Pettitt v Pettitt (1970) and *Gissing v Gissing* (1971)

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A. INTRODUCTION

The Pettitts, Harold John and Hilda Joy, and the Gissings, Violet Emily and Raymond Clifford, came from another time. The Pettitts married in 1952. The Gissings were born around the start of the First World War and married in 1935. The disputes over the ownership of the family homes of the Pettitts and the Gissings were resolved by the House of Lords 40 years ago (*Pettitt v Pettitt*, the older of the decisions, being delivered a little over a year before *Gissing v Gissing*).[1] The generation of 'young couples' setting up home after the Second World War,[2] whose likely intentions Lord Diplock tried to establish in *Gissing*, has largely passed away. However, the 'common intention' analysis which emerged from *Gissing*, although recently condemned by the Supreme Court of Canada as 'doctrinally unsound',[3] has proven to be remarkably durable and still governs certain disputes between the grandchildren of the *Pettitt* and *Gissing* generation. It is true that the advent of legislative reform has meant that many, but not all, matrimonial property disputes are now dealt with on the basis of a statutory discretion.[4] However, disputes between unmarried cohabitants continue to be decided on the basis of the rules of equity.[5] The common intention doctrine is also regularly invoked in respect of disputes between other family members, and even in the commercial context.

Since *Gissing* and *Pettitt* remain important authorities in the modern law, many aspects of their impact might be considered in the present chapter. However, consistently with the aim of examining the 'landmark' status of the cases, it has been chosen to focus on a theme which links them to the body of (post-war) cases which preceded *Pettitt* and also to the post-*Gissing* case law on the common intention analysis. The question which will be pursued here is whether it is possible under the common intention analysis to base a remedy on a common intention which, on the evidence, has not been proven to exist

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1 *Pettitt v Pettitt* [1970] AC 777 was decided on 23 April 1969 and *Gissing v Gissing* [1971] AC 886 on 7 July 1970.

2 *Gissing* (HL) (n 1) 909. Note also Diplock LJ's reference in *Ulrich v Ulrich and Felton* [1968] 1 WLR 180 (CA) 188 to 'the ordinary young couples of today'.

3 *Kerr v Baranow* 2011 SCC 10 [25] (Cromwell J).

4 Note the Matrimonial Proceedings and Property Act 1970, later consolidated in the Matrimonial Causes Act 1973. Section 37 of the 1970 Act, which deals with the issue of improvements made by spouses to the family home (central to *Pettitt*), remains in force: see n 25 below.

5 The Law Commission has recommended reform: *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, July 2007). However, it is not proposed to act on these proposals during the current parliamentary term: written statement by Parliamentary Under-Secretary of State, Ministry of Justice (Jonathan Djanogly), House of Lords, 6 September 2011. For an argument that, in the circumstances, radical judicial law reform would be undemocratic, see J Mee, '*Burns v Burns*: The Villain of the Piece?' in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Oxford, Hart Publishing, 2011) 175, 187–97.

between the parties. The idea of 'imputing' a non-existent common intention to the parties was raised by the minority in *Pettitt*, but appeared to have been rejected decisively by the majority in that case and by a greater majority in *Gissing*. Nonetheless, the issue resurfaced in *Stack v Dowden*, where Lord Walker stated that

> of all the questions to be asked about 'common intention' trusts as they emerge from *Pettitt v Pettitt* and *Gissing v Gissing*, the most crucial is whether the court must find a real bargain between the parties, or whether it can (in the absence of any sufficient evidence as to their real intentions) infer or impute a bargain.[6]

Thus, Lord Walker reopened one of the few issues which had been regarded as definitively settled by *Pettitt* and *Gissing*, suggesting moreover that there was no real difference between the key concepts of 'inference' and 'imputation'. In her leading speech in *Stack*, to which Lord Walker regarded his own speech as merely 'a sort of extended footnote',[7] Baroness Hale also countenanced the imputation of common intention, referring to ascertaining 'the parties' shared intentions, actual, inferred or imputed'.[8]

The more recent case of *Jones v Kernott*[9] allowed the Supreme Court to 'revisit' *Stack* and to provide 'some clarification'.[10] As part of this exercise, in which it is difficult not to see an element of damage limitation, it was made clear what was meant by the idea of 'imputed' common intention. In *Stack v Dowden*, Lord Neuberger had suggested that[11]

> [a]n imputed intention is one which 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. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.

This view of the meaning of imputation was apparently accepted by all five judges in *Jones v Kernott*.[12]

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[6] *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [17].
[7] *Ibid* [15] (Lord Walker).
[8] *Ibid* [60].
[9] *Jones v Kernott* [2011] UKSC 53.
[10] *Ibid* [1] and [2] (Lord Walker and Lady Hale).
[11] *Stack* (n 6) [126].
[12] *Jones* (n 9) [26]–[36] (Lord Walker and Lady Hale); [64]–[65] (Lord Collins); [73]–[75] (Lord Kerr); [79]–[84] (Lord Wilson). Strictly speaking, the proposition at the start of Lord Neuberger's second sentence does not actually follow from his first sentence. In principle, there is no limit to the type of non-existent intentions that the law might choose to attribute to the parties. In *Stack* (n 6) [61], Baroness Hale suggested that the court must search was for 'what the parties must, in the light of their conduct, be taken to have intended'. This suggested the possibility of another form of imputation, whereby the court would attribute to the parties, on some unexplained basis, the intention which on an 'objective' view of their conduct they should be 'taken' to have had.

There was less agreement in *Jones*, however, on the meaning of 'inference'. The conventional view has been that, even if there was no express common intention, it might be possible to 'infer' the existence of a genuine common intention from the conduct of the parties. However, Lord Walker and Lady Hale, with the agreement of Lord Collins, took an expansive view of this process, emphasising its 'objective' nature.[13] In his seminal speech in *Gissing*, Lord Diplock had regarded the process as 'objective' to the extent that 'the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct'.[14] However, Baroness Hale referred in *Stack* to 'what the parties must, in the light of their conduct, be taken to have intended',[15] suggesting a crucial shift from what the parties actually took each other to have intended to what *the court* in retrospect takes the parties to have intended. The tenor of the judgments of Lord Walker and Lady Hale, and Lord Collins, in *Jones*, and their assertion that there may be little practical difference between inference and imputation,[16] suggests that these judges would have no objection to inferring a common intention that neither party subjectively held nor reasonably took the other party to hold. This extended vision of inference was not accepted by Lord Kerr[17] or Lord Wilson,[18] and seems very difficult to defend. It is beyond the scope of the present chapter to address the interesting questions surrounding the proper scope of inference, except to the extent that they are relevant to the debate concerning the extent to which imputation is permissible.

The chapter is structured as follows. It begins, in part B., with a brief 'walk' through *Pettitt* and *Gissing*, to prepare the ground for the analysis which follows. Then the discussion turns, in part C., to a consideration of the 'imputed common intention' approach of Lord Diplock in *Pettitt*, and the broadly similar approach of Lord Reid in the same case. It will be seen that, despite Lord Diplock's attempts to clothe his approach in doctrinal respectability by invoking aspects of the law of contract, these approaches resemble in many ways the more overtly discretionary approaches favoured in the case law prior to *Pettitt* (which were decisively rejected by all the judges in *Pettitt*). In part D., consideration is given to Lord Diplock's inferred common intention approach in *Gissing*, which has formed the basis of the modern law. It will be argued that, in his seminal speech in *Gissing*, Lord Diplock did not envisage the imputation of admittedly false common intentions; his analysis did not involve a legal fiction 'used with a complete consciousness of its falsity'[19] because his Lordship insisted

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However, as is explained in the paragraph of text following this footnote, it emerged from *Jones* that this (still obscure) process is regarded as leading to an *inferred* intention.

[13] Jones (n 9) [34].

[14] *Gissing* (HL) (n 1) 906.

[15] *Stack* (n 6) [61].

[16] *Jones* (n 9) [34] (Lord Walker and Lady Hale). See also ibid [66] (Lord Collins), stating the point in more categorical terms. Contrast *ibid* [67] (Lord Kerr); [89] (Lord Wilson).

[17] *Ibid* [72]–[75].

[18] *Ibid* [89].

[19] N Piška, 'Constructive Trusts and Constructing Intention' in M Dixon (ed), *Modern Studies in Property Law: Volume 5* (Oxford, Hart Publishing, 2010) 203, 222, quoting L Fuller, *Legal Fictions* (Stanford, CA, Stanford University Press, 1967) 9–10.

that he was in the business of inferring the existence of genuine common intentions. It will be noted, however, that a doctrine which institutionalises an implausible willingness to infer (ostensibly genuine) common intentions based on certain contributions by a claimant, may come close in practice to one which openly envisages the imputation of fictional common intentions.

Lastly, in part E., the discussion turns to consider the extent to which the imputation of common intention is envisaged in the cases which have subsequently developed Lord Diplock's analysis in *Gissing*, in particular *Stack v Dowden* and *Jones v Kernott*. In this context, it is important to bear in mind a key distinction, which was identified by Lord Diplock in his speech in *Gissing*. This distinction, which has come to prominence in the later case law, is between 'the primary, or threshold question' – was there a common intention that the beneficial interests in the property would differ from the legal interests? – and 'the secondary, or consequential, question – "what was the common intention of the parties as to the extent of their respective beneficial interests?"'[20] It will be seen that, following *Stack* and *Jones*, the modern law appears to embrace imputation in respect of the question of quantifying the share to which the claimant will be entitled (but not in respect of the threshold question of whether there is a common intention that the beneficial interests will differ from the legal title). However, as is argued in this chapter, the invocation of 'imputation' in *Stack* and *Jones* does not actually indicate any significant departure from the law as it had previously developed in cases such as *Oxley v Hiscock*,[21] and it seems that the modern law may be stated without any need to use the language of imputation.

