

THE INIQUITY OF EQUITY: A HOME-SHARER'S TALE

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The article is concerned with the application of trusts law in disputes between home-sharers who are cohabitants in England and Wales. It considers the criticisms made of trusts law in dealing with such disputes, and the proposals of the Law Commission for England and Wales in its 2007 *Cohabitation Report*. However, as plans to introduce any new legislation have been shelved by the British government, cohabitants must continue to rely on trusts law. In the light of these developments, the aim of the article is to critique Equity's response in disputes over the shared home and, more particularly, whether the remedial approach evinced in recent cases will enable trusts law to respond in a fairer manner in these disputes. The article will, however, argue that trusts law remains gender biased because of its continued emphasis on financial contributions, and will thus discriminate disproportionately against female cohabitants.

I. INTRODUCTION

The home-sharer's tale in England and Wales is one that is fraught with legal complexities and uncertainty, especially when the home-sharers are neither married to each other nor, in the case of same-sex couples, registered civil partners. At present, the *Matrimonial Causes Act 1973*¹ and the *Civil Partnership Act 2004*² provide courts in England and Wales with the power to grant financial relief by redistributing property and/or future income between spouses and civil partners respectively at the termination of their relationships. Cohabitants, opposite and same sex, and other home-sharers, on the other hand, do not have access to any comparable statutory regime.³ Resort must therefore be made to the common law, namely contract law, property law, proprietary estoppel and trusts law, in particular the common intention constructive trust, to resolve disputes between such home-sharers. However, trusts law, as can be seen from cases like *Burns v. Burns*⁴ and *Lloyds Bank v. Rosset*,⁵ has been subject to much criticism which in part led the Law Commission for England and Wales to propose changes to the law in its *Cohabitation Report* published in July

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¹ (U.K.), 1973, c. 18.

² (U.K.), 2004, c. 33.

³ Cohabitants in Scotland are provided with some rights, albeit not as extensive as those provided to married couples and civil partners, on the termination of their relationship. See *Family Law (Scotland) Act 2006*, A.S.P. 2006, c. 19, ss. 25-29.

⁴ [1984] Ch. 317 [*Burns*].

⁵ [1991] 1 A.C. 107 [*Rosset*].

2007.⁶ Despite the more recent House of Lords decision in *Stack v. Dowden*,⁷ the view is that the current law remains unsatisfactory for resolving the financial and property matters of cohabitants on relationship breakdown. Besides being expensive for the parties to litigate, the law is complex, uncertain and often gives rise to outcomes that are unjust.

This article is particularly concerned with the application of equitable principles in *inter vivos* disputes between cohabitants as home-sharers.⁸ Given the absence of any statutory regime at present in England and Wales that is applicable to cohabitation, the aim is to examine Equity's response to disputes between cohabitants over the shared home and whether the remedial approach evinced in recent cases enables trusts law to respond more fairly to such disputes. The preliminary question that the article seeks to address is: Does Equity bring iniquity to female claimants? This in turn raises the question of whether calls for legal reform remain equally strong and justifiable. Even though the Labour government has shelved plans to bring in new legislation, the article will consider the proposals made by the Law Commission in its 2007 Report and, more particularly, whether those proposals might lead to greater equity for female claimants in disputes over the shared home. The article then considers the question of whether, given recent jurisprudential developments, the criticisms of Equity still stand. The focus on female claimants is deliberate, as the allegation made against Equity is that it is particularly inequitable to female claimants due to its gender bias. The article will argue that the current requirements for establishing a common intention trust—and more specifically its emphasis on financial contributions—ignores the gendered structure of many families, *i.e.*, the division of labour within the family remains highly gendered. This has an impact on women's participation in paid work outside the home and their overall economic position, even more so where there are dependent children in the family. This affects the extent to which women are able to make financial contributions for the purposes of, firstly, establishing an implied intention to share and, secondly, quantifying the amount of that share in the property.

II. FROM *BURNS* TO *ROSSET*: THE INIQUITY OF TRUSTS LAW FOR COHABITANTS

The problem that often plagues cases involving disputes over the shared home lies in the requirements needed to establish a common intention constructive trust. English law at present requires a claimant to prove firstly that there is a common intention to share the property, and secondly, that she has relied on that common intention to her detriment.⁹ In *Rosset*, the House of Lords, and more particularly Lord Bridge of Harwich, explains that the cases of common intention constructive trusts fall into one of two categories: firstly, an express common intention which is based on any

⁶ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307 Cm 7182) (London, Her Majesty's Stationery Office, 2007) [*Cohabitation Report*].

⁷ [2007] 2 All E.R. 929 [*Stack*].

⁸ Disputes over the beneficial ownership of the shared home may also involve spouses and civil partners, but mainly in competition with a third party, *e.g.*, a creditor of the claimant's spouse or civil partner, who claims rights over the shared home.

⁹ *Rosset*, *supra* note 5.

agreement, arrangement or understanding between the parties; or alternatively, an implied intention that arises from the conduct of one party which is referable to the acquisition of an interest in the shared property.¹⁰ In searching for an implied intention, the types of contributions that may, or ought to be, taken into account, and the weight to be given to them by the courts, are somewhat limited. Lord Bridge says by way of *obiter* that only direct financial contributions to the purchase price, whether initially or by payment of mortgage instalments, would suffice and that “it is, at least extremely doubtful whether anything less will do”.¹¹ Lord Bridge’s formulation of when a common intention may be implied from the parties’ conduct has led to much academic criticism, which has been well rehearsed elsewhere and the article does not seek to cover the same ground. It is, however, useful for the purposes of this article to note two particular criticisms made of trusts law. Firstly, commentators like Gardner,¹² Clarke,¹³ and Glover and Todd¹⁴ have argued that the requirement of a ‘common’ intention to ground a claim is erroneous since such an intention is often absent in these cases.¹⁵ The intimate nature of couple relationships, married and cohabiting, is such that the parties to the relationship do not deal with each other by organised thinking, like strangers negotiating at arm’s length.¹⁶ ‘Common intention’ is therefore a fiction as it is a judicial exercise at “inventing agreements”, with facts being stretched to find the necessary intention.¹⁷

Secondly, the emphasis placed on direct financial contributions as the only type of conduct that readily justifies an implied common intention is problematic. Montgomery, for instance, argues that implied intention should be premised on the reasonable inferences that could be drawn from the parties’ conduct, which would in turn depend on their expectations. Thus the inquiry should focus on the parties’ state of mind rather than direct financial contributions towards the purchase of the property: such contributions might be evidence of such intention but should not be treated as the only type of evidence.¹⁸ It also ignores the significantly important and often substantial non-financial and indirect financial contributions that are made towards the welfare of the parties and members of their family, which are equally important aspects of sharing a home. *Burns* is a case oft cited as epitomising the unfairness of that particular requirement. During the 17-year cohabitation, Mrs. Burns had made substantial non-financial contributions in the form of homemaker and childcare services, as well as some indirect financial contributions towards outgoings such as rates and telephone bills, and to buy fixtures, fittings and certain domestic chattels for the house. Her contributions were nonetheless held to be of the wrong type, and were not of themselves capable of raising any implied intention to share, which is the first

¹⁰ *Ibid.* at 132-133.

¹¹ *Ibid.* at 133.

¹² S. Gardner, “Rethinking Family Property” (1993) 109 L.Q.R. 263.

¹³ P. Clarke, “The Family Home: Intention and Agreement” (1992) 22 Fam. Law 72.

¹⁴ N. Glover & P. Todd, “The Myth of Common Intention” (1996) 16 L.S. 323.

¹⁵ It is arguably the term ‘common’ that is misleading: some sort of intention is necessary, namely the defendant’s intention, whether express or implied, which justifies the imposition of a constructive trust when his conscience is affected by renegeing on that intention. See *e.g.*, Glover & Todd, *supra* note 14; and S. Wong, “Trust(s) and Intention in Resolving Disputes over the Shared Home” (2005) 56(1) N. Ir. Legal Q. 105.

¹⁶ Gardner, *supra* note 12, at 265.

