian courts have moved towards unconscionability as the basis for equity's intervention. In **Muschinski v Dodds**^{lxv}, the court prevented the legal owner from unconscionably asserting full ownership and refusing to recognise the interest of the claimant who has made contributions for the purposes of the parties' 'joint endeavour' which has subsequently failed. However, the facts of **Muschinski v Dodds** reveal that there was both a commercial and domestic element in the parties' relationship which may have facilitated the finding of a joint endeavour by the parties. In **Baumgartner v Baumgartner**^{lxvi}, joint venture was extended to arrangements which were purely domestic. The claimant had made contributions which were both financial (in terms of pooled earnings) and non-financial (in terms of domestic services). There was further evidence that the pooled funds had facilitated the purchase of the property. The court found in favour of the claimant on the basis that the contributions were made for the parties' joint relationship which has failed and that it would be unconscionable for the defendant to retain the benefit of those contributions. At first glance, this approach appears to give the courts greater flexibility in granting equitable relief than the common intention approach. It also appears to allow greater room for indirect contributions to be taken into account.

However, **Baumgartner** has raised certain questions which remain unanswered. Is equitable intervention limited to situations which are analogous to **Baumgartner** where the parties have pooled their earnings or is it applicable to other forms of

unconscionable conduct? The cases give little guidance on the range of unconscionable conduct which will justify equity's intervention. It remains unclear whether the principle is equally applicable to purely domestic contributions which have enabled the defendant to make savings and increase his assets since the unconscionability-based constructive trust has been imposed usually where the claimant has made substantial financial contributions to the defendant's resources.^{lxvii} Cases like **Hibberson v George**^{lxviii}, **Tory v Jones**^{lxix} and **Public Trustee v Kukula**^{lxx} suggest that some sort of pooling of funds may be necessary for finding a joint endeavour. In **Hibberson v George**, there was no actual pooling of earnings but the claimant had made indirect financial contributions towards renovations and improvements of the property, the purchase of furniture and expenditure on the children. The court had stated that, although no strict pooling of resources is required, there must be at least some evidence of financial contributions being made towards the parties' relationship. In contrast, the parties' failure to pool their earnings was fatal to the plaintiffs' claims in both **Tory v Jones** and **Kukula**.

The strictness with which the courts interpret 'joint endeavour' suggests that the courts may be reluctant to impose a constructive trust solely on the basis of non-financial contributions such as domestic services.^{lxxi} Bryan^{lxxii} argues that domestic services have generally been either devalued or ignored in later cases.^{lxxiii} There is an evident shift in emphasis back towards assessing claims on the basis of financial contributions which he describes as 'the materialist bias of Equity reassert[ing] itself'.^{lxxiv} The approach appears only marginally more flexible than the common intention approach in its willingness to give greater weight to indirect financial

contributions in founding a claim. There are, however, remnants of gender bias in the unconscionability approach. In requiring some evidence of commercialism in the relationship, it ignores the impact of sexual division of labour on women's employment and earning patterns. Non-financial contributions, such as purely domestic contributions, will probably be insufficient to satisfy the 'joint endeavour' requirement and for the imposition of a constructive trust.

(b) Canada - unjust enrichment

The Canadian courts have similarly moved away from the common intention approach and adopted unjust enrichment as the underlying basis for the grant of equitable relief. Following cases like *Pettkus v Becker*^{lxxv} and *Sorochan v Sorochan*^{lxxvi}, the unjust enrichment approach requires the establishment of three requirements: an enrichment to the defendant, a corresponding deprivation to the plaintiff and an absence of juristic reason for the enrichment. Once these elements are present, a constructive trust will be imposed, provided that there is a causal connection between the unjust enrichment and the property under dispute. The fact that one party has benefited at the instance of the other party is not in itself sufficient to warrant the court's intervention. There must be evidence to indicate that the retention of the benefit will render such enrichment as 'unjust' in the circumstances of the case.^{lxxvii} In *Pettkus v Becker*, the claimant made financial contributions towards the parties' living expenses and provided unpaid labour in the man's bee-keeping business while the claimant in *Sorochan* had provided both domestic services as well as unpaid farm work. The court in *Sorochan* had, in fact, made no distinction between the claimant's domestic contributions and her farm labour and

held that the defendant had benefited from both types of labour which had been performed by the claimant without remuneration. It was, therefore, recognised that domestic services could equally enrich the owner of the property.