B. *PETTITT* AND *GISSING*

Although the speeches in *Pettitt* and *Gissing* reveal a range of opinion as to the extent to which equity could provide a remedy in matrimonial property disputes, the claims in both cases were unanimously rejected by the House of Lords. *Pettitt* concerned a claim by a husband based on improvements he had made to a family home which was in his wife's sole name. The husband 'had done work of internal decoration and had built a wardrobe: he had done much work in the garden including the building of an ornamental well and a brick side wall'.[22] The Court of Appeal had reluctantly upheld his claim[23] on the basis that the facts were indistinguishable from those in *Appleton v Appleton*,[24] where Lord Denning MR's

[20] *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 [47] (Chadwick LJ).
[21] *Oxley* (n 20).
[22] *Pettitt* (HL) (n 1) 805 (Lord Morris).
[23] [1968] 1 WLR 443.
[24] *Appleton v Appleton* [1965] 1 WLR 25 (CA). For discussion of *Appleton* and other CA authorities on improvements pre-dating the House of Lords' decision in *Pettitt*, see J Tiley, 'The More than Handy Husband' (1969) 27 *CLJ* 81.

Court of Appeal had found in favour of the claimant. The House of Lords, however, overruling *Appleton*, had no qualms about rejecting the claim.[25]

In *Gissing*, the family home had been purchased in the husband's name for £2,695. The claimant wife had paid £220 for furnishings and for the laying of a lawn. She had also worked outside the home while the mortgage (and another loan associated with the purchase) was being repaid, and had used her earnings to pay for clothes for herself and for the son of the marriage, as well as for 'various extras' for the family. The majority of the Court of Appeal, giving judgment prior to the decision of the House of Lords in *Pettitt*, found that the wife was entitled to an equal share in the beneficial interest because the house in question qualified as a 'family asset' to which special rules applied.[26] Again, the House of Lords had no hesitation in overturning this decision and holding that the claimant was not entitled to any share in the home.

In light of the comparative weakness of the claims at issue, the interest of the cases lies not in the application of doctrine to the facts of the cases themselves but rather in the fact that in each case, as Lord Reid explained in *Gissing*, 'much wider questions have been raised than are necessary for the decision of the case'.[27] Together the two cases mark, or at least appear to mark, a decisive departure from the previous body of case law related to matrimonial property disputes. The emphasis in *Pettitt* was on establishing that no special rules are applicable in this area of the law. This involved confirming that, as had been pointed out obiter by Lord Upjohn in *National Provincial Bank v Ainsworth*,[28] section 17 of the Married Women's Property Act 1882 does not give the court a wide discretion to alter property rights as between the spouses.[29] It also involved rejecting the so-called 'family assets' doctrine whereby, according to Lord Denning MR in the Court of Appeal in *Gissing*,[30]

> where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a 'family asset' in which each is entitled to an equal share.

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[25] As part of the legislative response to the decision in *Pettitt*, s 37 of the Matrimonial Proceedings and Property Act 1970 was enacted. This section declares that a spouse who contributes in money or money's worth towards improvements shall, if the contribution is of a substantial nature (and subject to any contrary agreement, express or implied), acquire a share or an enlarged share in the relevant property. The section was extended to engaged couples by the Law Reform (Miscellaneous Provisions) Act 1970, s 2(1). The Civil Partnership Act 2004, s 65 is in similar terms.

[26] [1969] 2 Ch 85 (CA).

[27] *Gissing* (HL) (n 1) 895.

[28] *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) 1234–36. This case is discussed by Alison Dunn in ch 19 of the present volume.

[29] For a statement of the contrary view, see *Hine v Hine* [1962] 1 WLR 1124 (CA) 1127–28 (Lord Denning MR): the court's discretion 'transcends all rights, legal and equitable'.

[30] *Gissing* (CA) (n 26) 93.

All the members of the House of Lords in *Pettitt* were agreed upon the rejection of the family assets doctrine and of the discretionary interpretation of the Matrimonial Property Act 1882, section 17. However, Lord Reid and Lord Diplock favoured an approach which would have preserved important aspects of these discredited doctrines. Both judges would have been willing to focus on what the spouses, or reasonable people in their shoes, would have agreed (an approach described by Lord Diplock as turning on 'imputed' common intentions). The majority of the House of Lords in *Pettitt*, however, found this approach unacceptable. Lord Morris insisted that[31]

> [i]n reaching a decision the court does not and, indeed, cannot find that there was some thought in the mind of a person which was never there at all. … The Court does not devise or invent a legal result. … [T]here is no power in the Court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the Court thinks that the parties would have agreed had they discussed the possible breakdown or ending of their relationship.

The same view was taken by Lord Hodson,[32] and by Lord Upjohn[33] (who vigorously defended the application of the traditional purchase money resulting trust). Thus, while rejecting the doctrines which the lower courts had developed since the Second World War, the House of Lords in *Pettitt* did not signal any alternative new departure in doctrinal terms. Contemporary commentators regarded the decision as leaving the law in confusion,[34] although arguably it would be more accurate to regard the case as establishing the unyielding position that a claimant who could not establish a claim under the traditional purchase money resulting trust, or succeed under the (then not very well developed) doctrine of proprietary estoppel, would be left with no remedy at all.

When *Gissing* reached the House of Lords not long after *Pettitt*, there was no recognised Chancery lawyer on the panel,[35] and in terms of the possibility of identifying a new direction for the development of the law (for those Law Lords so inclined) there was the problem that *Pettitt* had seemed to rule out most options.[36] The speeches in *Gissing* were neither long nor impressive (and, according to Lord Walker and Lady Hale in *Jones v Kernott*, 'were singularly unresponsive to each other'[37]). In a very short speech, Lord Reid

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[31] *Pettitt* (HL) (n 1) 804–05.
[32] *Ibid*, 810.
[33] *Ibid*, 816.
[34] S Cretney, 'No Return from Contract to Status' (1970) 32 *MLR* 570, 571; J Tiley, 'Family Property Rights – Contribution and Improvement' (1969) 27 *CLJ* 191, 196: '[M]ore delphic than the oracle, who at least had the advantage that her ambiguities were uttered in only one voice.'
[35] As noted by J Tiley, 'Family Property – No Community Yet' (1970) 28 *CLJ* 210, 210; Lord Browne-Wilkinson, 'Constructive Trusts and Unjust Enrichment' (1996) 14 *Trust Law International* 98, 99.
[36] Note that there was some discussion in argument in *Pettitt* of 'the doctrine of unjust enrichment' but Lord Reid did 'not think that that helps': *Pettitt* (HL) (n 1) 795.
[37] *Jones* (n 9) [28].

adhered to the view he had expressed in *Pettitt*.[38] Lord Morris reiterated his contrary view that '[t]he court cannot ascribe intentions which the parties never in fact had'[39] and had little that he wished to add to his remarks in *Pettitt*. Viscount Dilhorne clearly took the same position as Lord Morris on the impermissibility of imputation.[40] Lord Pearson's speech is more difficult to interpret. Following the approach of Lord Upjohn in *Pettitt*, he emphasised that if the claimant was to succeed, 'it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour'.[41] In respect of such a claim, the starting point would be the presumption of resulting trust. This presumption could, however, be rebutted by evidence showing 'some other intention', and the question of what intention the parties had was 'a question of fact'. Lord Pearson expressed the view that it was unlikely that the parties would enter into any agreement, and he continued as follows[42]:

> On the other hand, an intention can be imputed: it can be inferred from the evidence of their conduct and the surrounding circumstances. The starting point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust, though it may be displaced by rebutting evidence. It may be said that the imputed intent does not differ very much from an implied agreement. Accepting that, I still think it is better to approach the question through the doctrine of resulting trusts rather than through contract law.

In this passage Lord Pearson uses the word 'imputed', at first glance appearing to indicate support for the position of Lord Diplock in *Pettitt*. However, it seems clear, really beyond any doubt, that Lord Pearson was not using the word 'imputed' in the same sense as Lord Diplock in *Pettitt*. It has been suggested in later cases that Lord Pearson was simply using the word as a synonym for 'inferred'.[43] This is supported by the fact that Lord Pearson immediately followed the word with a full colon and the explanatory phrase 'it can be inferred from the evidence of their conduct and the surrounding circumstances'. In fact, judging from the context of his remarks and his repeated references to the resulting trust doctrine, it seems most probable that Lord Pearson had in mind simply the operation of the presumption of resulting trust.[44]

The longest speech in *Gissing* (running to only eight pages) was given by Lord Diplock. As will be discussed in more detail later in this chapter, it seems

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[38] *Gissing* (HL) (n 1) 895.
[39] *Ibid*, 898.
[40] *Ibid*, 900.
[41] *Ibid*, 902.
[42] *Ibid*.
[43] *Stack* (n 6) [105] (Lord Neuberger) (compare *ibid* [22] (Lord Walker); *Kernott v Jones* [2010] EWCA Civ 578; [2010] WLR 2401 (CA) [77] (Rimer LJ).
[44] Note the discussion, text to nn 96–102, of whether the operation of this presumption may usefully be regarded as involving imputation.

clear that he accepted that the idea of imputation had been ruled out in *Pettitt*, thus ensuring that there was a majority against imputation in *Gissing* too (even without counting Lord Pearson, who almost certainly rejected imputation in the sense in which it had been championed by Lord Diplock in *Pettitt*). Lord Diplock's speech is notable because it set out a new analysis based on giving effect to the actual common intentions of the parties, as expressed by them or to be inferred from their conduct. Viscount Dilhorne was the only judge to express agreement with this 'common intention' approach,[45] although he did not concur formally with Lord Diplock's speech and it is not clear that he agreed with all aspects of the analysis which Lord Diplock advanced.[46] Lord Reid, whose views in *Pettitt* had been close to those of Lord Diplock in that case, adhered in *Gissing* to the views he had expressed in *Pettitt* and gave no indication that he agreed with the new approach which Lord Diplock set out in *Gissing*, appearing in fact to indicate some uncertainty as to what legal position the speeches of his colleagues were establishing.[47] While support for Lord Diplock's approach was, therefore, far from overwhelming in the case itself, from this somewhat unpromising start it has become clearly established as the orthodox approach in this area of English law. From a practical perspective, this seems to have occurred primarily because no alternative line of doctrinal development was identified in *Pettitt* and *Gissing* (and, arguably, because the extravagance of Lord Denning's subsequent attempts to develop a 'constructive trust of a new model' made Lord Diplock's less radical approach appear in a more attractive light).[48] Even though there have since been two further House of Lords decisions in the area, *Lloyds Bank v Rosset*[49] and *Stack v Dowden*, and one decision of the Supreme Court, *Jones v Kernott*, Lord Diplock's speech in *Gissing* has remained an important aspect of the doctrinal picture.