¹⁷ *Ibid.*

¹⁸ J. Montgomery, “Question of Intention?” (1987) Conv. 16.

hurdle that must be surmounted to ground a claim. Indirect contributions, financial and non-financial, are therefore devalued and considered as relevant only to the secondary questions of detrimental reliance and quantification of the beneficial shares in the shared property. For these commentators,¹⁹ trusts law is gender biased and discriminates disproportionately against women, since it ignores the sexual division of labour, and the fact that women are more likely to make a substantial portion of the non-financial contributions in the family.²⁰ As Eekelaar poignantly observes, “[a] woman’s place is often in the home, but if she stays there, she will acquire no interest in it”.²¹

With increased female participation in the labour market,²² the traditional family structure of the male wage-earner/female homemaker is undoubtedly on the decline. The evidence nevertheless reveals that not only does the gender pay gap still exist,²³ but also that the age and the number of dependent children have a substantial impact on women’s employment.²⁴ The data further indicate that the gender pay gap varies by married or cohabiting status, but the legal marital status of women is not a relevant factor in determining the degree of their financial dependency on their partners.²⁵ The disparities in working hours and the pay gap between men and women lead to gendered financial inequality in the relationship, with women becoming more financially dependent on their male partners.²⁶ The financial inequality can be one of three forms: inequality in earnings, inequality in asset and debts, and inequality in earning capacity. The latter two are in part a result of inequality in earnings. With less financial resources available to them, women become unequal contributors to

¹⁹ See e.g., K. O’Donovan, *Sexual Divisions in Law* (London: Weidenfeld & Nicolson, 1985); M. Neave, “Living Together—Legal Effects of the Sexual Division of Labour in Four Common Law Countries” (1991) 17 *Monash U.L. Rev.* 14; S. Wong, “Constructive Trusts over the Family Home: Lessons to be Learned from Other Commonwealth Jurisdictions?” (1998) 18 *L.S.* 369.

²⁰ The effects of the gender bias of trusts law is equally pertinent to married women who launch a claim to a beneficial share of the marital home, usually against creditors of their husbands.

²¹ J. Eekelaar, “A Woman’s Place—A Conflict between Law and Social Values” (1987) *Conv.* 93 at 94.

²² In the second half of 2008, the employment rate in the UK was 79% for men and 70% for women. Information available online: Office for National Statistics <<http://www.statistics.gov.uk/CCI/nugget.asp?ID=1654&Pos=2&ColRank=2&Rank=672>>.

²³ K. Bellamy & K. Rake, *Money, Money, Money—Is it still a rich man’s world? An audit on women’s economic welfare in Britain today* (London: Fawcett Society, March 2005). The report indicates that women’s economic position still lags behind men’s due to their remaining primarily responsible for caretaking in the family. Data from the 2007 Annual Survey of Hours and Earnings indicate that the pay gap between women’s median hourly pay and men’s is 12.6%: online: <<http://www.statistics.gov.uk/pdfdir/ashel107.pdf>>. See also D. Leaker, “The gender pay gap in the UK” (2008) 2(4) *Economic & Labour Market Review* 19. online: <<http://www.statistics.gov.uk/CCI/article.asp?ID=1979&Pos=1&ColRank=1&Rank=224>>.

²⁴ As at the second quarter of 2008, 73% of women without children are in paid employment, compared with 68% of women with children. The latter are also more likely to be working part-time, especially if there are dependent children. See online: Office for National Statistics: <<http://www.statistics.gov.uk/CCI/nugget.asp?ID=1655&Pos=&ColRank=2&Rank=672>>.

²⁵ Leaker, *supra* note 23. The hourly pay of men and women who are not married or cohabiting is fairly similar and the pay gap is negligible, whereas the gender pay gap for married or cohabiting couples rises to 14.5%, and increases with the number of children present in the family. Leaker’s analysis, based on the 2007 Labour Force Survey results, indicates that the gender pay gap ranges from about 12.3% for a couple with one dependent child to 35.5% with four or more dependent children.

²⁶ T. Warren, “Diverse breadwinner models: a couple-based analysis of gendered working time in Britain and Denmark” (2000) 10 *Journal of European Social Policy* 349; T. Warren, “Class- and gender-based working time? Time poverty and the division of domestic labour” (2003) 37 *Sociology* 733.

household income. They are more likely to be dependent on men for their access to money and other household resources, and to have less control over how money is spent.²⁷ This means that a female partner's financial contributions may not necessarily be applied in the manner that the law requires in order for a common intention trust to be established.²⁸ Crucially, the substantial and important non-financial contributions, such as homemaker and childcare contributions, which a woman may make, are completely ignored in assessing whether an implied intention can be found.

Furthermore, a claimant bears the burden of adducing evidence that relevant contributions have been made in order to establish the requisite common intention and acts of detrimental reliance. Meeting this burden, as Douglas *et al.* observe, is not as simple as it seems.²⁹ Their research reveals the difficulty frequently faced by claimants in producing documentary evidence of their contributions over the period of the relationship. Coupled with the tendency for women's earnings to be used on expenses that are classified by the law as indirect rather than direct contributions,³⁰ the evidential burden is heavier for women. Consequently, the law as it currently stands in England and Wales represents a source of injustice for many female claimants and fails to respond adequately to disputes over the shared home on cohabitation breakdown.³¹

Criticisms of the current law thus provided fertile ground for the debate on law reform to thrive.³² They further paved the way for two reviews by the Law Commission. The first began in 1994, which culminated in the publication of the long-awaited *Discussion Paper on Sharing Homes* in 2002,³³ and the second in 2005, which produced the *Cohabitation Report* in 2007.³⁴ In that time, the Law Society also considered the issue of law reform and published its own *Report on Cohabitation* in

²⁷ C. Vogler, "Money in the household: some underlying issues of power" (1998) 46 *The Sociological Review* 687; C. Vogler & J. Pahl, "Money, power and inequality within marriage" (1994) 42 *The Sociological Review* 263.

²⁸ *I.e.*, as direct financial contributions to the acquisition of the property rather than indirect contributions towards household bills and other expenses.

²⁹ G. Douglas, J. Pearce & H. Woodward, "Dealing with Property Issues on Cohabitation Breakdown" (2007) 37 *Fam. Law* 36. For a fuller discussion of their findings, see "A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown". online: <<http://www.law.cf.ac.uk/researchpapers/papers/1.pdf>>.

³⁰ J. Pahl, "Household Spending, Personal Spending and the Control of Money in Marriage" (1990) 24(1) *J. Br. Sociological. Assoc.* 119 [Pahl, "Household Spending"].

³¹ See Douglas *et al.*, *supra* note 29; see also Part 4 of Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Consultation Paper No. 179 (London, Her Majesty's Stationery Office, 2006).

³² See *e.g.*, A. Barlow & C. Lind, "A matter of trust: allocation of rights in the family home" (1999) 19 *L.S.* 468; J. Miles, "Property Law v. Family Law: Resolving the Problems of Family Property" (2003) 23 *L.S.* 624; A. Barlow & G. James, "Regulating Marriage and Cohabitation in 21st Century Britain" (2004) 67 *Mod. L. Rev.* 143; A. Barlow *et al.*, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Oxford: Hart Publishing, 2005); S. Wong, "The shared home: A rational solution through statutory reform?" in H. Lim & A. Bottomley, eds., *Feminist Perspectives on Land Law* (London: Routledge-Cavendish, 2007); A. Bottomley & S. Wong, "Shared Households: A New Paradigm for Reform of Domestic Property Relations" in A. Diduck & K. O'Donovan, eds., *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish, 2006).

³³ Law Commission, *Sharing Homes: A Discussion Paper* (Law Com No. 278) (London, Her Majesty's Stationery Office, 2002) [*Sharing Homes Paper*].

³⁴ *Cohabitation Report*, *supra* note 6.