This proposition was endorsed in *Peter v Beblow*^{lxxviii} where domestic services performed by one partner in the relationship was treated as an incontrovertible benefit and are capable of raising the presumption of an enrichment, which the claimant has been deprived of in the absence of adequate compensation. As cohabitants are not under any common law, equitable or statutory requirement to provide such services, the presumption is that the services are not being given gratuitously. Accordingly, there is an absence of juristic reason for the enrichment and a corresponding deprivation.^{lxxix} The causal connection need not be in the form of the claimant's direct financial contributions towards the acquisition of the property. Thus, the causal test is a more general one and is satisfied so long as there is a clear link between the contributions and the disputed property. More importantly, the approach does not place greater significance on financial contributions over domestic contributions.

The unjust enrichment formulation further refers to the reasonable expectations of the claimant and the state of mind of the owner of the property. Thus, the owner must know, or ought to have known, that the contributions were not made on the basis of a gift but with a reasonable expectation of a share in the property. The reasonable expectation requirement has been criticised by Gardner^{lxxx} as a retreat to the parties' thinking and manipulation of facts by the courts to find the relevant expectation and absence of juristic reason for the enrichment. Scane, on the other

hand, argues that the reasonable expectation requirement appears to act in a purely evidentiary way to raise the presumption that the services are rendered by one partner in a relationship tantamount to spousal, for the benefit of the family or the business of the other partner, with an expectation of some form of economic compensation.^{lxxxix} Once the claimant establishes that the relationship is one tantamount to spousal and that she has made contributions (whether direct or indirect), the combination of these two factors raises the presumption and shifts the burden of proof to the defendant to show that he had no knowledge of the claimant's expectation. This is arguably very different from the common intention requirement which needs some form of meeting of minds by the parties. The reasonable expectation calls for no such meeting of minds and may be purely unilateral in its formation. It is submitted that this presumptive role does not differ substantially from Gardner's trust and collaboration in domestic relationships which, likewise, raises the presumption of shared benefit.

A further problem raised is the nexus between the causal connection and the claimant's reasonable expectations. In **LAC Minerals Ltd v International Corona Resources Ltd**^{lxxxix}, the court recognised the significance of a proprietary remedy when monetary compensation is inadequate. The imposition of a constructive trust will depend on whether there exists any reason for giving the plaintiff additional rights over the property which necessarily flows from awarding a proprietary remedy. Even then, there must be a proprietary link between the unjust enrichment and the property to justify such an award. The basis of the unjust enrichment analysis appears to be two-fold: firstly, the claimant's mistaken belief that, in supplying domestic services, she will acquire a share in the property and secondly, the

defendant's acquiescence in 'freely accepting' the contributions made by the claimant.^{lxxxiii} This appears to exclude situations where the defendant has made his non-sharing intention clear to the claimant. It may, therefore, be argued that the claimant's continued provision of domestic services is done without the reasonable expectation of sharing the property. This argument has been rejected on the grounds that, despite communication of the defendant's refusal to share, the very nature of these relationships is such that the claimant will probably continue to provide the services when faced with the risk of losing more from the deterioration of the relationship than what may be gained from withdrawing the services. Thus, the continued provision of the services cannot be seen as being 'voluntary' and should not be a bar to a restitutionary remedy.^{lxxxiv} This proposition appears to be supported by **Sorochan** where a constructive trust was imposed, despite the defendant having communicated his non-sharing intent to the plaintiff. This suggests that the reasonable expectation requirement is a minimal one and that a defendant may not be able to raise a defence to a proprietary claim by merely warning off the claimant.^{lxxxv}