C. IMPLIED COMMON INTENTION IN *PETTITT*

This part of the chapter considers how much the approaches of Lord Reid and Lord Diplock in *Pettitt* had to offer in theoretical terms, a question which gains in practical importance because of the renewed debate about the legitimacy of imputation in *Stack v Dowden* and *Jones v Kernott*. Given the complications that have subsequently ensued in this area of the law, it might be thought that the majority judges in *Pettitt* were at fault in failing to support the relatively straightforward approach of the minority judges.[50] It will, however, be concluded in this section that the minority approaches do not stand up to close scrutiny. Notwithstanding the best efforts of Lord Diplock in particular to find a distinctive

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[45] See *Gissing* (HL) (n 1) 900–01. Compare *Jones* (n 9) [28] (Lord Walker and Lady Hale), appearing to understate somewhat the extent of Viscount Dilhorne's engagement with Lord Diplock's analysis.

[46] Eg, Viscount Dilhorne 'did not think that any useful purpose will be served by my expressing any views on what will suffice to justify the drawing of [the inference that a common intention existed]': *Gissing* (HL) (n 1) 901. This contrasts with Lord Diplock's detailed remarks on this issue.

[47] *Gissing* (HL) (n 1) 897.

[48] See J Mee, *The Property Rights of Cohabitees* (Oxford, Hart Publishing, 1999) ch 6.

[49] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL).

[50] Compare the remarks of Lord Walker in *Stack* (n 6) [21], quoted as text to n 77.

theoretical basis for his approach, it does not appear possible to identify a principled distinction between the minority approaches and the completely discretionary approach that had been supported by Lord Denning MR, which most observers would concede goes too far in terms of judicial law-making.

In *Appleton v Appleton*, Lord Denning's approach had been to ask 'What is reasonable and fair in the circumstances as they have developed seeing that they are circumstances which no one contemplated before?'[51] Lord Denning explained that he preferred this 'simple test' to the alternative idea, which he noted had sometimes been favoured in the case law, which was to ask 'What term is to be implied? What would the parties have stipulated had they thought about it?'[52] Lord Denning MR's approach in *Appleton* may be seen as going as far as is possible in the direction of allowing the court a discretion to deal with the property dispute between the parties, in whatever way appears to be fair to the court in light of the facts at the time of the hearing. It was rejected by Lord Reid, who could see no ground for the assertion that the property rights of the parties could be different before and after the breakdown of their marriage. Rather, he felt that 'the property rights of the spouses must be capable of determination immediately after the property has been paid for or the improvements carried out and must in the absence of subsequent agreements or transactions remain the same'.[53] Lord Diplock also asserted that his approach differed from that favoured by Lord Denning MR, arguing that his own approach focused on the position at the time of the relevant transaction and that '[t]he circumstances of the subsequent breakdown and the conduct of the spouses which contributed to it are irrelevant to this inquiry'.[54]

Lord Reid believed that it was possible to

> give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse.[55]

There is a significant ambiguity in Lord Reid's approach. He refers to what would have been agreed by 'the spouses, or reasonable people in their shoes', without considering the possibility that one or both of the spouses might not be reasonable people. This issue was highlighted by Lord Neuberger in *Stack v Dowden* in disagreeing with what he took to be a revival of the idea of imputed intention by other members of the House of Lords in that case. Lord Neuberger commented that an approach based on imputed intention would be uncertain

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[51] *Appleton* (n 24) 28.
[52] *Ibid*. For examples of this approach, see *Cobb v Cobb* [1955] 1 WLR 731 (CA) 735 (Romer LJ); *Fribance v Fribance* [1957] 1 WLR 384 (CA) 387 (Lord Denning MR) ('the court has to attribute an intention to them'); *Hine v Hine* (n 29) 1132 (Pearson LJ).
[53] *Pettitt* (HL) (n 1) 793.
[54] *Ibid*, 825.
[55] *Ibid*, 795.

> because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle … that the court's view of fairness is not the correct yardstick for determining the parties' shares …[56]

There is some indication in Lord Reid's speech that he envisaged that his proposed approach would turn on what the actual spouses would have agreed.[57] However, Lord Neuberger's point about the possibility of an unreasonable party seems an important one. What if one of the parties has such a forceful personality that, if the parties had ever discussed the matter, the other party would immediately have capitulated and agreed to some resolution which would have greatly favoured the first party?

The idea of looking to a hypothetical negotiation between the actual parties also runs into difficulties on facts like those in *Jones v Kernott*,[58] where the parties were already estranged at the time of the relevant events. The property in *Jones* was held in joint names at law, and it was conceded that, prior to their separation, the parties had also held the beneficial interest jointly. The claimant argued that her beneficial interest had increased because, for many years after the separation, she had paid the mortgage (as well as all the other outgoings) on the property, with the defendant concentrating on another property that he purchased in his sole name. If the court were to consider in a case like this what the parties *would have agreed*, what is the nature of the hypothetical implied by the use of the conditional tense? It can hardly be 'if they had considered the possibility of their relationship ending', since it had already ended. It would be intelligible to ask 'What would they have agreed if they had got around to reaching an agreement?' This, however, involves the possibly false assumption that the reason they did not reach an agreement was that they did not exert themselves to do so. However, the reality (if not on the facts of *Jones v Kernott*, then in other possible cases) might well be that they did not reach an agreement because they were unable or unwilling to agree. In such circumstances, it does not seem to make sense for the court to attempt to resolve their dispute by asking 'What would the parties themselves have agreed if they had not been in complete disagreement?'[59]

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[56] *Stack* (n 6) [127].

[57] Lord Reid emphasised the fact that it would be appropriate to give a remedy where the defendant acquiesced in the claimant's contribution in circumstances where 'it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position': *Pettitt* (HL) (n 1) 795. The use of the word 'reasonable' here seems to refer to the court's approach to assessing what the actual spouses would have agreed, rather than requiring the court to consider what reasonable people in their shoes would have agreed.

[58] *Jones* (n 9).

[59] In *Jones* (n 9), the Supreme Court held that it was appropriate on the facts to infer a common intention, formed some time after the breakdown of the relationship, that the beneficial interests would no longer reflect the legal title. This was stated explicitly by Lord Walker and Lady Hale (*ibid* [48]), with whose reasons Lord Collins agreed. Neither Lord Kerr nor Lord Wilson appears

Lord Reid did not offer a great deal in terms of a theoretical justification for his proposed approach. In the context of the present chapter's consideration of the notion of imputation, it is significant to note that his Lordship did not use the word 'impute' in his speech in *Pettitt*; and in *Gissing* he commented that '[i]f the law is to be that the court has power to impute [a deemed] intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way'. Lord Reid had stated earlier in his short speech in *Gissing* that he 'adhere[d] to the views which I expressed in *Pettitt's* case'.[60] Considered together, these remarks suggest that Lord Reid's approach in *Pettitt* did not turn on 'imputed' intention, at least in the sense envisaged by Lord Diplock in *Pettitt*.

Lord Reid seemed to favour a more direct approach, which would move straight from a conclusion as to what the parties, or reasonable persons in their shoes, would have agreed, to a trust giving effect to that which would have been agreed.[61] His Lordship did not explicitly envisage an intermediate step whereby a hypothetical agreement would be imputed to the parties. He did not elaborate in detail upon the basis, in terms of doctrine or otherwise, for making a remedy available in the manner he suggested. However, it may be that what he envisaged was a simple extension of the presumption of resulting trust. He noted:

> There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other?[62]

The answer to Lord Reid's rhetorical question seems to be that the presumption of resulting trust originated in different historical circumstances, at a time when it was very likely that a person who paid the purchase price of property intended to gain a share in that property.[63] Historical conditions have changed, so that it is questionable today whether the presumption is an accurate reflection of the likely intention of contributors (so that, in modern times, it would make more sense to put the burden of proof on a contributor to show that he was intended to obtain a share in the beneficial interest). By force of inertia the old

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to have disagreed, although they did not address the point expressly. In terms of quantification, the majority felt that it was possible to infer a common intention that the defendant's share would crystallise on his departure from the disputed property, leaving him ultimately with a 10% beneficial share. Lord Kerr (*ibid* [77]) and Lord Wilson (*ibid* [89]) preferred to conclude that no common intention as to quantification could be inferred but that it was possible to impute an equivalent common intention. The majority would have been willing to do likewise if they had not felt that this result could be reached by inference: *ibid* [48] (Lord Walker and Lady Hale). The approach in the modern cases to imputing a common intention in respect of the secondary question of quantification is discussed in part F.