2002.³⁵ The debates have been strongly influenced by two different rationalisations. Firstly, as cohabitation becomes increasingly an accepted partnering and parenting structure in the UK, there is little reason to draw a sharp distinction between marriage and cohabitation.³⁶ Cohabitation then ‘piggy backs’ on marriage because it looks similar to marriage. The other rationalisation is that cohabitants, like their married counterparts, are in emotionally and economically interdependent relationships that can leave them equally economically vulnerable when the relationship breaks down. There is therefore an imperative of equal treatment to provide cohabitants with access to the law to deal with their financial and property matters.³⁷

The Law Commission’s home-sharing project came to nought though as the *Sharing Homes Paper* concluded that it was not feasible to devise a scheme to deal with the property rights of home-sharers. The main reason given was the proposed scheme’s inability to respond flexibly to the complexities and diversity of home-sharing relationships, whether familial or non-familial in nature.³⁸ The Law Society’s recommendations were also not pursued as they were overtaken by certain developments that took place during the passage of the *Civil Partnership Bill*. During the Bill’s passage through both Houses, the plight of ‘economically vulnerable’ cohabitants re-surfaced but got blended with the figures of economically vulnerable familial carers, which were raised by a different lobby group, associated namely with the Christian right.³⁹ In a tactical attempt to derail the Bill, amendments were introduced in the House of Lords to extend it to familial home-sharers who satisfy certain criteria.⁴⁰ The argument made to justify the amendments was that such familial home-sharers, who performed essential roles of carers and sharers, were as equally economically vulnerable as same-sex couples. The Labour government, on the other hand, maintained throughout the Parliamentary debates that the Bill was not the appropriate vehicle to deal with the economic vulnerability of domestic partners, except those who are same-sex couples.⁴¹ To gain the support of the House of Commons for the removal of those amendments, the government gave the reassurance that the issue of economically vulnerable cohabitants (rather than familial home-sharers) would be referred to the Law Commission for review in its ninth programme of law

³⁵ Law Society, *Cohabitation: The Case for Clear Law: Proposals for Reform* (London: Law Society, 2002).

³⁶ Barlow & James, *supra* note 32; Barlow *et al.*, *supra* note 32.

³⁷ This rationalisation has, for instance, particular resonance with the legislative reform at sub-national level in Australia to deal with de facto couple relationships: see *e.g.*, the *Domestic Relationships Act 1994* (A.C.T.); *Relationships Act 2003* (Tas.); and *Property (Relationships) Act 1984* (N.S.W.). Basing reform on the rationale of economic interdependency, however, shows that legal intervention need not necessarily be limited to couple relationships and can be extended to other close personal non-couple relationships. See Bottomley & Wong, *supra* note 32; J. Mee, “Property rights and personal relationships: reflections on reform” (2004) 24 L.S. 414.

³⁸ For the purposes of that review, ‘home-sharers’ were not limited to spouses and cohabitants. It covered a wider range of people including friends and relatives who shared a home: see *Sharing Homes Paper*, *supra* note 33 at para. 1.1. For a fuller discussion of the *Sharing Homes Paper* and the reasons for the failure of the Law Commission’s scheme, see Mee, *supra* note 37.

³⁹ See *e.g.*, the advertisement placed by the Christian Institute in *The Times*, 9 November 2003 (U.K.).

⁴⁰ These were: the family members must be at least 30 years of age; and have lived together for a minimum of 12 years.

⁴¹ U.K., H.C., *Parliamentary Debates*, at col. 174 and 177 (12 October 2004) (Jacqui Smith).

reform.⁴² This culminated in the publication of the *Cohabitation Report* in 2007,⁴³ which made recommendations for legal reform.

In the 2007 Report, the Law Commission concluded that the current law is complex, uncertain and often gives rise to outcomes that are unjust. In particular, the Law Commission acknowledged the problems posed by the common intention requirement in trusts law and its focus on direct financial contributions for giving rise to an implied intention.⁴⁴ Despite the more recent House of Lords decision in *Stack*,⁴⁵ the law remains unsatisfactory and leads to costly litigation between separating cohabitants. This led the Law Commission to propose a scheme that will provide cohabitants who satisfy certain eligibility criteria⁴⁶ with rights, albeit less extensive than those given to spouses and civil partners, when they separate. The aim is to enable the courts to take a more holistic view of ‘qualifying’ contributions, financial and non-financial,⁴⁷ made in the course of the relationship—a much wider consideration of contributions than currently permissible under trusts law. In terms of relief, the courts are to be given wider powers to make a range of financial and property adjustment orders to address the economic impact of cohabitation at the point of separation.⁴⁸ The purpose of the orders is to provide relief to a cohabitant for any economic vulnerability sustained at the time of separation, which stems from an economic disadvantage that the cohabitant may suffer and/or a benefit that the other partner may retain as a result of the contributions made.

A retained benefit may take the form of any enhancement, retention and/or accrual of the respondent’s capital, income or earning capacity. Economic disadvantage, on the other hand, represents the applicant’s present or future loss such as a diminution in savings, loss of future income and/or earning capacity, and can include future childcare costs. The scheme will enable the courts to order the reversal of a retained benefit and/or the sharing of an economic disadvantage as far as it is reasonable and practicable to do so, having regard to discretionary factors.⁴⁹ However, as a “continuing cost of a relationship” which had been borne exclusively by one partner rather than shared by both of them,⁵⁰ the scheme does not provide for the full reversal of an economic disadvantage: it should instead be shared subject to the “economic

⁴² *Ibid.* at col. 179.

⁴³ *Supra* note 6.

⁴⁴ For a fuller discussion of the inadequacies of trusts law to resolve the property matters of cohabitants on relationship breakdown, refer to Law Commission, 2006, *supra* note 31, Part 4, particularly paras. 4.7-4.21.

⁴⁵ *Supra* note 7. The implications of that case is discussed in more detail in section IV below.

⁴⁶ Parenting cohabitants would have automatic access to the law, while non-parenting cohabitants would only have access where they satisfy a minimum duration requirement, which the Law Commission suggests be set at between two and five years. *Cohabitation Report*, *supra* note 6 at para. 3.63.

⁴⁷ *Ibid.* at paras. 4.43-4.49. A qualifying contribution is loosely defined as any contribution arising from the relationship which is made to the couple’s shared lives or to the members of their family and include future contributions, especially providing post-separation childcare.

⁴⁸ *Ibid.* at paras. 4.32-4.42. These include property transfers, property settlements and orders for sale of assets.

⁴⁹ *Ibid.* at para. 4.38. These include the welfare of any minor children of the couple (which remains the court’s first consideration), the parties’ financial needs and obligations, and their respective financial resources.

⁵⁰ See *ibid.* at paras. 4.69-4.78.

equality ceiling” principle. Economic equality does not necessarily mean an equal division of the parties’ assets. Rather, it is a criterion for assessing the couple’s economic positions for the purposes of setting a cap on the award to be made. It serves to prevent the applicant from being placed, at least for the foreseeable future, in an economically stronger position than the respondent, and to recognise an element of partnership that arises from couples living together and sharing their lives. No adjustment will thus be made where the couple are in broadly equivalent economic positions. Nor can there be a set-off between the respondent’s share of the economic disadvantage against any claim by the applicant for a reversal of a retained benefit.

The benefit/disadvantage model is certainly a more progressive and nuanced way of dealing with the financial and property matters of cohabitants at the termination of the relationship. It attempts to address criticisms of the current law, particularly in relation to the common intention requirement, and the gender bias of the law in emphasising financial contributions but ignoring the valuable non-financial contributions made to the welfare and success of the relationship. The scheme gives greater weight to indirect financial and non-financial contributions made in the relationship, but avoids the problematic need to place value on the contributions *per se*. The focus is instead on the extent of a cohabitant’s economic vulnerability, which is assessed by the economic impact of the contributions made during the relationship. Coupled with the courts’ powers to make a wider range of financial and property orders, the scheme does have the desired flexibility to respond to and remedy the economic vulnerability faced by a cohabitant at the breakdown of the relationship.