This leaves a gap in the unjust enrichment analysis as to the necessary 'proprietary link' between the unjust enrichment and the property to justify a proprietary remedy. The necessary link between causal connection and reasonable expectation may, however, be easily satisfied by the presumptions raised in favour of the claimant and it will be increasingly harder for a defendant to resist a proprietary claim. Unlike commercial cases where the emphasis is on the causal connection and inadequacy of monetary compensation, the courts' treatment of family cases appears to be more generous. They evince a greater willingness to impose a constructive trust, despite

the absence of a clear proprietary link to any particular asset of the defendant. The difference in treatment in domestic cases may be justified on two grounds.^{lxxxvi} Firstly, the nature of domestic relationships requires the causal connection requirement in domestic cases to be less stringent than in commercial cases. Secondly, while the parties in a commercial transaction assume a certain level of risk, the acceptance of risk in domestic relationships is generally absent. Thus, the courts' willingness to grant a proprietary remedy stems from the reasonable expectations of the parties that the contributions are being made towards the joint relationship, thereby entitling the claimant to a share in the property. This willingness may also be partially due to the fact that the courts recognise the remedial nature of the constructive trust in these cases, which will not affect the prior claims of third parties.

By taking into account domestic contributions, it has been suggested that the unjust enrichment approach is a more realistic acknowledgement of familial relationships as a common enterprise.^{lxxxvii} Each member contributes to the relationship according to his or her abilities and the needs of the other members of the household. If the relationship subsequently breaks down, the property ought to be distributed according to these contributions, whether direct or indirect, financial or non-financial. Criticisms of gender bias brought about by sexual division of labour and the weaker economic position of women in terms of making direct financial contributions and/or the allocation of the household income towards the acquisition of the property are markedly reduced if the doctrine provides greater scope for the recognition of indirect contributions, especially domestic services. The reduced gender bias in the unjust enrichment approach is in part facilitated by the presumptive role that

reasonable expectations play. Notwithstanding this, the unjust enrichment approach is not completely gender neutral.

At present, the focus is on relationships which are ‘tantamount to spousal’. This qualification raises two problems. The first relates to identifying relationships which will qualify. This will necessarily entail the courts’ evaluation of relationships and deciding whether they are sufficiently ‘marriage-like’ so as to come within the scope of the doctrine. This poses a factual difficulty for the courts and the tendency will be for the courts to look at long-standing relationships as being more worthy of the courts’ protection than relationships of shorter duration. Factors such as the duration of the relationship, the presence or lack of presence of children, the usage of the same family name and having a joint account may influence the courts in deciding that a particular relationship qualifies.^{lxxxviii} The courts are equally susceptible to value judgments in determining whether the relationship is sufficiently spousal-like. Unless the claimant can pass this first hurdle, the issue of her contributions being an unjust enrichment does not even arise.

The second problem is whether the analysis will apply to other types of relationships. The couples in all these cases are heterosexual and the courts have consistently referred to relationships tantamount to spousal. It remains to be seen whether the courts will be prepared to extend this principle to other relationships, for example, homosexual couples or couples who share a household but do not have a sexual relationship. The unjust enrichment approach will be of limited effect if the courts continue to make a distinction between relationships which they perceive as being spousal-like and those which are not. In that respect, the common intention

approach, despite its criticisms of gender bias, may be a more flexible approach with its ability to include a wider range of relationships.