[60] *Gissing* (HL) (n 1) 895–96.

[61] Note also Lord Reid's remark *ibid*, 896 (whether the claimant will obtain a share in the absence of discussion or agreement 'depends on the law of trust rather than on the law of contract').

[62] *Pettitt* (HL) (n 1) 795.

[63] See the text following n 88.

presumption has survived in the context of contributions to the purchase price of property, but it is difficult to see why a new unrealistic presumption should be invented in the context of the making of improvements to the property of another, particularly because it is difficult to see how, in principle, the application of such a presumption could be limited to the matrimonial or quasi-matrimonial context. Overall, the failure of Lord Reid to provide a fully elaborated rationale for his approach means that, in theoretical terms, it is less interesting than that of Lord Diplock, who offered a more complex explanation for his approach.

Lord Diplock began by framing the problem in terms of the spouses acting 'in concert' to acquire or improve the family home. He explained that he had used the neutral expression 'acting in concert' because 'many of the ordinary domestic arrangements between man and wife do not possess the legal characteristics of a contract',[64] partly because of the *Balfour v Balfour*[65] principle that such arrangements are not generally made with an intention to create contractual relations. Thus, by introducing the notion of 'acting in concert' and suggesting that it implied an arrangement which was close to, but not technically, a contract, Lord Diplock was giving the impression, without actually justifying this proposition, that the spouses were in a situation analogous to a contractual one, in which context it could be appropriate for the court to imply terms to fill any gap in the parties' arrangements. His Lordship argued that, unless an actual common intention could be inferred from the parties' conduct, the court was faced with a difficulty in ascertaining the common intention of the parties, upon which the extent of the parties' proprietary interests should depend. He felt that the court could solve this problem by the application of 'a familiar legal technique' used in the contractual context[66]:

> [T]he court imputes to the parties a common intention which in fact they never formed and it does so by forming its own opinion as to what would have been the common intention of reasonable men as to the effect of [an unforeseen event] upon their contractual rights and obligations if the possibility of the event happening had been present to their minds at the time of entering into the contract.

In contrast to Lord Reid's approach, it seems clear that Lord Diplock was contemplating imputing the common intention that reasonable persons would have formed. In the place of the parties, 'there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.'[67]

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[64] *Pettitt* (HL) (n 1) 822.
[65] [1919] 2 KB 571 (CA).
[66] *Pettitt* (HL) (n 1) 823.
[67] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) 728 (Viscount Radcliffe), quoted by Lord Diplock in *Pettitt* (HL) (n 1) 825.

Lord Diplock's approach may be seen as implying the existence of a contract where none actually exists, rather than merely supplying reasonable terms to fill a gap in a pre-existing contract.[68] This represents a problem, since the justification for enforcing implied contractual terms is the fact that the express terms of the contract are enforceable by and against each of the parties and it is necessary to fill in any gaps in order to give efficacy to the contract as a whole. If, however, prior to the process of implying terms, there is no contract in existence between the parties, it is difficult to see the rationale for enforcing the contract that has been invented for the parties.

Even if one overlooks this problem, it is necessary to look more closely at what contingency the parties may be said to have overlooked. For Lord Diplock, the key point was that the parties' separate entitlements would become important only 'if the asset ceases to be used and enjoyed by them in common and they do not think of the possibility of this happening'.[69] Keen to distinguish his approach from that of Lord Denning MR in *Appleton v Appleton*,[70] Lord Diplock emphasised that the eventuality which had not been considered by the parties was not necessarily that the marriage between the parties might break down, since '[t]he family asset might cease to be needed for the common use and enjoyment of themselves and their children without the marriage breaking down at all'.[71] However, it seems difficult to assert that the eventualities that might make relevant the issue of separate ownership are such that the parties could realistically be said to have failed to consider them. While it might well be that spouses would not consider the possibility that their relationship would end in acrimony, it seems odd to suggest that they would not consider the possibility of their marriage lasting happily until the death of one of them, or the possibility of their children growing up and their current home ceasing to be suitable for the spouses' occupation. In terms of the likely intentions of spouses in general, it seems more realistic to suggest that, while not necessarily dwelling on the ultimate reality that their marriage will eventually end in death if not in marital breakdown, they would be tacitly aware of this. This issue, together with the argument that Lord Diplock was not implying a term into an existing contract so much as inventing a contract from nothing, calls into question the persuasiveness of Lord Diplock's attempt to categorise his approach as a conventional example of the application of a 'familiar legal technique'.

More crucially perhaps, an issue arises in respect of the process of determining what 'reasonable spouses' would have agreed if they had addressed their minds to the possibilities which they are said to have overlooked. Should

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[68] As noted also by H Lesser, 'Inter Vivos Matrimonial Property Rights in England: A Doctrinal Melting Pot' (1973) 23 *University of Toronto Law Journal* 148, 165.
[69] *Pettitt* (HL) (n 1) 822.
[70] *Appleton* (n 24) 28.
[71] *Pettitt* (HL) (n 1) 825. Lesser (n 68) 180 argued that 'the only practical distinction' between Lord Diplock's position and that of Lord Denning MR 'is the time at which reasonableness has to be tested', since Lord Diplock's approach would ignore the subsequent history of the marriage. According to Lesser, '[t]his affects the extent to which justice can be applied as a criterion but not its inherent appropriateness as such a criterion'.

the court's approach be to impute the common intention that the claimant would have the share that would be fair in light of the extent of the claimant's contribution? It may be that this is what Lord Diplock had in mind, given that he referred twice to what would be agreed by '*fair* and reasonable' spouses.[72] However, it is difficult to see how the inquiry can be limited to what would be 'fair' in this sense, if one is indeed implying a term to fill in a gap in the parties' arrangements. Would reasonable persons not have agreed the term that would have been in their best interests at the time? This would bring into play a much wider range of considerations than simply the extent of each party's contributions and the 'fairness' of a particular property arrangement in the zero sum game of a dispute over property in the context of a subsequent breakdown in the relationship (and, it will be recalled, Lord Diplock emphasised that the process of deciding what the parties would have agreed does not factor in, on the basis of hindsight, the prediction that the parties' relationship is ultimately going to break up in acrimony).

Thus, assuming that hypothetical reasonable parties were considering the impact of their contributions on their separate property entitlements, it would be sensible for them to take into consideration which of them was more likely to become bankrupt, whether the law would provide for the redistribution of their separate entitlements if their relationship were ever to break down (as the law would if the parties were married or in a civil partnership), the nature of their testamentary arrangements, the impact which the claimant's acquiring a beneficial interest would have on any social welfare entitlements, and so on. Moreover, assuming that hypothetical reasonable spouses would take an interest in what would be 'fair' in terms of their separate entitlements, presumably they would look beyond the particular transaction in question, to take account of past (and likely future) contributions and gifts by both parties in other contexts, as well as factoring in to some degree the extent of the wealth of each party independent of the particular transaction at issue.

It is difficult to see what the justification would be for the law to ignore these considerations related to achieving the best outcome for the parties at the time. Surely it would not be just for the courts to require the parties to live with the consequences of an imputed intention, focused on a narrow idea of 'fairness' in respect of the contributions to this one transaction, which reasonable persons in the shoes of the parties would *not* have formed if they had addressed their minds to how to order their separate property entitlements at a time when their relationship was going well. The problem is that, if the wider considerations that have been discussed above are brought into play, what was looking like a dangerously uncertain inquiry begins to appear completely unmanageable. Moreover, it seems clear from the speeches of Lords Diplock and Reid that the property rights which would emerge from this process would take effect at once, thus potentially affecting third parties. It seems to go rather far to say that third parties should be bound by an interest which is created on the basis of an assessment – entirely unpredictable from the outside – of what would have been

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[72] *Pettitt* (HL) (n 1) 824 and 825.

the optimal arrangement between the parties on the basis of the full range of relevant issues (including the question of safeguarding their position in the context of possible disputes with third parties).

Lastly, to invert Lord Neuberger's point in *Stack v Dowden* about a subjective approach favouring an unreasonable party,[73] it should be noted that Lord Diplock's objective approach in *Pettitt* would disadvantage an 'unreasonable' claimant or defendant. If the defendant can plausibly argue that, if the parties had discussed the issue in question, he or she would never have agreed to the claimant's acquiring a share, what is the justification for awarding a share to the claimant on the basis of an imputed intention? Of course, it is possible to argue that it would be just to override the parties' views as to what is fair, but probably the best vehicle for giving effect to such a view is not a theoretical model which purports to give effect to imputed intention as a mere supplement to actual intention (and which, presumably, would not substitute reasonable imputed intentions for actual intentions, however unfair, where such intentions actually existed).[74]

Thus, overall, it does not seem that the version of 'imputed' common intention favoured by the minority judges in *Pettitt* is compelling in theoretical terms. What these judges envisaged does not really seem all that different from the discredited pre-*Pettitt* discretionary approaches, since the judges seemed to equate reasonable intentions with 'fair' intentions, notwithstanding the fact that if the parties, or reasonable persons in their shoes, were to have formed a common intention at a time when their relationship was not in difficulties, they would not necessarily have focused on a narrow conception of 'fairness'.