There are nevertheless concerns about the proposed scheme being restrictive in some areas, particularly its response to the post-separation needs of the parties. At present, the Law Commission does not feel that it would be suitable for financial relief to be needs-based, the preferred option being to address the issue of needs as part of economic disadvantage, provided they are relationship-related and arise from qualifying contributions to the relationship.⁵¹ By subsuming needs under the rubric of disadvantage, there are concerns that insufficient weight is being given to the link between needs, interdependency and economic vulnerability. In a consultees’ response to the Law Commission, there was disagreement with the Commission’s view that a consideration of needs would necessarily reinforce dependency. In order to give greater effect to a relational discretion-based approach that is adequate to respond to the economic vulnerability of couples which arise from the interdependent nature of sharing their lives, it is more important to look at the issue of benefit or disadvantage more holistically, and in conjunction with needs.⁵²

The scheme may give rise to other practical difficulties. Firstly, the applicant must bear the evidential burden of proving the eligibility of the relationship, the period and the types of contributions made. This requires proof of the exact timing of the start and cessation of cohabitation, a point that might be heavily contested by the parties. Notwithstanding that the focus on the economic impact of contributions eschews placing value on such contributions, the courts would still be required to look at who

⁵¹ See *Cohabitation Report*, *supra* note 6, at paras. 4.24 and C.9-C.12.

⁵² S. Wong, “Response to the Law Commission Consultation Paper No 179 “Cohabitation: The Financial Consequences of Relationship Breakdown”” (2006), unpublished paper on file with author. The group response came from a one-day workshop held in September 2006 at Kent Law School, funded by a Socio-Legal Studies Association small research grant.

had contributed what. An applicant adducing evidence of making contributions is likely to face a similar set of problems as a claimant under trusts law.⁵³ Even where evidence is adduced, there are the added issues of whether the contributions qualify, and whether there is a causal link between them and a benefit or a disadvantage. For instance, to what extent might contributions to household expenses and outgoings form part of a couple's lifestyle expenditure (which arguably will not qualify under the scheme) rather than go towards the other partner's retained benefit in the shared home? The eligibility of contributions may also be susceptible to the arbitrary allocation of responsibilities between the couple. Coupled with the tendency for women's earnings to be used on expenses that are classified by the law as indirect rather than direct contributions,⁵⁴ the evidential burden may be heavier for women.

Another practical difficulty is the quantification of the benefit or disadvantage for the purposes of deciding what award to make. While the Law Commission provides an extensive explanation of the shape that its proposals take, there is little explanation of how benefit and disadvantage are to be calculated for the purposes of making an award.⁵⁵ A retained benefit in the shared home might require, for example, proof of the value of the property at the start of the relationship and at the point of separation but more crucially, the extent to which the increase in value is attributable to the applicant's direct and indirect contributions. This sort of evidence will undoubtedly require some help from experts, which may be costly, time-consuming and possibly complex. As for disadvantage, the Law Commission suggests, by way of guidance, that the quantification of a disadvantage will⁵⁶ "necessarily involve a hypothesis: what was the impact of cohabitation on the applicant's economic position, or what would the applicant have had *but for* making the qualifying contribution?"

Many claims are likely to be for the adjustment of a disadvantage, particularly for loss of future earnings and/or earning capacity. Notwithstanding the proposed 'but for' test, predicting future economic impact of either of these based on past contributions can be extremely problematic and would require some element of guesswork by the courts. Future loss will depend, to some extent, on the life choices that the applicant makes, which may or may not be envisaged at the point of separation. There is the added question of calculating how long it takes for a party to 'catch up' on earnings and/or earning capacity. The quantification exercise will therefore involve a certain element of speculation and/or expert evidence.

The Law Commission is generally reluctant to encourage the use of expert evidence for the purposes of quantifying benefit and disadvantage, but acknowledges that the avoidance of such evidence may not always be possible as calculation of disadvantage may involve difficult areas of proof.⁵⁷ In order to minimise the use of expert evidence, the Law Commission suggests possible sources that may be of assistance to the courts, which include official data on the labour market and other

⁵³ Douglas *et al.*, *supra* note 29.

⁵⁴ See Pahl, "Household Spending", *supra* note 30.

⁵⁵ Worked examples are provided by the Law Commission, 2007, *supra* note 6, in Appendix B but little explanation is provided of how benefit or disadvantage is to be calculated for the purposes of making an award.

⁵⁶ *Cohabitation Report*, *supra* note 6, at para. 4.66 (emphasis added).

⁵⁷ *Ibid.* at para. B.12.

publications such as *At a Glance*.⁵⁸ However, commentators like Douglas *et al.*⁵⁹ have rightly expressed reservations about the usefulness of these sources to the courts, especially without expert evidence to assist with interpreting the data in a meaningful way. Thus, problems associated with proof of contributions having been made and their eligibility, as well as quantification of their economic impact in terms of benefit or disadvantage, raise practical issues for the scheme. Any draft legislation would need to take on board these issues and provide a clear set of guidelines to the courts on how calculations are to be made in order to avoid allegations of arbitrariness and/or uncertainty, both in terms of the way in which judges exercise their discretion, and the types and extent of the awards they make.

The Law Commission's proposals are nevertheless an improvement on trusts law as they seek to address concerns such as the need to find a common intention and the gender bias of trusts law. The scheme further permits the courts to take into consideration not only direct and indirect financial contributions, but also non-financial contributions made during the course of the cohabiting relationship. However, in March 2008, the Labour government announced that no further action would currently be taken to bring in new legislation in England and Wales. The government proposed instead to await the findings of the Scottish Executive on the costs of running the scheme provided under the *Family Law (Scotland) Act 2006*, and the efficacy of that scheme in resolving disputes between cohabitants on the termination of their relationships, before deciding whether to introduce new legislation in England and Wales. Given the stalemate that law reform has reached in England and Wales, cohabitants must, for the time being, continue to rely on equitable doctrines such as the common intention trust to resolve disputes over property when their relationships terminate. This leads us to the next question of whether the remedial approach evinced in recent cases may enable trusts law to respond more fairly to disputes between home-sharers which we turn to below.

III. FROM MRS. ROSSET TO MRS. OXLEY: ON THE ROAD TO 'FAIRNESS' FOR COHABITANTS?

Subtle shifts can be discerned more recently in the judicial treatment of disputes over the shared home. Firstly, judges began taking a broader approach to the issue of quantification of the beneficial shares of disputants. For instance, in *Midland Bank v. Cooke*,⁶⁰ Waite L.J. held that where a partner who is not a legal co-owner

⁵⁸ *Ibid.* at para. 4.66.

⁵⁹ G. Douglas, J. Pearce & H. Woodward, "The Law Commission's Cohabitation Proposals: Applying Them in Practice" (2008) 38 Fam. Law 351. Douglas *et al.* argue that the Law Commission's suggestions of potential sources of assistance to aid the courts with quantification may be somewhat optimistic. Concerns about how courts are expected to quantify benefit and disadvantage are also shared by practitioners: see L. Bull, "Cohabitation Outcomes after the Law Commission Report" (2008) 38 Fam. Law 57.