(c) New Zealand - reasonable expectations

Gillies v Keogh^{xxxix} paved the way for the ‘reasonable expectations’ approach which the New Zealand courts have adopted in dealing with family property disputes. In ***Gillies v Keogh***, there was evidence that, throughout the relationship, the defendant had made it clear to the plaintiff that she viewed the properties as being her own. Consequently, the court found in favour of the defendant on the basis that there had been no reasonable expectations on the part of the plaintiff which justified the court’s intervention. The court observed that the common thread in these cases is the reasonable expectations of the parties. In formulating these expectations, the courts will have to consider certain factors. The first is the ‘degree of sacrifice made by the claimant’, which may include ‘opportunities foregone’. This is also used as a yardstick in assessing the unjust enrichment of the defendant. Secondly, the court will consider ‘the value of broadly measurable contributions of the claimant by comparison with the broadly measurable value of the benefits received’. In that respect, the court recognised that contributions towards the household expenses and food and other domestic services may have little significance and may at times be treated as being no more than a fair exchange for free board and lodging. It is also clear that the parties may ‘contract out’ of the reasonable expectations approach, as in ***Gillies v Keogh***.

The approach, therefore, appears to incorporate both a subjective and an objective component in determining the parties' reasonable expectations. The objective component centres on whether a reasonable person in the claimant's position would have expected an interest while the subjective component involves the claimant formulating an expectation to share. In *Phillips v Phillips*^{xc}, the court recognised that a long-standing de facto relationship and the conduct of the parties are equally capable of giving rise to reasonable expectations of property sharing as in marriage. In *Lankow v Rose*^{xcⁱ}, the court reiterated that the imposition of a constructive trust would be justified only if the claimant has established four essential elements: that contributions, whether direct or indirect, have been made towards the acquisition, preservation or enhancement of the defendant's assets or property; that (s)he expected an interest in the property; that the expectation was reasonable in the circumstances; and the defendant should reasonably be expected to give the claimant an interest. The court further stated that there had to be a causal link between the claimant's contributions and the acquisition, preservation or improvement of the property. The contributions need not be financial but must fall into one of two categories. Firstly, the contribution of itself must assist the defendant in the acquisition, preservation or enhancement of the property or its value. Alternatively, the contribution by its provision must assist the defendant in acquiring, improving or maintaining the property or its value. In that respect, domestic contributions may qualify as contributions towards acquisition of the home. However, the contributions must manifestly exceed the benefits received. In other words, the claimant must show that (s)he has suffered some detriment or that the contributions have resulted in the enrichment of the defendant which is unjust. This is where the New Zealand courts have reiterated the fundamental difference between de facto

relationships and marriage. The presumptive half share adopted in legal marriage does not apply in de facto relationships. Therefore, the remedy of a constructive trust is based on a clear causative link being established between the claimant's contributions and the property in dispute and the appropriate share to be awarded is dependent on the balancing of contributions made and benefits received.

Although the cases illustrate that the courts do not intend to limit qualifying contributions to purely direct and financial contributions, they also reveal two major limitations. Firstly, the weighing up of contributions against benefits received may render the remedy ineffective on a practical level. The courts are faced with the difficult task of determining the point at which the contributions actually outweigh the benefits received so as to qualify. This is particularly problematic in cases of purely domestic contributions. If the courts are conservative in their valuation of such contributions, the net result of the balancing act will effectively reduce the share to be awarded to the claimant. Even where financial contributions are made, the balancing act is not necessarily an easier task. Given that women are generally in a weaker economic position, their contributions are constrained by their own economic resources. Thus, a mathematical calculation of contributions versus benefits would render the approach equally as biased as the common intention approach.

The other more pressing problem is the ability of the parties to contract out of the reasonable expectations approach. In ***Cossey v Bach***^{xcii}, the court stated that the expressed intentions of the parties remain paramount. Once the defendant has made it clear to the claimant, as in ***Gillies v Keogh***, that (s)he is not to acquire a share in the property, the claimant can no longer be said to continue holding a

reasonable expectation. The expressed intention has to be unequivocal, made by the party who has the power to dispose of the interest in question and pertinent to the circumstances of the case. The defendant's expressed intention will effectively override the claimant's reasonable expectation and allow the defendant to avoid having a constructive trust fixed on him. The ramifications of such an expressed intention is felt most in cases of domestic contributions. For the same reasons raised by Scane in relation to the unjust enrichment approach, it may be difficult for women in such relationships to withdraw their domestic contributions. At the same time, the opting-out option will pose an effective bar to their claiming a share in the property.