D. INFERRED COMMON INTENTION IN *GISSING*

(1) Inference Rather than Imputation

This part of the chapter considers the approach of Lord Diplock in *Gissing* and the extent to which, if at all, he was willing to contemplate the possibility of attributing non-existent intentions to the parties. It will be argued that, on the face of his speech in *Gissing*, Lord Diplock did not envisage any legal fiction of this nature. Lord Diplock contemplated only the inference of a common intention from the conduct of the parties, in circumstances where there was no express common intention between them. A different view of Lord Diplock's speech appears to have been taken by Lord Walker in *Stack v Dowden.*[75] Lord Walker noted that Lord Diplock had used the word 'infer' repeatedly in his analysis in *Gissing*. However, in Lord Walker's view, '[b]ut for the substitution of the word "infer" for "impute" the substance of the reasoning is, it seems to me, essentially

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[73] See the text to n 56.
[74] Compare *Jones v Kernott* (n 9) [47] (Lord Walker and Lady Hale): '[the court] cannot impose a solution upon them which is contrary to what the evidence shows that they actually intended'; and see also *ibid* [86] (Lord Wilson).
[75] *Stack* (n 6) [17]–[21].

the same (although worked out in a good deal more detail) as Lord Diplock's reasoning in *Pettitt v Pettitt*, when he was in the minority'.[76] Lord Walker went to state that[77]

> [y]our Lordships may think that only a judge of Lord Diplock's stature could have achieved such a remarkable reversal of the tidal flow of authority as has followed on his speech in *Gissing v Gissing*. But it might have been better for the long-term development of the law if this House's rejection of 'imputation' in *Pettitt v Pettitt* had been openly departed from (under the statement as to judicial precedent made by the Lord Chancellor in 1966) rather than being circumvented by the rather ambiguous (and perhaps deliberately ambiguous) language of 'inference.'

In *Jones v Kernott*, Lord Walker and Lady Hale also seemed to suggest, more obliquely, that Lord Diplock's speech in *Gissing* involved imputation of a deemed intention. They did so by attributing the view to Lord Reid in *Gissing* that Lord Diplock's speech in that case was about 'an imputation of a deemed intention' and then appearing to imply that this view was correct by going on to comment that '[t]his sort of constructive intention … [is] familiar in many branches of the law'.[78] On the view taken in this chapter, these views of Lord Diplock's speech represent (with respect) a serious oversimplification. It seems clear that, in referring in *Gissing* to the inference of a common intention, Lord Diplock meant the process of deducing the existence of a genuine common intention between the parties from evidence of their conduct.

Lord Diplock commented in *Gissing* that he had differed from the majority in *Pettitt* in that he felt that the court could give effect to a common intention 'which it was satisfied that [the parties] would have formed as reasonable persons if they had actually thought about it at that time'.[79] Lord Diplock conceded that 'I must now accept the majority decision that, put in this form at any rate, this is not the law.'[80] In his speech in *Gissing*, he abandoned the idea of imputed intention in favour of inferred intention – moving from imputing to the parties the intention which as reasonable people they would have formed, to a process of inference from the facts (building on the presumption of resulting

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[76] *Ibid* [20].
[77] *Ibid* [21].
[78] See *Jones* (n 9) [28], [29].
[79] *Gissing* (HL) (n 1) 904.
[80] *Ibid*, 904. Lord Diplock's use of the phrase 'put in this form at any rate' seems to raise a question as to the extent to which he had really resiled from the position he had stated in *Pettitt*. However, see *ibid*, 906, where, having pointed out that a person must be seen as having the intention which the other person reasonably understood him to be manifesting by his words and conduct, Lord Diplock explained that '[i]t is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct'. It seems that this limited introduction of 'reasonableness' into the assessment of a person's intentions (the significance of which was overstated in *Jones* by Lord Walker and Lady Hale ((n 9) [34]) represents the full extent to which, in *Gissing*, Lord Diplock sought to retain some scope for the application of a yardstick of reasonableness in the assessment of intentions.

trust) which might have broadly similar results in some cases. On this understanding, Lord Diplock's approach in *Gissing*, unlike his approach in *Pettitt*, did not involve openly attributing to the parties an intention that they did not have. However, given the implausible nature of the inferences of fact which Lord Diplock declared himself willing to draw on the basis of the claimant's conduct in making certain contributions, his approach might indeed result in the court attributing a non-existent intention to the parties (while maintaining that it was a genuine intention established on the basis of evidence of conduct).

(2) Inference from Conduct and the Presumption of Resulting Trust

In discussing the process of inferring the existence of a common intention, Lord Diplock began by referring to the operation of the presumption of resulting trust. He considered the situation where the home has been purchased 'without the aid of an advance on mortgage'. Lord Diplock stated that, in such a case, 'if the rest of the evidence is neutral the prima facie inference is that [the couple's] common intention was that the contributing spouse should acquire a beneficial interest in the land in the same proportion as the sum contributed bore to the total purchase price'.[81] He went on to argue that, in a case where the purchase had been assisted by a mortgage, the fact that the claimant had made a cash contribution to the initial deposit and legal charges not borrowed on mortgage would also lead to a presumption that there was a common intention that the claimant should have a share in the beneficial ownership. In such a case, however, it would not 'be reasonable to infer a common intention as to what her share should be without taking account also of the sources from which the mortgage instalments were provided'.[82] Furthermore, still assuming that she had made an initial contribution, 'it would be unrealistic to regard the wife's subsequent contributions to the mortgage instalments as without significance unless she pays them directly'.[83] Lord Diplock also suggested that even in the absence of an initial contribution, the fact that the claimant makes 'a regular and substantial direct contribution to the mortgage instalments' could justify the inference of 'a common intention … from the outset that she should share in the beneficial interest'.[84] Thus, in discussing the range of situations in which a common intention might be inferred from the conduct of the parties, Lord Diplock expressly built on the presumption of resulting trust as it applied in the straightforward situation of a purchase which did not involve a mortgage, arguing that certain inferences should be drawn in more complex situations, essentially because this would be 'reasonable' or 'realistic' in light of the primary inference mandated by the basic presumption of resulting trust.

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[81] *Gissing* (HL) (n 1) 907.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*, 908. Lord Diplock's discussion of the process of inference from conduct concentrated on conduct in the form of the making of financial contributions. He did not expressly comment on the status of conduct in the form of caring for the children of the relationship. However, the later case law has taken the view that this conduct is not sufficient to justify the inference of a common intention. See *Burns v Burns* [1984] Ch 317 (CA); Mee (n 5).

It is clear that Lord Diplock is describing a process that, ostensibly, involves inferring the existence of a genuine common intention from evidence of conduct. The court is concluding that the conduct of the parties is such that it proves that there must have been a prior common intention between the parties in relation to sharing the beneficial ownership – the argument is that the parties would not have acted as they did if there had not been such a prior common intention. In reality, though, people act as they do for a variety of reasons, and the plausibility of the inferences that Lord Diplock envisaged is very much open to question. For example, it is quite possible that a spouse could, at the time of the initial purchase, make a small financial contribution to the purchase price of a house which is conveyed into the sole name of his or her spouse, without there having been a prior common intention between the spouses that the contributor would have a share in the beneficial ownership.[85] In light of possible objections to his approach based on the implausibility of his suggested inferences, the presumption of resulting trust plays a key role in terms of shoring up Lord Diplock's analysis and making it appear defensible in light of orthodox principles of equity.

A crucial difficulty with Lord Diplock's reliance on the presumption of resulting trust in the context of the inference of common intention is that what is presumed under that presumption is *not* a common intention between the parties that the beneficial ownership would be shared.[86] Although this does not appear to be widely appreciated, the notion of 'common intention', with its contractual flavour, had not featured in discussion of the resulting trust prior to *Gissing*.[87] Under the traditional purchase money resulting trust doctrine, the presumption instead relates to the unilateral intentions of the relevant contributor: '[I]t is the intention of the … contributor alone that counts.'[88] It appears that the purchase money resulting trust doctrine was initially developed by analogy with the resulting use that arose upon a voluntary conveyance of land.[89] In the latter context, it was felt by equity that a person should 'retain' the beneficial interest in the land unless they had intended to pass it, along with the legal title, to the donee.[90] In light of the frequency with which donors intended to retain the beneficial interest in the land, equity presumed that the intention of the donor was consistent with a resulting use, unless the contrary was shown. In the purchase money context, the idea seems to have been that a person who put up all the money for a purchase in the name of another could be seen as the 'real'

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[85] Compare the facts of *Midland Bank plc v Cooke* [1995] 4 All ER 562 (CA).
[86] R Chambers, *Resulting Trusts* (Oxford, OUP, 1997) 37.
[87] It had been mentioned a few times in post-war (pre-*Pettitt*) matrimonial property cases in the context of the question of attributing a 'reasonable' common intention to parties who had not actually reached any agreement as to their respective property rights in family assets. On the modern origin of the common intention analysis, see Mee (n 48) 151–54.
[88] *Kerr v Baranow* (n 3) [25] (Cromwell J).
[89] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 93; 30 ER 42, 44 (Eyre CB). See the discussion in J Mee, 'Resulting Trusts and Voluntary Conveyances of Land 1674–1925' (2011) *32 Journal of Legal History* 215, 223–24.
[90] For detailed discussion of the historical emphasis on the idea of retention, see J Mee, '"Automatic" Resulting Trusts: Retention, Restitution, or Reposing Trust?' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010) 207, 214–19.

purchaser; it was as if he had acquired the ownership of the land from the vendor and then voluntarily conveyed it himself to the nominal purchaser, so as to trigger the same principle as in the case of a voluntary conveyance of the land directly from the real purchaser to the nominee (although with a trust being presumed under the purchase money doctrine instead of a use).