⁶⁰ [1995] 4 All E.R. 562 [*Cooke*]. The case involved a wife's claim to a beneficial half share in the home that was initially purchased in the husband's sole name in 1971. The purchase price was funded by £1,100 which was a wedding gift from the husband's parents, a mortgage of £6,450 in the husband's name and the balance from the husband's savings. While the wife did subsequently obtain an order under the *Married Women's Property Act 1964* for her name to be added as joint legal owner, no declaration of trust was made regarding their respective beneficial interests.

has established an equitable interest in the shared property through a direct financial contribution, the amount of the parties' beneficial shares should be determined, in the absence of any express evidence of their intention, by undertaking "a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages".⁶¹ Moreover, the conduct that the court should consider should not be limited to the types of contributions needed to found a beneficial interest in the first place. The court could, and should, take into consideration all conduct (which includes direct and indirect, financial and non-financial contributions) that would shed light on the parties' intention regarding the quantification of their beneficial interests. *Cooke* further held that the absence of any express evidence of agreement or discussion between the parties regarding the matter of quantification did not prevent the court from inferring (or imputing) the parties' intention.⁶²

The broad-brush approach taken by Waite L.J. in *Cooke* was indeed radically different as it involved the exercise of greater judicial discretion than in previous decisions. This might be seen as having a somewhat destabilising effect on the traditional institutional frame of trusts law because trusts, including constructive trusts, are seen as being institutional in nature and premised on the courts' vindication of pre-existing proprietary rights. However, an affirmation of the courts' discretion to *impute* intention muddies this orthodox view and brings trusts closer to performing a remedial function. Nearly a decade later, *Oxley v. Hiscock*⁶³ came before the Court of Appeal. The case involved a dispute between cohabitants over the beneficial ownership of a property purchased in the sole name of the male partner but had been acquired by the parties' joint efforts for their joint benefit. The female partner, Mrs. Oxley, provided £36,300 of the £127,000 purchase price while Mr. Hiscock, a sum of £60,700. The balance of the purchase price was funded by a £30,000 loan taken out in Mr. Hiscock's name. Both Mrs. Oxley and Mr. Hiscock had worked throughout their 16-year relationship, with Mr. Hiscock probably being the higher income earner. They, like the Cookes, did not have a joint account but the evidence suggests that there had been a pooling of their financial resources to pay for all outgoings, and that both had also made contributions, financially and in kind, towards improving the property. The court also found that the loan was most likely repaid through the parties' joint contributions. *Oxley* is, however, markedly different from *Cooke* in several key aspects: the couple were not married to each other (although Mr. Hiscock had proposed marriage at one stage but then persuaded Mrs. Oxley not to get married because of fiscal disadvantages); the relationship was formed when both were of slightly more mature years;⁶⁴ they had no children together (but Mrs. Oxley's three children from a former marriage did live with them); and Mrs. Oxley's direct and indirect financial contributions were significantly more than Mrs. Cooke's.⁶⁵

⁶¹ *Ibid.* at 574.

⁶² *Ibid.* at 575.

⁶³ [2004] 3 All E.R. 703 [*Oxley*].

⁶⁴ Mrs. Oxley was 34 years old when the couple's relationship started. Equally, Mrs. Oxley strikes a very different figure of a cohabitant from Mrs. Burns.

⁶⁵ Mrs. Cooke made no contribution towards the mortgage payments, but had used her income to pay for household and decoration bills. There was, however, insufficient evidence to enable the court to conclude whether her husband's ability to repay the loan was dependent on her indirect contributions to other outgoings for the property.

Mrs. Oxley also strikes a figure of someone who is, emotionally, more vulnerable in the relationship, as can be seen from her being overly trusting of Mr. Hiscock, and in rejecting the solicitor's advice to set out clearly their respective beneficial interests.⁶⁶ She certainly paints a picture of a woman less legally sophisticated than Mrs. Cooke, who at least knew enough about the law to initiate legal proceedings against her husband for her name to be added as a joint legal owner of the marital home.

Unlike the trial judge, the appellate court viewed the case as falling within not the first category of express intention cases but the second where, by her direct financial contributions towards the purchase price, a common intention could be implied in Mrs. Oxley's favour. The issue then turned on what exactly the parties' respective beneficial interests were in the shared property. It is clear from *Cooke* and *Oxley* that, once a common intention, whether express or implied, is established, the quantification of the parties' beneficial interests is not limited to a strict resulting trust analysis, even where there is no evidence of any agreement, arrangement or discussion between the parties regarding the matter.⁶⁷ Quantification is therefore what:⁶⁸

each is entitled to ... which the court considers *fair* having regard to the whole course of dealing between [the parties] in relation to the property ... 'the whole course of dealing' ... includes the arrangements made from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.

Chadwick L.J. in *Oxley* goes on to say that, in assessing what might be 'fair', three possible strands of reasoning can be discerned from case law.⁶⁹ Firstly, the common intention is taken to be that the parties have agreed at the time of acquisition to postpone the quantification of their beneficial shares until such time when the property is sold or the relationship ends, having regard to the whole course of dealing between them.⁷⁰ Alternatively, the purpose of conducting a survey of the course of dealing is to help ascertain what the parties are *assumed* to have intended at the time of acquisition of the property regarding the beneficial ownership of the property. The approach imputes intention to the parties despite the evidence indicating an absence of any thought having been given to the matter at all.⁷¹ Lastly, the court could adopt an approach akin to proprietary estoppel, where the amount of the parties' beneficial interests is to be determined on the basis of what is fair in the circumstances, and of which the other party who holds the legal title is estopped from denying. Chadwick L.J., however, observes that an element of artificiality exists, to varying degrees, in the first two strands, as there is often an absence of evidence to suggest that the parties had indeed given any earlier thought to the amount of their respective interests. The most appropriate approach, in his Lordship's view, is therefore the third one, which

⁶⁶ *Supra* note 63 at para. 9.

⁶⁷ *Cf. Springette v. Defoe* [1992] 2 F.C.R. 561.

⁶⁸ *Supra* note 63 at para. 69 (emphasis added).

⁶⁹ *Ibid.* at para. 70.

⁷⁰ This is an approach suggested by Lord Diplock in *Gissing v. Gissing* [1971] A.C. 886, at 909 and adopted by Nourse L.J. in *Stokes v. Anderson* [1991] F.C.R. 539, at 543.

⁷¹ This approach is suggested by Waite L.J. in *Cooke*, *supra* note 60 at 573.

necessarily infers that the parties' intention is for the matter to be determined later on the basis of what seems fair. Consequently, in *Oxley*, the articulation of 'fairness' in relation to the quantification of beneficial shares brings about greater convergence of constructive trust and estoppel as the 'fairness' approach mirrors estoppel's approach to awarding a remedy that is "the minimum necessary to satisfy the equity". This approach, Chadwick L.J. observes, can be traced back to that suggested by Browne-Wilkinson V.C., as he then was, in *Grant v. Edwards*,⁷² and approved by Sir Robert Walker in *Yaxley v. Gotts*.⁷³ Chadwick L.J. goes on to say that it seems:⁷⁴

very difficult to avoid the conclusion that an analysis [of the parties' beneficial interests] in terms of proprietary estoppel will, necessarily, lead to the same conclusion; and that it may be more satisfactory to accept that there is no difference, in cases of this nature, between constructive trust and proprietary estoppel.

In both cases, the courts are being asked to give effect to the claimant's beneficial interest, the existence of which the defendant who holds the legal title is estopped from denying.

More importantly, a survey of the 'whole course of dealing' provides greater scope for other contributions, financial and non-financial, to be considered in determining what a fair share is. The adoption of an estoppel-like approach in *Oxley* necessarily involves an element of judicial discretion. But the significant difference between the approaches taken in *Cooke* and *Oxley* is that the notion of 'fairness' sets a limit on judicial discretion: the determination of the disputants' respective beneficial interests is based on what a 'fair' apportionment (the minimum necessary to satisfy the claimant's equity) might be in the light of the parties' whole course of dealing—a measure that restricts itself to balancing the claimant's expectation and/or reliance loss against the detriment suffered. In some ways, the approach taken in *Oxley* might be seen as an attempt by the Court of Appeal to rein in the somewhat broader discretionary approach taken in *Cooke*. A 'fairness' criterion may, on the face of it, suggest a more principled approach to the quantification of the beneficial shares but it can equally be no more than a(nother) shorthand for the exercise of judicial discretion.⁷⁵ *Oxley* tells us very little about the exact parameters of this notion of 'fairness', and how the courts are to interpret and apply it. As Pawlowski observes, it is unclear whether 'fairness' will mean that the courts will confine the survey of 'the whole course of dealing' to a financial inquiry, or whether the courts will undertake a more robust analysis of the parties' relationship and go beyond financial contributions to the relationship.⁷⁶ Thus, in the absence of identifiable principles of what 'fairness' means, *Oxley* fails to deliver the much-needed clarity, and there are lingering concerns about palm-tree justice and uncertainty of outcomes, which will result in more litigation.

⁷² [1986] Ch. 638 at 656-657.