Conclusion

The above analysis shows how the common intention approach raises problems which renders it inadequate to deal with family property disputes. The main objection is the need to find the relevant common intention to share which is rarely found in majority of domestic relationships. This has led some to argue that the process of awarding a proprietary remedy depends on the willingness of the courts to manipulate the facts in order to find the relevant intent. A further problem of the approach is its emphasis on the referability rule which focuses on direct financial contributions rather than all forms of contributions, whether direct or indirect, financial or non-financial. The principles clearly ignore the effects of sexual division of labour in such relationships which place women at a disadvantage. The approaches taken by various Commonwealth jurisdictions have, firstly, moved away from the common intention approach and, secondly, evinced greater willingness to take into account indirect contributions and, more particularly, non-financial

contributions such as domestic services, in deciding whether to grant a proprietary remedy. The discussion on the Commonwealth approaches reveal that some approaches have evinced greater willingness than others in recognising indirect non-financial contributions in getting a proprietary claim off the ground. However, none of the approaches are not completely problem-free.

The joint endeavour approach in Australia continues to manifest remnants of the ‘solid tug of money’ by emphasising the need for the pooling of resources which inevitably requires some form of financial contributions from the claimant. This may be difficult in cases of women who are constrained by their domestic responsibilities in taking on employment and making the requisite contributions. In both New Zealand and Canada, the courts have stated that the contributions need not be solely financial, thereby allowing non-financial contributions to be taken into consideration. This is a marked departure from the conservatism shown by the English courts. The willingness of both the Canadian and New Zealand courts to recognise the significance of non-financial contributions such as domestic services reveals the fallacy that no value can be placed on such services. It may be of interest to note that an independent study by Legal & General reveals that the average value of domestic services is about £16,265 per year.^{xciii} However, there are two caveats on the generosity of the reasonable expectation approach in the form of the contributions/benefits equation and opting out. Each may be an effectively barrier to relief especially in cases where women are providing purely domestic services. The Canadian approach appears to offer the greatest flexibility in terms of recognising indirect contributions, especially domestic contributions. Yet, the approach remains problematic if the courts place too rigid an interpretation of the

types of relationships which fall within its scope. At present, the cases point to relationships which tantamount to spousal. This exposes the assessment of deserving cases to value judgments by the courts and may limit the applicability of the doctrine only to relationships which the courts view as being spousal-like and more deserving of protection. Thus, even where the claimant has made substantial indirect contributions, a short-lived relationship may be viewed as less deserving of protection than a long-standing one.

Even where the courts are prepared to recognise indirect contributions, it remains a difficult matter in determining the form and duration of such contributions which would suffice in justifying a share in the property. It is no doubt easier to argue that the claimant who has cared for the family over a twenty year period is obviously a more deserving case than one who has been in a relationship for six months. On the other hand, if the claimant in the latter relationship has made substantial indirect financial contributions, it becomes harder to define hard and fast rules for assessing eligibility and entitlement. However, this is where the open-texturedness of the equitable doctrines come into play. The principles should be flexible enough to allow room for each case to be assessed on their merits. It is doubtful whether concepts like trust and collaboration are necessary to add coherence to this area of law. The Commonwealth approaches show how non-financial contributions need not be such a black box in terms of grounding a proprietary claim. They reveal how doctrines dealing with family property disputes may be better formulated to accord with the reality of domestic relationships and to take into account the continued existence of sexual division of labour and the economic inequality between men and women in these relationships. Thus, the Commonwealth approaches reveal two important

points. Firstly, equitable principles may be formulated which are more receptive to the economic disparity of men and women, in the resolution of family property disputes and secondly, that the contributions made by a female claimant need not be limited to only financial contributions and that the courts are competent in placing some value on non-financial contributions.