Some further mental adjustment was required to deal with a situation where more than one person had contributed to the purchase price, but ultimately, in this situation, each contributor was seen as the real purchaser of a fraction of the beneficial ownership of the property reflecting the proportion of the total purchase money that he or she had provided. By analogy with the treatment of the sole contributor scenario, each contributor was presumed to intend to retain the proportion of the beneficial interest of which he or she was the 'real' purchaser. There is no evidence that equity saw the creation of a resulting trust in this situation as depending on a 'common intention' between the parties that ownership would be shared, even if this might seem a more plausible basis for an equitable doctrine if one were to be developed in modern times to address the situation of joint contributors to a purchase. In fact, prior to the nineteenth century, it was unclear whether the purchase money resulting trust doctrine actually applied to a scenario where X and Y contributed to the purchase price of property taken in the name of X. In *Crop v Norton*,[91] Lord Hardwicke had seemed to suggest that the doctrine could not apply in such circumstances, arguing that[92]

> where a purchase is made, the purchase-money is paid by one, and the conveyance taken in the name of another, there is a resulting trust for the person who paid the consideration; but this is where the whole consideration moved from such person; but I never knew it where the consideration moved from several persons, for this would introduce all the mischiefs which the Statute of Frauds was intended to prevent.

It was not until *Wray v Steele*[93] was decided in 1814 that the matter was settled. This aspect of the development of the purchase money resulting trust cannot be seen as consistent with the notion that it had always turned on a common intention between the contributors that the beneficial ownership would be shared.

The point, then, is that the traditional presumption of resulting trust (itself very difficult to defend in modern times) went no further than attributing an intention to the contributor to obtain a share in the beneficial interest. By

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[91] *Crop v Norton* (1740) 2 Atk 74, 26 ER 445; Barn CC 179, 27 ER 603; 9 Mod 233, 88 ER 418.
[92] (1740) 9 Mod 233, 235; 88 ER 418, 421. See also (1740) Barn CC 179, 184; 27 ER 603, 606. It is true that it had earlier been established that where X and Y contributed unequally to the purchase of property taken in the names of X and Y, they would be presumed to take in equity, not as joint tenants but as tenants in common, in the proportions of their contributions: *Lake v Gibson* (1729) 1 Eq Ca Abr 290. However, this could be seen as a rule of the law of co-ownership, rather than a general rule applying to all purchase money resulting trusts.
[93] *Wray v Steele* (1814) 2 V & B 388, 35 ER 366.

contrast, the inference that Lord Diplock was willing to draw was of a different nature, in that it involved the intentions of the legal owner as well as the contributor. Whether one regards the common intention trust as having a 'perfectionary' function, so that it gives effect to an informal declaration of trust by the legal owner,[94] or as being justified on a basis analogous to proprietary estoppel, it is clear that the legal owner and his or her intentions or representations or declarations (and their effect on the claimant) are at the heart of the analysis. In contrast, the traditional purchase money resulting trust may be seen as 'claimant-sided', in the sense that what matters is the intention of the contributor. In terms of plausibility, it seems much easier to draw inferences from the conduct of the contributor about that person's intentions rather than (as Lord Diplock's analysis requires) about the legal owner's intentions or representations and their effect on the contributor. In other words, it may be possible to infer from the fact that X contributed to the purchase price of property that X intended to gain a share in the beneficial ownership; it is more difficult to infer from X's conduct that the legal owner led X to believe that X would have a share in the beneficial ownership.

Thus, Lord Diplock's views on the inference of common intention seem to involve a distortion of the nature of the presumption of resulting trust. The inferences which Lord Diplock suggested should be drawn from the conduct of the parties are generally not credible[95] and are only made to seem so because of his expedient of treating an expanded version of the presumption of resulting trust as an engine to generate common intentions. In the end, this point appears to be central to the power of the common intention analysis since, if a fully realistic view were to be taken, common intentions would much more rarely be found and a remedy would be available to a claimant much less frequently.

Interestingly, in *Jones v Kernott* Lord Walker and Lady Hale insisted that '[t]he presumption of a resulting trust is a clear example of a rule by which the law *does* impute an intention, the rule being based on a very broad generalisation about human motivation'.[96] Hints to this effect may also be discerned in *Pettitt* and *Gissing*.[97] As the foregoing discussion suggests, there is some truth in this observation, given that Lord Diplock's speech in *Gissing* harnessed the presumption of resulting trust as a mechanism for generating inferences of 'fact' which appear implausible, so that it may reasonably be insisted that, behind the façade of searching for genuine intention, what is really going on is the imputation of non-existent intentions. However, it is also

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[94] See G Elias, *Explaining Constructive Trusts* (Oxford, OUP, 1990) 56–65.
[95] Note the remarks of Viscount Dilhorne in *Gissing* (HL) (n 1) 901 and contrast Lord Diplock's comments in *Pettitt* (HL) (n 1) 822 ('true inference' in most cases which come before the courts is that the parties formed no common intention) with his approach in *Gissing*.
[96] *Jones* (n 9) [29]. See also *ibid* [30], [31] (and see at [24] in relation to the presumption of advancement).
[97] See *Pettitt* (HL) (n 1) 816, where Lord Upjohn suggested that the presumptions of advancement and resulting trust represented 'the common sense of the matter and what the parties would have agreed had they thought about it'. Note also Lord Pearson's reference to the idea of imputation in *Gissing* (HL) (n 1) discussed in the text to nn 41–44.

important to acknowledge that the presumption of resulting trust has traditionally operated as a means of arriving at proof of a fact in a case where evidence is unavailable,[98] rather than as a mechanism for imposing a view of what it *would* have been reasonable for the parties to have agreed if they had, in some way, behaved differently from how they are likely to have behaved in fact.[99] It is true that, where it applies (which, according to Lord Walker and Lady Hale would be rare in the domestic context)[100] and is not rebutted, the presumption can lead to a finding of intention which the relevant individual 'may never have had'.[101] However, this is the case even where a fact is being found by a court, on the balance of probabilities, without the assistance of a presumption; since the available evidence may be misleading or the court may reach inappropriate conclusions on the basis of the evidence, the possibility of a mistake on the court's part cannot be ruled out. The fact that the presumption of resulting trust is outdated, so that the inferences of fact it generates (although originally based on 'likely intentions')[102] are no longer reliable, suggests that it is an unreliable tool in the process of inferring real intentions rather than that it is a tool for imputing fictional intentions.

E. LORD DIPLOCK'S APPROACH TO QUANTIFICATION IN *GISSING*

The previous parts of this chapter have suggested that Lord Diplock's analysis in *Gissing* relies on implausible inferences of genuine common intentions rather than on a process of imputing fictional common intentions. This part examines whether this approach is maintained in the passages in Lord Diplock's speech that deal with the question of quantification (and this consideration of Lord Diplock's treatment of quantification will also prepare the ground for the discussion to follow concerning the relationship between imputation and quantification in the later case law). Lord Diplock argued that, once the court had found that a common intention to share the beneficial ownership had existed, it would not be equitable to deny a claimant any interest 'merely because at the time the [claimant] made her contributions there had been no express agreement as to how her share in it was to be quantified'.[103] According to Lord Diplock[104]:

> In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently.

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[98] Compare W Swadling, 'Explaining Resulting Trusts' (2008) 124 *LQR* 72, 74–79.
[99] Notwithstanding the view of Lord Upjohn in *Pettitt* (HL) (n 1) 816, quoted in n 97.
[100] *Jones* (n 9) [31].
[101] *Ibid* [24] (Lord Walker and Lady Hale) (in the context of the presumption of advancement).
[102] *Ibid* [31] (Lord Walker and Lady Hale), quoting Lord Diplock in *Pettitt* (HL) (n 1) 824.
[103] *Gissing* (HL) (n 1) 908.
[104] *Ibid.*

He then went on to discuss the inferences which could be drawn based on various patterns of conduct, in the form of making various types of contribution.

Lord Diplock appeared to be pushing the idea of inferring the existence of a genuine common intention to the limit in suggesting that one could infer a common intention as to quantum in circumstances where 'that understanding was never expressly stated or even consciously formulated in words by either of them independently'. It is true that the whole idea of inference from conduct involves accepting that a common intention can exist even if it was never 'expressly stated'. However, can a common intention be said genuinely to exist if neither party ever 'consciously formulated [it] in words'? To parse this phrase, such a common intention would have to involve an intention which *was* 'formulated in words' but not consciously (which seems hard to envisage), or else (more likely) an intention which was never formulated in words at all but somehow still existed. The latter form of 'intention' could presumably take the form of an assumption, upon which the person holding it never dwelt consciously but which might still have influenced the person's conduct. One difficulty is as to how such an unarticulated assumption might be said to have been transmitted from one person to the other, so as to become a 'common' intention. At this point, one is reminded of Steyn LJ's dismissal in *Springette v Defoe* of the possiblity of communication of an intention at 'a sub-conscious level' on the basis that '[o]ur trust law does not allow property rights to be affected by telepathy'.[105] However, it seems just about possible to argue that one is dealing here with 'the possibility of conventional, albeit subtle, forms of communication between people who know each other intimately: non-verbal cues, assumptions underlying remarks made about other matters, things not said which would otherwise have been said'.[106]

However, even if this type of subconscious formulation and communication of a common intention might be conceivable as a matter of logic, it is very difficult to see how its existence could be tested by the legal process. Thus, although Lord Diplock seems to be restricting himself to a requirement of a genuine common intention,[107] he is drawing attention to possible forms of genuine common intention the past existence of which, it seems, can only be guessed at. Hence, while ostensibly keeping to the idea of 'genuine common intention', Lord Diplock is coming close to his view in the earlier case of *Ulrich v Ulrich*, where, in describing the law applicable to family assets, he had said[108]:

> Where there is no explicit agreement, the court's first task is to infer from their conduct in relation to the property what their common intention

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[105] *Springette v Defoe* [1992] 2 FLR 388 (CA) 394. Contrast the reference to 'subconscious intention' by Nicholas Strauss QC, sitting as a deputy High Court judge, in *Jones v Kernott* [2009] EWHC 1713 (Ch), [2010] WLR 2401 (Ch) [33].
[106] Mee (n 48) 125.
[107] Note his reference in this context to 'the probable common understanding … upon which each *must have acted* in doing what each did': *Gissing* (HL) (n 1) 908 (emphasis added).
[108] *Ulrich v Ulrich* [1968] 1 WLR 180 (CA) 188–89.