⁷³ [2000] Ch. 162 at 176-177.

⁷⁴ *Supra* note 63 at para. 66.

⁷⁵ See e.g., M. Pawlowski, "Family Home: Doing Justice to the Parties" (2006) Fam. Law 462; G. Battersby, "*Oxley v Hiscock* in the Court of Appeal: the search for principle continues" (2005) C.F.L.Q. 259.

⁷⁶ Pawlowski, *ibid.*

IV. *STACK*: FORGING A NEW TERRAIN

*Stack*⁷⁷ is the latest in the line of cases on family property disputes. The case involved cohabitants whose relationship spanned nearly 27 years. In 1983, they started cohabiting in a property in Purves Road purchased for £30,000 by Ms. Dowden in her sole name. The purchase was funded by a down payment of £8,000 from savings in a Halifax account in Ms. Dowden's name⁷⁸ and a mortgage of £22,000 taken out in her sole name. Except for periods of maternity leave when each of the couple's four children was born, Ms. Dowden remained in full-time employment throughout the relationship. She made all the mortgage payments and paid all the bills for council tax, utilities and other outgoings for the Purves Road property. Substantial redecoration and repairs as well as some alterations and improvements were carried out on the property by the parties' joint efforts. In 1993, the Purves Road property was sold for £67,000 and a property in Chatsworth Road was purchased for £190,000. That property was conveyed to the parties as joint tenants but no declaration of trust was made to expressly set out the beneficial ownership. There was, however, a declaration that the survivor was entitled to give a valid receipt for capital money received from any disposition of the property. The purchase of the Chatsworth Road property was funded by the sale proceeds of the Purves Road property, £58,000 from Ms. Dowden's savings in the Halifax account and a loan of £65,000 which the parties were jointly liable for and was secured by a mortgage, one endowment policy in joint names and another in Ms. Dowden's sole name.

When the parties' relationship ended in 2002, Ms. Dowden served a notice of severance. Mr. Stack then brought proceedings under section 14 of the *Trusts of Land and Appointment of Trustees Act 1996*, seeking the sale of the property and the equal division of the sale proceeds on the basis that, on severance of the joint tenancy, the parties became entitled to the property as tenants in common in equal shares. Mr. Stack's claim was successful at first instance but Ms. Dowden successfully appealed to the Court of Appeal for the sale proceeds to be divided 65:35 in her favour. Mr. Stack's appeal was unanimously dismissed by the House of Lords. The reasoning of all five judges, however, was not unanimous, with Lord Neuberger dissenting. It is necessary to tease out and examine the various issues that arose in the appeal in order to understand the principles that map this terrain now.

The first issue was whether there was any express declaration of trust. More importantly, did the declaration that the survivor was entitled to give a valid receipt for capital money form an effective declaration of trust? If not, how do we ascertain the trust upon which the beneficial shares are held? In answer to the first question, the judges unanimously agreed that, following earlier authorities like *Harwood v. Harwood*⁷⁹ and *Huntingford v. Hobbs*,⁸⁰ the declaration was insufficiently conclusive of the property being held under an express trust for the parties as equitable joint tenants. Moreover, as held in *Goodman v. Gallant*,⁸¹ the severance of a beneficial

⁷⁷ *Supra* note 7.

⁷⁸ While there was some evidence to suggest that Mr. Stack had paid some money into the Halifax account, it was insufficient to support the finding that the account was intended to be 'joint savings'.

⁷⁹ [1992] 1 F.C.R. 1.

⁸⁰ [1993] 1 F.C.R. 45.

⁸¹ [1986] 1 All E.R. 311.

joint tenancy normally results in a beneficial tenancy in common in equal shares. There was no dispute between the parties that the Chatsworth Road property was held by them as trustees⁸² or that they were each entitled to some beneficial interest in the property. The question for the court was the extent of those interests. All five judges agreed that, where the parties have not stipulated what their exact beneficial interests are, the assumption, at least in the domestic context, is that “equity follows the law”, *i.e.*, the beneficial interests would reflect the legal interests in the property. Thus, joint legal ownership gives rise to the assumption of joint beneficial ownership, unless proven otherwise by the party asserting the unequal division of the beneficial ownership.⁸³ Where the judges differed was on the question of how easily that assumption could be rebutted.

Both Lord Walker and Baroness Hale (with whom Lord Hoffman and Lord Hope agreed) were of the opinion that the rebuttal of the presumption of equal sharing is a “heavy burden”⁸⁴ and “not a task to be lightly embarked on”.⁸⁵ Baroness Hale further stated that: “cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very *unusual*.”⁸⁶ The majority view therefore was that the assumption of beneficial joint tenancy would only be rebutted in exceptional cases.

The next consideration was whether the case was exceptional so as to rebut the presumption of beneficial joint tenancy. Here, Baroness Hale found “many factors” which pointed to the exceptionality of the case. The first is the significantly higher amount of financial contributions made by Ms. Dowden towards the acquisition of the Chatsworth Road property.⁸⁷ But more tellingly, the absence of “[a pooling of] their separate resources, even notionally, for the common good”⁸⁸ suggested a lack of intention to share everything, including the property, equally. As Baroness Hale observes, there were only two items throughout the parties’ 27-year relationship that were in joint names: the Chatsworth Road property, and one of the two endowments which secured the £65,000 loan. They kept their investments and savings separate throughout their relationship. Ms. Dowden paid most of the household expenses and outgoings for the property. There was even some suggestion by Baroness Hale that there was a lack of commitment on the part of Mr. Stack in that⁸⁹ “[h]ad it been clear that [Mr. Stack] had undertaken to pay for consumables and child minding, it might have been possible to deduce some sort of commitment that each would do what they could”.

Thus, the inference to be drawn from these factors was that the parties could not have intended that the Chatsworth Road property be held in equal shares. With the presumption of beneficial joint tenancy rebutted, the next issue is the quantification

⁸² *Law of Property Act 1925* (U.K.), 15 Geo. V., c. 20., ss. 34 and 36.

⁸³ In sole ownership cases, the burden of proof lies with the non-owner to show s/he has an equitable interest in the property: *per* Baroness Hale in *Stack*, *supra* note 7, at para. 56. The presumption of beneficial joint tenancy applies only to domestic contexts and not to situations where the property was acquired by family members for commercial reasons. See *Laskar v. Laskar* [2008] EWCA Civ. 347.

⁸⁴ *Supra* note 7 at para. 33, *per* Lord Walker.

⁸⁵ *Ibid.* at para. 68, *per* Baroness Hale.

⁸⁶ *Ibid.* at para. 69 (emphasis added).

⁸⁷ *Ibid.* at para. 87.

⁸⁸ *Ibid.* at para. 90.

⁸⁹ *Ibid.* at para. 91.

of the parties' beneficial interests in the property. This is where Lord Neuberger dissented with his four colleagues.

In Lord Neuberger's view, where there is no evidence other than the property being acquired as a home for the legal owners in joint names, the presumption is that the parties must have intended a beneficial joint tenancy.⁹⁰ However, that presumption may be rebutted by additional evidence, for example the unequal financial contributions made by the parties to the purchase price. Hence, for Lord Neuberger, the starting point for quantification should rightly be a resulting trust, especially where there is no other relevant evidence except the parties' differential contributions.⁹¹ A constructive trust analysis may conceivably arise where there is, in addition to financial contributions, other relevant evidence that would enable the court to deduce the parties' actual or implied intention regarding beneficial ownership.⁹²

The majority, on the other hand, felt that a more holistic approach should be taken and that consideration of the issue of quantification should not be limited to direct financial contributions—an approach that parallels a resulting trust analysis. Lord Walker, for instance, says that:⁹³

In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not ... operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties' common intention.