Part of the problem of the common intention approach may be as stated by Halliwell. In searching for legal clarity, the English courts may have become too rule-oriented as reflected by the rigid interpretation of ***Rosset*** and, in particular, the requirement for direct financial contributions. Once the courts recognise that the common intention approach need not be dictated solely by the referability rule, it allows greater flexibility for the courts to take into consideration a wider range of contributions, direct and indirect. The courts' assessment should incorporate consideration of the whole course of conduct between the parties, as well as the effects of sexual division of labour in the relationship and how that may impact on the claimant's resources in terms of making contributions, whether direct or indirect, towards the relationship. By re-focusing on these issues, it may pave the way for a principled basis of deciding family property disputes which is less gender bias.

i.. s 28(3).

ii.. for example, where the marriage has not broken down or the adjustive powers of the courts are inapplicable because a spouse's remarriage.

iii.. **Tinsley v Milligan** [1992] Ch 310 (CA), [1993] 3 WLR 126 (HL). Cf **Re Sharpe** [1980] 1 WLR 219, **Risch v McFee** [1991] 1 FLR 105 and **Richards v Dove** [1974] 1 All ER 888 where the financial contributions made were construed by the courts as being loans rather than for the purpose of acquiring a share in the property. This raises the question of the construction to be given to contributions made for the purposes of ascertaining whether a resulting trust actually arises.

iv.. **Hofman v Hofman** (1965) NZLR 795, per Woodhouse J at 800.

v.. [1991] 1 AC 107.

vi.. [1971] AC 886.

vii.. [1970] AC 777.

viii.. [1975] 1 WLR 1338.

ix.. [1986] Ch 638.

x.. In both **Eves** and **Grant v Edwards**, the defendants had given excuses to the plaintiffs for not sharing the legal title in the properties and the plaintiffs had made indirect contributions rather than direct financial contributions. However, the courts construed the fact that excuses had to be given for not sharing the legal title as evidence of some common intention to share.

xi.. [1981] AC 487.

xii.. per Lord Bridge, at 133.

xiii.. (1993) 109 LQR 263.

xiv.. **Burns v Burns** [1984] Ch 317.

xv.. See n 10. Although **Eves** and **Grant v Edwards** were decided prior to **Rosset** and therefore cannot be attributed to it *per se*, these cases were not expressly overruled in **Rosset**. Thus, it would seem that the reasoning of the courts in both these cases for finding a common intention remains sound.

xvi.. (1992) 22 Fam Law 72, 74.

xvii.. (1993), *op. cit.*, 265.

xviii.. per Dickson J, **Pettkus v Becker** (1980) 117 DLR (3d) 257, 270.

xix.. Neave, (1991) 17 Monash University Law Review 14.

xx.. O'Donovan, *Sexual Divisions in Law* (1985) London, Weidenfeld & Nicolson. Sexual division of labour refers to the system whereby the parties take on distinct roles of responsibility in which the female partner is the primary partner caring for the family and the male partner is the main wage-earner responsible for bringing home the family's income.

xxi.. O'Donovan, *op. cit.*, Chap 5; Land, *Parity begins at home* (EOC/SSRC 1981).

xxii.. *Women and Men in Britain 1995* (EOC).

xxiii.. Labour Force Survey, Spring Quarter, 1994.

xxiv.. *Women and Labour* - a paper presented at the University of Kent, Canterbury on March 5, 1997.

xxv.. New Earnings Survey, 1996.

xxvi.. New Earnings Survey, 1995.

xxvii.. (1987) Conv 93, 94.