> would have been had they put it into words before matrimonial differences arose between them.

This view was expressed before the majority of the House of Lords in *Pettitt* had rejected Lord Diplock's 'imputed common intention' approach and so seems unlikely to have been intended to be any more limited than Lord Diplock's approach shortly afterwards in *Pettitt*. If one changed the phrase 'what their common intention would have been had they put it into words' to 'what their common intention was although not put into words', one would seem to have Lord Diplock's approach in *Gissing*.

Nonetheless, there seems to be a clear difference in principle between Lord Diplock's approach in *Gissing* and his position in *Pettitt*. If, for example, in respect of quantification, one is looking at what reasonable parties would have agreed, it seems that there will always be an answer. However, if one is looking at what as a matter of probability these particular parties did intend in respect of quantum, then (even if one is willing to include real but subliminal intentions) one could still conclude that the parties had no common intention in respect of quantum. Lord Diplock clearly recognised this, since he stated only that the court should do its best to discover 'whether' any inference could reasonably be drawn as to the parties' 'probable common understanding' about the extent of the claimant's share. He went on to state that[109]

> [i]t is only if no such inference can be drawn that the court is driven to apply as a rule of law, and not as an inference of fact, the maxim 'equality is equity,' and to hold that the beneficial interest belongs to the spouses in equal shares.

Although Lord Diplock's speech has proven remarkably influential as a whole, this particular suggestion of his has not found favour in later cases. The logic behind it is questionable. The occasional application of the relevant maxim in the context of the traditional purchase money resulting trust may be seen as resolving an evidential difficulty in terms of the extent of a claimant's contribution which is very substantial and may or may not exceed one half. In such circumstances it may indeed be necessary to use 'an equitable knife … to sever the Gordian knot'.[110] However, Lord Diplock's suggestion was to apply the maxim as a rule of law to determine the ultimate question of the entitlements of the parties. It is not at all clear why, in a case where the claimant has made a relatively minor contribution, the award of a 50 per cent share would be justifiable.

While later courts have not taken up Lord Diplock's suggestion as to the application of the maxim that 'equality is equity', this part of his speech is significant for present purposes because Lord Diplock expressly contemplated

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[109] *Gissing* (HL) (n 1) 908.
[110] *Ainsworth* (n 28) 1236 (Lord Upjohn).

that it might be impossible to infer any common intention as to the extent of the claimant's share, apparently demonstrating beyond a doubt that he was not describing a process that, in principle, permits the court to impute a non-existent reasonable intention to the parties (even at the quantification stage).

F. IMPUTATION IN THE SUBSEQUENT CASE LAW

Having considered Lord Diplock's approach in *Gissing* and having concluded that his speech did not support the idea of imputation (either in respect of the threshold question of whether a common intention exists, or in relation to the quantification issue), the discussion now turns to the role of imputation in the subsequent case law.

For many years after its rejection in *Pettitt* and *Gissing*, the idea of imputation cropped up only occasionally in the case law.[111] For example, in the influential case of *Grant v Edwards*, the only mention of imputation was Mustill LJ's insistence that the court 'must not impute to the parties a bargain which they never made, or a common intention which they never possessed'.[112] More recently, however, references to imputation began to crop up in the cases again.[113] After *Stack* and *Jones*, it appears to have been clarified that imputation is not permissible in respect of the first question, as to whether there is a common intention that the beneficial interests will differ from the legal title.[114] However, the position appears to be different in relation to the second question,

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[111] See *Hardwicke v Johnson* [1978] 1 WLR 683 (CA) 688, where Lord Denning MR relied upon Lord Diplock's views in *Pettitt*, without mentioning that they had been rejected by the majority of the House of Lords. See also *Burns v Burns* [1984] Ch 317 (CA) 322–26 (Waller LJ); and note the position taken by A Zuckerman, 'Ownership of the Matrimonial Home – Common Sense and Reformist Nonsense' (1978) 94 *LQR* 26. The 'imputed common intention' approach was one of the inspirations for the development in New Zealand of an approach based on 'reasonable expectations': *Gillies v Keogh* [1989] 2 NZLR 327; Mee (n 48) ch 9.

[112] *Grant v Edwards* [1986] Ch 638 (CA) 652. In *Jones v Kernott* (n 9) [59], Lord Collins saw a contrast between *Gissing* and *Lloyds Bank v Rosset* (n 49) in terms of the distinction between inference and imputation. This appears to follow on from a suggestion by Lord Walker in *Stack* (n 6) [25], that in concurring with Lord Bridge's remarks in *Rosset* (n 49) 132–33, the House of Lords 'was unanimously, if unostentatiously, agreeing that a "common intention" trust could be inferred even when there was no evidence of an actual agreement'. It is arguable, however, that Lord Bridge's language here must be understood in light of his earlier comments, *ibid*, 132E–G. On this view, the two categories of case envisaged by Lord Bridge were (i) cases where 'independently of any inference to be drawn from the conduct of the parties' the parties have reached an agreement, arrangement or understanding, and (ii) cases where, in the absence of 'an agreement or arrangement to share *in this sense*' (*ibid*, 132F, emphasis added), ie in the absence of an express agreement or arrangement, a common intention may be inferred from the parties' conduct. While the previous point of interpretation is debatable, it does seem most unlikely, in light of his generally conservative approach to the common intention trust, that Lord Bridge intended to smuggle imputation in a strong sense back into the analysis. At most, it seems, he was merely referring to the operation of the presumption of resulting trust: see nn 96–102. See further Mee (n 48) 131–34.

[113] See *Stokes v Anderson* [1991] 1 FLR 391 (CA); *Midland Bank plc v Cooke* (n 85); *Oxley v Hiscock* (n 20).

[114] The possibility of imputation in relation to the first question is not mentioned in the summary of the law by Lord Walker and Lady Hale in *Jones* (n 9) [51]–[52] (as surely it would have been if it were permissible); and note the explicit rejection of the possibility by Lord Collins *ibid* [64]. Lord Wilson wished to keep this question open: *ibid* [84].

discussed at the end of the previous part of this chapter, of quantifying the claimant's remedy where a common intention was found to exist but no common intention as to the respective shares was expressed or may be inferred from the conduct of the parties.

Following *Stack* and *Jones*, it is now appears to be settled that in the relevant situation, 'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between [the parties] in relation to the property'.[115] This test may be rationalised in various ways, a number of the options having been canvassed by Chadwick LJ in *Oxley v Hiscock*.[116] What is interesting in the present context is the argument, favoured in *Jones*, that this approach involves imputation, in that if the court 'cannot deduce exactly what shares were intended, it may have no alternative but to ask what [the parties'] intentions as reasonable and just people would have been had they thought about it at the time'.[117] The assumption appears to be that 'reasonable [persons] will intend only what is fair',[118] so that it makes no difference whether the test in respect of the quantification of the parties' shares is framed by reference to imputed reasonable intentions or by reference to what 'the court considers fair having regard to the whole course of dealing between [the parties] in relation to the property'.

There are significant problems with the references to imputation in this context. In *Oxley*, Chadwick LJ had referred to the idea of imputation in this situation as 'artificial – and an unnecessary fiction'[119]; and in *Jones*, Lord Kerr developed the point as follows:

> [I]n the final analysis, the exercise is wholly unrelated to ascertainment of the parties' views. It involves the court deciding what is fair in light of the whole course of dealing with the property. That decision has nothing to do with what the parties intended, or what might be supposed would have been their intention had they addressed that question. In many ways, it would be preferable to have a stark choice between deciding whether it is possible to deduce what their intention was and, where it is not, deciding what is fair, without elliptical references to what their intention might have – or should have – been.[120]

This passage suggests that court-determined 'fairness' and imputed reasonable intentions are not necessarily the same thing. It will be recalled that it was argued in Part C. above that if the parties had actually thought about their beneficial entitlements at a time when their relationship was going well, they probably would not have envisaged a process which would focus narrowly on

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[115] *Ibid* [51] (Lord Walker and Lady Hale), quoting *Oxley v Hiscock* (n 20) [69] (Chadwick LJ).
[116] *Oxley* (n 20) [69]–[71].
[117] *Jones* (n 9) [47] (Lord Walker and Lady Hale). See also *ibid* [31] (Lord Walker and Lady Hale); [72] (Lord Kerr); [84] (Lord Wilson).
[118] *Ibid* [83] (Lord Wilson).
[119] *Oxley* (n 20) [71].
[120] *Jones* (n 9) at [74].

the idea of fairness in relation to the acquisition or improvement of the home but would instead have looked to a much wider range of issues, not limited to the consequences of their past conduct or to 'fairness' in a narrow sense. This suggests that if the modern law involves quantifying the parties' shares on the basis of an assessment of fairness in light of the whole course of the parties' conduct in relation to the disputed property, it is inaccurate (and, therefore, confusing) to suggest that the court is implementing the solution that the parties themselves – or even reasonable persons in their shoes – would have envisaged if they had directed their minds to the matter in advance.

Lord Kerr concluded that 'imputing intention has entered the lexicon of this area of law and it is probably impossible to discard it now'.[121] However, if the law is to remain as suggested by the majority in *Jones*, there seems to be no reason why it should not be discarded.[122] It is significant that Lord Walker and Lady Hale (with whose reasons Lord Collins expressed agreement, making a majority of the Supreme Court) found it possible to summarise the law at the conclusion of their judgment without any reference to the concept of imputation.[123] This suggests that the statement of the test for quantification in terms of 'fairness in light of the whole course of dealing with the property' is to be taken as the primary formulation. It may be that future courts will concentrate on this summary, so that imputation may retreat into the background once more.