The view of the majority was that the law has “moved on”⁹⁴ in response to changing social and economic conditions and the preferred approach is to “ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of dealing”.⁹⁵ At first blush, the approach seems to mirror that taken in *Oxley* but there is, however, a significant difference. Baroness Hale qualifies the approach by stating that a survey of the whole course of conduct for the purpose of quantification cannot be grounded purely on fairness alone; that the court's primary objective is to “search for the result which reflects what the parties must, in the light of their conduct, be taken to have intended”.⁹⁶ Here, ‘conduct’ is construed more broadly and is not limited to financial contributions, whether direct or indirect. As Baroness Hale explains: “the domestic context is very different from the commercial world.... Many more factors than financial contributions may be relevant to divining the parties' intentions”. Her Ladyship then proceeds to provide a non-exhaustive list of other relevant factors which might help shed light on the parties' intentions given that “[t]he arithmetical calculation of how much was paid by each is also likely to be less important”.⁹⁷ The “other factors” mentioned by

⁹⁰ *Ibid.* at para. 109.

⁹¹ *Ibid.* at para. 122.

⁹² *Ibid.* at para. 125. Lord Neuberger, at para. 126, is mindful of the conceptual difference between implied and imputed intention, and cautions that embracing the latter would be both wrong in principle and inconsistent with earlier authorities. This point will be dealt with in more detail below.

⁹³ *Ibid.* at para. 30.

⁹⁴ *Ibid.* at para. 26 (*per* Lord Walker) and 60 (*per* Baroness Hale).

⁹⁵ *Ibid.* at para. 60, *per* Baroness Hale.

⁹⁶ *Ibid.* at para. 61.

⁹⁷ *Ibid.* at para. 69.

Baroness Hale are wide-ranging and go far beyond the consideration of direct and indirect financial contributions. They are indeed wide enough to enable the courts to take a more holistic view of a couple's relationship, and the various facets of a relationship involving the sharing of lives. Within this more nuanced approach, there is scope for non-financial contributions such as homemaker contributions and childcare to be considered as well.

The pressing question then is whether the restatement of the equitable principles in *Stack* has helped to provide greater clarity and certainty of outcome in this particular area of the law. While one would commend the majority on their attempts to address earlier criticisms of *Rosset*, and to respond positively to recommendations for the courts to take a more 'holistic approach' to the quantification of beneficial interests,⁹⁸ the upshot of *Stack* is that we are left with a fresh set of questions and uncertainties regarding the substantive content of the constructive trust principles. Firstly, *Stack* raises issues about the way in which exceptionality is established in cases of joint legal ownership. While differential financial contributions are not of themselves sufficient to rebut the presumption of beneficial joint tenancy, the factors relied on by the majority in *Stack* as evidence of exceptionality are problematic, not least because their purported exceptionality is questionable. For instance, much was made of the significantly lower financial contributions made by Mr. Stack; that his lower financial contributions, to both the acquisition of property and the day-to-day costs of sharing the property as a home, are indicative of an unequal sharing intention. This is further compounded by the independent money management pattern that the couple had opted for during their relationship. As the judges give little explanation, it is unclear why these factors make the case exceptional.⁹⁹ It may be argued that his contributions towards the payment of the joint endowment policy premiums and the repayment of the loan capital and interest, together with his, albeit irregular, contribution to household expenses, were not that insignificant. This is especially so when considered in proportion to his earnings, which was nearly half that of Ms. Dowden's: the contributions may conceivably be no more than an arbitrary allocation of responsibility. It may therefore be inappropriate to regard Mr. Stack as lacking in commitment to the 27-year relationship. Moreover, courts should be careful not to read too much into the evidence of independent money management patterns in couple relationships. There is empirical evidence that couples are increasingly opting for the independent money management model and that that model is common, rather than exceptional, among cohabitants.¹⁰⁰ The threshold is therefore set very low and it can be said then that nearly every case could be made out as exceptional.

Secondly, there is some suggestion that there is equally scope for a holistic approach to be taken in establishing a beneficial interest in the first place (and not just quantification), and that a claim may be made without the claimant having made

⁹⁸ *Sharing Homes Paper*, *supra* note 33.

⁹⁹ See also R. Probert, "Equality in the Family Home?: *Stack v Dowden*" (2007) 15(3) F.L.S. 341; and W. Swadling, "The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed" (2007) 123 L.Q.R. 511.

¹⁰⁰ See C. Vogler, M. Brockmann & R. Wiggins, "Intimate relationships and changing patterns of money management at the beginning of the twenty-first century" (2006) 57(3) *The British Journal of Sociology* 455; and V. Elizabeth, "Managing money, managing coupledom: a critical examination of cohabitants' money management practices" (2001) 49 *The Sociological Review* 389.

any direct financial contributions towards the purchase of the property. In such situations, *Rosset* provides the claimant with little recourse, unless she is able to bring herself within the first category of express common intention. There is, however, obiter in *Stack* that Lord Bridge's analysis of an implied common intention might now be outdated, and that other forms of contributions, in cash or in kind, towards the acquisition or substantial improvement of the property might equally ground a claim.¹⁰¹ Lord Hope, for instance, says that "indirect contributions such as making improvements which added significant value to the property, or a complete pooling of resources in both time and money so that it did not matter who paid for what during their relationship, ought to be taken into account".¹⁰² Thus *Stack* suggests that, in future, an implied intention need not be based solely on direct financial contributions towards the purchase of the property, but rather, that the parties' conduct in relation to sharing the property and in managing their joint affairs ought to be looked at in the round.¹⁰³ This may potentially provide some recourse to someone in Mrs. Burns' situation. However, while subsequent cases like *Abbott* evidence the court's willingness to accept indirect financial contributions that are referable to the acquisition of the property as relevant conduct,¹⁰⁴ non-financial contributions remain problematic and the extent to which these contributions are sufficient to raise an implied intention is unclear. As Dixon observes:¹⁰⁵

it is unclear how a trial judge is to separate a course of dealings between the parties that goes to the acquisition of the land (allowable), from a course of conduct which goes to the success of the relationships or simply reflects the normal obligations of everyday life (disallowable).

Non-financial contributions such as labour towards substantial improvement of the property are more easily identifiable as allowable conduct since they may be quantifiable in economic terms as adding value to, and broadly facilitating, the acquisition of the property. However, contributions that are domestic in nature (for example childcare and homemaker contributions) remain problematic since they are sited more awkwardly within intimate relationships.¹⁰⁶ By their very nature, non-financial domestic contributions have proven to be difficult to value because they are incommensurable with financial contributions, and can fall easily within Dixon's

¹⁰¹ *Supra* note 7, *per* Lord Hope at para. 12; *per* Lord Walker at para. 26; *per* Baroness Hale at para. 63.

¹⁰² *Ibid.* at para. 12.

¹⁰³ This approach has been reaffirmed by the Privy Council in *Abbott v. Abbott* [2007] UKPC 53 [*Abbott*], where three of the Judicial Committee members were Baroness Hale, Lord Walker and Lord Neuberger. The case involved the wife's claim to a beneficial share in the marital home, which was registered in the husband's sole name.

¹⁰⁴ In *Abbott, Ibid.* the wife made no direct financial contributions but the court was willing to accept her indirect financial contributions towards the payment of the mortgage instalments and the premiums of the insurance policies, which secured the loan as sufficient conduct for raising an implied intention to share.

¹⁰⁵ M. Dixon, "The never-ending story—Co-ownership after *Stack v Dowden*" (2007) *Conv.* 456 at 458.

¹⁰⁶ The provision of non-financial domestic contributions is not only often highly gendered (Bellamy & Rake, *supra* note 23) but may also be 'naturalised' by judges as being provided out of 'natural love and affection' and therefore given less weight as contributions going towards the acquisition of property. For further discussion on the problematisation of unpaid domestic care, see S. Wong, "Would You 'Care' to Share Your Home?" (2007) 58(3) *N. Ir. Legal Q.* 268. See also O'Donovan, *supra* note 19; Neave, *supra* note 19.

description of disallowable conduct. It remains to be seen whether a more generous judicial treatment of such contributions will materialise as a result of the attempts made in *Stack* to overcome the rigour of *Rosset*, and to provide a more flexible and holistic approach to the acquisition of an equitable interest in the shared property.