28.. Neave, *op. cit.*

xxix.. *Op. cit.*, 118.

xxx.. (1993), *op. cit.*

xxxi.. (1993) 20 Journal of Law and Society 56.

xxxii.. *Ibid*, 62.

xxxiii.. *Ibid*, 64.

xxxiv.. *Money and Marriage* (1989) Macmillan Education Ltd. Pahl identifies four basic typologies of management systems, i.e. wife-management system, the allowance system, the pooling system and the independent management system. For further details on the classification of each system, refer to 67-77.

xxxv.. *Ibid*, Chap 9.

xxxvi.. *Ibid*, 104-109. Pahl notes that male-control is more common in families with relatively higher income levels and is usually associated with the allowance and independent management systems. Male-control is also evident in the pooling system especially in families with higher income levels or where the man is the sole wage-earner.

xxxvii.. *Ibid*, Chap 6. See also Pahl and Vogler, (1994) 42(2) Sociological Review 263. Pahl and Vogler found that the orthodox model of households as egalitarian decision-making units only applied to about one-fifth of households in the study. These were predominantly couples who opted for the pooling system. Inequality between men and women over control of and access to the household finances was least in such households and greatest in either low or higher income households where the finances were male-controlled.

xxxviii.. *Ibid*, 142-146. See also Pahl, (1990) 24(1) The Journal of British Sociological Association 119.

xxxix.. **Midland Bank v Dobson** [1986] FLR 171.

xl.. Moffat, *Trusts Law* (1994) Butterworths, at 454, argues that this may amount to asking the courts to reconstruct the terms of the parties' agreement in order to determine whether there is the requisite nexus.

xli.. Ferguson, (1993) 109 LQR 114.

xlii.. Moffat, *op. cit.*, at 454-455.

xliii.. Lawson, [1996] Legal Studies 218.

xliv.. [1995] 4 All ER 562.

xlv.. [1996] 1 FLR 826.

xlvi.. Cf **Clough v Killey** [1996] 72 P&CR D22 which re-affirms the more conservative approach of **Rosset**. The court held that, where there is an express common intention as to co-ownership and shares, the court would enforce this and not adopt a broad brush approach in determining the parties' shares.

xlvii.. [1991] 1 WLR 1127.

xlviii.. For criticisms on **Hammond v Mitchell**, see Lawson, [1992] Conv. 218; O'Hagan, [1993] 56 MLR 223 and Clarke and Edmunds, [1992] Fam Law 523.

xlix.. per Scarman LJ in **Crabb v Arun DC** [1976] Ch 179, 198.

i.. Moffat, *op. cit.*, at 459.

ii.. Warburton, (1991) 5 Trust Law International 9.

iii.. **Eves; Grant v Edwards; Midland Bank v Cooke**.

liii.. *Op. cit*, 99.

liv.. (1990) Conv 370.

lv.. *Op. cit*, 378.

lvi.. Cf Ferguson, *op. cit*, which provides a critical analysis of Hayton's comments. See also Hayton, (1993) 109 LQR 485, providing a reply thereto.

lvii.. Cf Gardner, (1993) *op. cit*, who argues that, despite the flexibility of estoppel principles, an estoppel claim cannot arise in the absence of reasonable belief. Thus, in order for the assimilation of constructive trusts and estoppel to found claims based on indirect contributions, it would mean the abandonment of the referability rule which will allow greater invention of facts by the courts.

lviii.. Cf Warburton, *op. cit*, who argues that any attempt to assimilate constructive trusts and proprietary estoppel appears to be an attempt to re-introduce by the backdoor Lord Denning's 'new model constructive trust' and will expose claimants and third parties to the same uncertainty which the new model constructive trust was criticised for.

lix.. (1991) 20 The Anglo-American Law Review 500.

lx.. See **Greasley v Cooke** [1980] 1 WLR 1306 where the claimant was able to rely successfully on her domestic services; cf **Rosset** where such claims were rejected as being sufficient acts of detrimental reliance.

lxi.. *Op. cit*, 521.

lxii.. Warburton, *op. cit*.

lxiii.. Halliwell, *op.cit* at 520, in fact, argues that disentangling estoppel from common intention would pave the way for increased recognition of non-financial contributions. For an interesting discussion on sexuality and detriment, see Flynn and Lawson, [1995] Feminist Legal Studies 105.

lxiv.. (1993), *op. cit*.

lxv.. (1985) 160 CLR 583.

lxvi.. (1987) 164 CLR 137.