A possible difficulty with dropping the reference to imputation is that this might appear to leave the relevant test without any theoretical justification at all, beyond the unsatisfying argument that the court is 'driven' to resort to this solution in the absence of any better alternative.[124] In fact, however, when one reflects on the courts' conviction that the answer to the quantification issue must lie in a survey of all of the parties' conduct, it seems possible to suggest a more principled approach.[125] It seems that matters would be clarified if one bore in mind that, in respect of the common intention trust, conduct may have a 'twofold function', in that it may be relevant both as evidence from which one is able to infer a common intention and also as evidence of detrimental reliance on that common intention.[126] If one sees the underlying rationale for the common intention trust as being that the claimant has been led to act to his or her detriment on the basis of a common intention as to the sharing of beneficial ownership, the obvious option where no genuine common intention as to quantification may be inferred from the parties' conduct is for the remedy to

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[121] *Ibid*.
[122] Lord Wilson expressed great enthusiasm for the concept of imputation in his judgment in *Jones*, but this seems to have been strongly connected to his desire to give 'careful thought' in a future case to the possibility of extending the scope of imputation beyond the secondary question of quantification to cover the primary question of whether a common intention exists that the beneficial ownership should differ from the legal ownership: *ibid* [84].
[123] *Ibid* [51]–[52].
[124] *Ibid* [31] (Lord Walker and Lady Hale); [87] (Lord Wilson).
[125] See Mee (n 48) 148–51.
[126] *Grant v Edwards* (n 112) 647 (Nourse LJ).

reflect the extent of the detriment incurred by the claimant on the basis of the relevant common intention. Thus, one would return to look at aspects of the parties' conduct to determine the extent to which the claimant had acted to his or her detriment on the common intention. Relevant matters would include contributions to the acquisition of the purchase price, but would not necessarily be limited to this. Thus, for example, if the claimant had contributed to improvements to the house (or had acted to his or her detriment in a manner unconnected with the disputed property), this conduct might also be taken into account if it could be said that it was undertaken on the basis of the common intention.

It is useful to compare the problem under discussion to those which arise in the context of proprietary estoppel remedies (notwithstanding Lord Walker's apparent overreaction in *Stack* to a previous tendency in the case law to exaggerate the similarities between the common intention trust and proprietary estoppel).[127] While there is much force in the argument that the remedy for proprietary estoppel should reflect the detriment incurred by the claimant (subject to an upper limit based on the expectation reasonably induced in the claimant by the defendant's representation), this argument has not been accepted by the courts to date.[128] The current position appears to be that the remedy will reflect the expectation unless such a remedy would be disproportionate to the detriment incurred by the claimant.[129] However, it must be understood that the situation that is now being considered is not really analogous to the standard proprietary estoppel scenario. Instead, it is similar to a proprietary estoppel situation where D promises C that C will obtain an unspecified interest in D's land. In such a situation (assuming that C has acted to his or her detriment), it is clear that equity will not deny C a claim simply because the precise extent of the promised beneficial interest was unclear.[130] However, there can be no question here of giving effect to the expectation reasonably induced by D's representation, since this expectation is not precise. Therefore, the argument that the remedy should, in such circumstances, reflect C's detriment is different from (and easier to make than) the more general contention that the estoppel remedy should always reflect C's detriment rather than the expectation. The courts have been far from surefooted in relation to the question of estoppel remedies, preferring the simple option of fulfilling the expectation and appearing unconvincing when required to devise a remedy on a different basis. This proposition is illustrated by the unsatisfactory approach in *Jennings v Rice*, where Robert Walker LJ felt that, in a case where it was not

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[127] *Stack* (n 6) [37]. Note that earlier cases such as *Stokes v Anderson* (n 113) and *Oxley* had emphasised the analogy with estoppel in the relevant context (see also *Grant v Edwards* (n 112) 657–58 (Sir Nicholas Browne-Wilkinson V-C)) but, unfortunately, had overlooked the fact that the courts do not generally speak in terms of awarding the claimant a 'fair share' in estoppel cases.

[128] For discussion of the issues, see J Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in M Dixon (ed), *Modern Studies in Property Law, Volume 5* (Oxford, Hart Publishing, 2009) 389.

[129] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8.

[130] Compare *Ramsden v Dyson* (1866) LR 1 HL 129, 171 (Lord Kingsdown).

appropriate to grant an expectation remedy, 'the court has to exercise a wide judgmental discretion' and identified a series of factors to be taken into account (which, it seems, might provide little guidance in many cases).[131] However, writing extra-judicially, Lord Walker seems subsequently to have come to the view that it would be more appropriate to revert to a quantification of the remedy by reference to the detriment incurred by the claimant.[132]

In the end, it seems that in the situation under discussion, when a common intention has been found to exist but no common intention as to quantum has been expressed or can be inferred, there is really no need to resort to the imputation of a fictional common intention in relation to quantum. A remedy can be granted which reflects the extent of the detriment suffered by the claimant (or, if this is regarded as preferable, a remedy which is determined on the basis of a wide judgmental discretion which would be guided by the type of factors identified in *Jennings v Rice* but in which, in reality, the question of detriment would normally play a central role). This type of approach would be close to that favoured in *Jones* but could more satisfactorily be justified by reference to principle.

Without the type of theoretical anchoring which has just been suggested, it is difficult to distinguish the modern approach from those ventured by the courts prior to *Pettitt* and *Gissing*. In *Stack*, Baroness Hale stated an unwillingness to 'return to the days before *Pettitt v Pettitt* without even the fig leaf of section 17 of the 1882 Act'.[133] However, it is not clear whether there is a substantial difference between the approach set out in *Stack* and *Jones* and the formulation put forward, more than 50 years earlier, by Romer LJ in *Cobb v Cobb* (also a joint names case). Romer LJ stated that[134]

> [i]n cases of this kind one usually has no direct evidence of intention in relation to the ownership of the matrimonial home, because the parties to the marriage very seldom form one when they buy it; and the court has to attribute an intention from the course of conduct of husband and wife (including their respective contributions towards the purchase price) at the time when the home was purchased and subsequently.

G. CONCLUSION

This chapter has considered the landmark cases of *Pettitt* and *Gissing* through the prism of imputed common intention, an idea advanced by Lord Diplock in *Pettitt* and (on one view) implemented in a different form by him in his speech in *Gissing*. The conclusion has been that the common intention trust analysis, as first put forward in the speech of Lord Diplock in *Gissing*, did not directly involve

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[131] *Jennings* (n 129) [51]–[52].
[132] Lord Walker, 'Which Side "Ought to Win"?: Discretion and Certainty in Property Law' [2008] *Singapore Journal of Legal Studies* 229, 239 ('the court will probably aim at making good the claimant's detriment').
[133] *Stack* (n 6) [61].
[134] *Cobb v Cobb* [1955] 1 WLR 731 (CA) 735.

the imputation of common intentions. Unfortunately, the notion of imputation has, following *Stack v Dowden* and *Jones v Kernott*, crept back into the modern law on the common intention trust in respect of the secondary issue of quantification. However, as argued above, it seems unnecessary to present the modern approach to quantification in terms of the imputation of a non-existent common intention.

Despite the emphasis on imputation in relation to the quantification issue, it seems clear after *Jones* that the law does not permit imputation in respect of the first question of whether there is a common intention that the beneficial interests should differ from the legal title. This does not mean, however, that the modern doctrine will not, in practice, end up providing a remedy for claimants on the basis of non-existent common intentions. The essence of a true legal fiction is that everyone knows that it is not true. Under the 'imputed common intention' approach proposed by Lord Diplock in *Pettitt*, there would have been no pretence that the parties actually had the 'reasonable' common intention which would have been attributed to them. A key difficulty with the alternative vision put forward by Lord Diplock in *Gissing*, a vision which triumphed in the later case law, is that it involved pretence rather than fiction, creating great potential for confusion. The approach of the majority in *Jones*, rejecting imputation at the first stage but arguing that inference has such a broad scope that this rejection may have little or no consequence in practice, serves to aggravate this problem.

The extent of the uncertainty is illustrated by the fact that, as well as using the familiar language of inferring and imputing, Baroness Hale also referred in *Stack* to 'divining the parties' true intentions',[135] a reference that was repeated in *Jones*.[136] One of the meanings offered by the *Oxford English Dictionary* for 'to divine' is 'to make out or interpret by supernatural or magical insight', and the applicable modern meaning may be '[t]o make out by sagacity, intuition, or fortunate conjecture (that is, in some other way than by actual information); to conjecture, guess'.[137] It does seem that Lord Diplock's common intention analysis sometimes requires the court to arrive at a conclusion as to the parties' intentions 'other than by actual information', but whether this is to be achieved by guesswork, magical insight or the attribution of fictional imputed intention is not easy to discern. Forty years after *Pettitt* and *Gissing* marked a new departure in the law's treatment of disputes over the beneficial interests in family homes, the law has yet to be clarified in full, with judges still engaged in arcane discussion about inferring and imputing common intentions which, in many cases, do not really exist. The 'twin peaks'[138] still cast their shadow over the landscape.

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[135] *Stack* (n 6) [69]. See also *ibid* [66].
[136] *Jones* (n 9) [31] (Lord Walker and Lady Hale).
[137] *Oxford English Dictionary*, 2nd edn (Oxford, Oxford University Press, 1989), sv 'divine, *v*'.
[138] *Grant v Edwards* (n 112) 646 (Nourse LJ).