The holistic approach adopted in *Stack* also poses other problems for constructive trusts at a doctrinal level. For instance, in restating that the court's response in these cases is to give effect to the parties' shared intention, rather than to what the court considers fair, the majority held that the search is for the parties' common intention, actual, implied or *imputed*, with respect to the property. Reference to imputed intention is problematic because it is not clear from the judgments of the majority how such an intention is to be found, and whether it is one that could indeed be imputed to the parties, without slippage to subjective notions of 'fairness' by judges. As Lord Neuberger explains, an implied intention is "objectively deduced to be the subjective actual intention of the parties"; whereas an imputed intention is "attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention".¹⁰⁷ Imputed intention therefore reinforces the element of artificiality argued by others like Gardner,¹⁰⁸ Clarke,¹⁰⁹ and Glover and Todd.¹¹⁰ It is, according to Lord Neuberger, inconsistent with normal principles and the majority view expressed in the earlier cases of *Pettitt v. Pettitt*¹¹¹ and *Gissing v. Gissing*.¹¹² It further involves an exercise that is difficult, subjective and uncertain since a judge would be:¹¹³

constructing an intention where none existed at the time, and where the parties may well not have been able to agree... It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed.

An approach that allows the imputation of intention does not therefore lend itself to legal clarity and certainty. This is in part due to the fact that the courts have yet to provide a principled analysis of the exact role, and the appropriateness, of the common intention trust as a remedial tool for redistributing property in the context of intimate home-sharing relationships such as cohabitation. Lee, for instance, argues that imputed intention fails to take account of the normative value of intention (agreement) that Equity seeks to protect through the imposition of a constructive trust.¹¹⁴ The evidential difficulties of finding an actual or implied intention in most cases have led the courts to manipulate the concept of 'intention' in order for the doctrine to be more flexible and be stretched to accommodate the redistribution of property. However, the remedial role that the common intention trust is being called upon to perform continues to leave the doctrine in a state of flux. As Swadling rightly points out, the courts have yet to provide any analysis of the common intention trust in

¹⁰⁷ *Supra* note 7 at para. 126.

¹⁰⁸ *Supra* note 12.

¹⁰⁹ *Supra* note 13.

¹¹⁰ *Supra* note 14.

¹¹¹ [1969] 2 All E.R. 385.

¹¹² [1970] 2 All E.R. 780.

¹¹³ *Ibid.* at para. 127.

¹¹⁴ R. Lee, "Stack v Dowden: A Sequel" (2008) 124 L.Q.R. 209. For further arguments on the normative value of intention, see also Glover & Todd, *supra* note 14; Wong, *supra* note 15.

this remedial capacity and its relationship with other equitable doctrines, such as resulting trusts, estoppel and unjust enrichment.¹¹⁵

This lack of clarity and certainty is mirrored in the outcomes of these cases after the courts have carried out a survey of the parties' whole course of conduct. In *Stack*, the majority upheld Ms. Dowden's claim for a 65 per cent share—a share that is roughly equivalent to her financial contributions towards the purchase of the property—on the grounds that she had “exceptionally” made a significantly larger financial contribution towards the property in terms of its purchase, as well as its use as a family home, and its upkeep. But it is unclear what outcome might have been reached if she had not settled for a 65 per cent share, but rather left it to the court to determine her fair share, or if she had performed a greater domestic role, and made lesser financial contributions. The outcome in joint legal ownership cases such as *Stack*, as well as in sole legal ownership cases like *Oxley*, reflect a paradox: in a majority of the cases, there seems to be little difference in terms of outcome between taking the ‘whole course of dealing’ approach and a resulting trust approach, which the majority of judges has rejected. Moreover, the courts’ take on the ‘whole course of dealing’ appears to be more generous in cases involving married couples, where quantification has not necessarily been limited to financial contributions.¹¹⁶ However, in cases involving cohabitants, the trend appears to be the courts’ continued emphasis on financial contributions.¹¹⁷

Consequently, it is unclear the extent to which “other factors”, including Ms. Dowden's performance of the role of mother and main carer of the couple's four children, do in fact play an equally important and relevant role in establishing exceptionality as well as in determining her (larger) contribution to the relationship. Aside from financial contributions, Baroness Hale's reference to the other relevant factors is intended to provide a more nuanced approach to assessing the parties' common intention regarding their respective shares. The obfuscation of the connection between “other factors” and the issue of exceptionality casts a shadow over the extent to which this nuanced approach will indeed be taken by the courts without a retreat to emphasising financial contributions, thereby embedding a resulting trust approach, albeit in modified form since it enables indirect financial contributions to be considered. If courts continue to place greater weight on financial contributions, then it is perhaps logical to acknowledge this practice more openly, thus adopting an approach that is more in line with Lord Neuberger's. This will no doubt run up against earlier criticisms made on the valorisation of such contributions, and its discriminatory effect on female cohabitants. But it will at least provide greater clarity to claimants that the courts will first and foremost look at financial contributions to determine what the parties' respective beneficial shares are, unless there is other evidence to point the court in the direction of a constructive trust analysis. This may thus lend greater clarity to how equitable proprietary rights are to arise and be quantified, as opposed to trying to make the trust do more than it can in these domestic situations.

¹¹⁵ *Supra* note 99.

¹¹⁶ See e.g., *Cooke*, *supra* note 60; *Abbott*, *supra* note 103. In those cases, the spouses were held to hold the property in equal shares despite the lower financial contributions made by the wives in those cases.

¹¹⁷ In addition to *Stack*, see also *Drake v. Whipp* [1996] 1 F.L.R 826 (where the claimant was held to have a 33% share); and *Oxley* (a 40% share), *supra* note 63.

V. CONCLUSION

Despite recent jurisprudential developments, the common intention constructive trust remains a dissatisfactory means of resolving disputes between couples over the shared home. The holistic approach taken in *Stack* to quantify beneficial interests in a shared home is certainly a step in the right direction, and attempts to provide a more nuanced approach to these disputes. It opens up a space for judges to consider a wider range of factors and contributions, financial and non-financial, direct and indirect, to determine what the parties' intentions are regarding sharing the beneficial ownership of the home. Aside from quantification, *Stack* also paves the way for future courts to consider the extent to which it may be permissible for a common intention to be implied from contributions other than direct financial contributions, as can be seen from *Abbott*. But as has been argued above, uncertainty continues to surround the way in which the courts apply the equitable principles and quantify the parties' respective beneficial interests. The trend seems to be one giving financial contributions, direct and indirect, priority over other types of contributions. It is therefore difficult to resist the conclusion that, while recent jurisprudential developments appear to make it easier for female claimants to overcome the rigour of *Rosset*, with regard to establishing a beneficial interest, the quantification of that interest remains heavily wedded to financial contributions despite judicial affirmation of a holistic approach. This continues to place women who have made predominantly domestic contributions to the relationship at a serious disadvantage, with little legal recourse even under this more nuanced approach.

On the other hand, the Law Commission's proposals provide more scope for not only direct and indirect financial contributions but also non-financial contributions such as domestic contributions to be considered. While the latter may not normally be sufficient to establish a benefit retained by the respondent, a claim of disadvantage may possibly be made. Moreover, the adjustive powers provided to the courts mean that, where it is reasonable and practicable to do so, a cohabitant may be awarded an interest in the shared home or in its sale proceeds. This may be seen as a major step forward in addressing the iniquity faced by female claimants under the existing common intention trust principles. However, there are concerns about the practical problems that the proposed scheme gives rise to. There is, for instance, the issue of adducing evidence of contributions, their eligibility and their economic impact for the purposes of grounding a claim. The scheme also does not provide a sufficiently full explanation of how the courts should calculate benefit and disadvantage. This may be particularly problematic for assessing economic disadvantage, especially loss of future earnings or earning capacity. This may in turn lead to a lack of legal clarity and uncertainty of outcomes, as well as a source of confusion for both lawyers and cohabitants. If and when the government decides to pass new legislation, clearer guidelines on the quantification of benefit and disadvantage will be needed in such a legislation in order for cohabitants to reap the full benefits of the scheme proposed by the Law Commission.