lxvii.. Neave, (1991) 5 Australian Journal of Family Law 185.

lxviii.. (1989) 12 Fam LR 725.

lxix.. (1990) DFC #95-095.

lxx.. (1990) 14 Fam LR 97.

lxxi.. Cf **Miller v Sutherland** (1991) 14 Fam LR 416, where no financial contributions were made towards the acquisition of the property but the claimant succeeded on the basis of the substantial renovation work done by her and her family on the defendant's property. There is, however, nothing in the decision to suggest that the unconscionability-based constructive trust will allow purely domestic services to give rise to a similar result. In fact, it is arguable that, although couched in terms of unconscionability, the court's reasoning was not very different from that taken in **Eves** where the plaintiff wielded a fourteen pound hammer. The nature of the non-financial contributions were perceived as going beyond typical 'women's work' and were capable of economic valuation.

lxxii.. (1994) 8(3) Trusts Law International 74.

lxxiii.. **Arthur v Public Trustee** (1988) 90 FLR 203 and **Bryson v Bryant** (1992) 29 NSWLR 188. Refer also to Riley, (1994) 16 Sydney Law Review 412.

lxxiv.. Cf **Green v Green** (1989) 17 NSWLR 343 where, despite the claimant's lack of financial contribution, her claim succeeded. The court was prepared to infer a common intention from the casual statements made by the deceased as well as to give detrimental reliance a broad interpretation. Bryan suggests that this case illustrates the fact that 'common intention' has still survived the introduction of the unconscionability-based constructive trust.

lxxv.. (1980) 117 DLR (3d) 257.

lxxvi.. (1986) 29 DLR (4th) 1.

lxxvii.. Dickson J explains, at 274, that the ‘absence of juristic reason’ condition is satisfied ‘where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in the property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation it would be unjust to allow the recipient of the benefit to retain it’.

lxxviii.. [1993] 101 DLR (4th) 621.

lxxix.. Farquhar, (1993) 72 Canadian Bar Review 538.

lxxx..(1993), *op. cit.*, 273-274.

lxxxi.. (1991) 70 Canadian Bar Review 260, 278.

lxxxii.. (1989) 61 DLR (4th) 14.

lxxxiii.. Birks defines free acceptance as ‘one ‘where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept’ (*Introduction to the Law of Restitution* (1986) Clarendon Press, 265). For Birks, free acceptance not only establishes the enrichment but also the unjust factor. This argument has been challenged by both Burrows (1988) 104 LQR 576 and Mead (1989) 105 LQR 460. Using Birks’ example of the window-cleaner, Burrows, who is supported by Mead, contends that the window-cleaner, in offering his unrequested services, is assuming the role of risk-taker in expecting payment from the recipient. The law of restitution should not be expected to undertake the task of protecting that risk (at 578). However, Burrows agrees with Birks that there is an unjust enrichment in the situations where services are rendered, albeit unrequested, to the recipient under a mistake.

lxxxiv.. Scane, *op. cit.*, 295.

lxxxv.. For a detailed discussion of the issue of proprietary link, refer to Scane, *op.cit.*, 287-304.

lxxxvi.. Paciocco, (1989) 68 Canadian Bar Review 315.

lxxxvii.. Welstead, (1987) Denning Law Journal 151.

lxxxviii.. Cases like **Pettkus** (twenty years), **Sorochan** (forty-two years), **Pirie v Leslie** (1988) 29 ETR 246 (Man QB) (nine years) and **Boucher v Koch** (1988) 14 RFL (3d) 443 (Alta CA) (twenty years) all illustrate how the length of the relationship may be an influential factor in determining whether equitable relief is to be granted.

lxxxix.. [1989] 2 NZLR 327.

xc.. [1993] 3 NZLR 159 (CA).

xcii.. [1995] 1 NZLR 277 (CA).

xciii.. [1992] 3 NZLR 612 (HC).

xciiii.. The Daily Mail, November 6, 1996.