Burns v Burns: The Villain of the Piece?

John Mee[*]

INTRODUCTION

The claimant in *Burns v Burns*[1] cohabited with her partner for 18 or 19 years[2] and cared for their children but was left with no remedy in the law of trusts upon the termination of the relationship. Is *Burns* a landmark case in family law? The word 'landmark' is often used to refer to a case which marks a breakthrough or exciting new departure. Few would suggest that *Burns*, famous as a 'hard case', qualifies under this criterion. However, other established meanings of 'landmark' seem more apposite. A landmark can mean 'an object set up to mark a boundary line' or '[a]n object in the landscape, which, by its conspicuousness, serves as a guide in the direction of one's course… any conspicuous object which characterizes a neighbourhood or district'.[3] *Burns* may indeed mark a boundary line, either between family law and the law of trusts or (on one view) between the era of Lord Denning's judicial activism and a reaction which set in after his retirement from the bench.[4] It certainly represents a conspicuous feature of the landscape of the law relating to cohabitants' property rights, around which scholars, and would-be law reformers, must navigate. The decision retains its importance in the modern law relating to the common intention constructive trust, its authority not appearing to have been shaken by the decision of the House of Lords in *Stack v Dowden*.[5] This chapter considers again the issues raised by *Burns*, both in respect of the common intention constructive trust and in relation to the possible reform of the property rights of cohabitants. The chapter takes a sceptical view of the merits of judicial law reform in the present context, arguing that there are significant objections to the idea of the courts setting out to establish a new framework to regulate the property entitlements of cohabitants upon the termination of their relationship.

The chapter begins, in Part 1, with a consideration of the facts of *Burns* and of the approach taken in the judgments of the Court of Appeal in that case. This Part also considers how the case fits in with previous authority, including the approach of Lord Denning MR in a series of earlier Court of Appeal cases. In Part 2, consideration is given to the impact of Schedule 1 of the Children Act 1989, legislation which, it has been suggested, may address the apparent injustice in cases

---

[*] I would like to thank Mary Donnelly and Rebecca Probert for their comments on a previous draft of this chapter. Any remaining errors are solely my responsibility.

[1] [1984] Ch 317 (Court of Appeal).

[2] Ibid, 332 per Fox LJ (18 years); 320, 325, 326 per Waller LJ (19 years). The parties began to cohabit in rented accommodation in summer 1961 and separated at some point (unspecified in the judgments) in 1980.

[3] 'Landmark, *n.*' *The Oxford English Dictionary*. 2nd edn (Oxford, Oxford University Press, 1989).

[4] Lord Denning MR gave his last judgment in September 1982, less than a year before *Burns* was decided in July 1983.

[5] [2007] UKHL 17.

such as *Burns v Burns*. The author's position is that this legislation, although important in its own right, does not truly provide a remedy for the perceived injustice which *Burns* has come to symbolise, i.e. the fact that the claimant was unable to share in the wealth created by the family over the duration of the relationship. Finally, Part 3 discusses some of the issues raised by *Burns* as to the legitimacy of judicial reform in this area of the law. The ultimate conclusion of this chapter is that, although many commentators do not approve of the consequences of the decision, it is probably not possible to say that the law of trusts was wrongly applied in *Burns v Burns* or, even, that the law of trusts should be applied differently if a similar case were to arise today. Whether legislation should be enacted to regulate the property rights of cohabitants is a different (and complex) question.

BURNS V BURNS

The 'figure of Mrs Burns'[6] has featured prominently in debate relating to the possible reform of the law affecting cohabitants' property rights and the case has frequently been used as a shorthand to sum up the case in favour of reform.[7] Valerie Burns took part in a Panorama programme on 'The Cost of Living in Sin' which was broadcast by the BBC on 24 November 2002.[8] This programme emphasised the potentially adverse consequences of cohabitation outside marriage and may have contributed to an increased perception that legislative reform was required in the area. A striking feature of the facts of *Burns v Burns* is that it involved a relationship which was very much 'quasi-matrimonial'. For many of those who rest the case for reform of cohabitants' rights on a perceived functional similarity between cohabitation and marriage,[9] *Burns* seems to demonstrate compellingly the case for reform. This case was given further colour by Valerie Burns' description on the Panorama programme of how, following the breakdown of her relationship, she was reduced to sleeping in her car in a lay-by.

The Facts of the Case

In 1961, Valerie was aged 20, was living with her parents and earning around £12 a week as a tailor.[10] In the summer of that year, she moved into a rented house with Patrick Burns. The judgments do not indicate his age but a newspaper report

---

[6] See A Bottomley 'From Mrs. Burns To Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181, 183.
[7] See eg: Law Society *Cohabitation – The Case for Clear Law: Proposals for Reform* (2002) 1. For comment on the tendency to emphasise the *Burns* scenario, see the observations of R Probert 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' (2001) 13 *Child and Family Law Quarterly* 275; Bottomley note 6 above.
[8] See news.bbc.co.uk/2/hi/programmes/panorama/2489373.stm for details of the programme and a link to a full transcript.
[9] For discussion of the assumptions underlying this view, see R Probert 'Cohabitation: Current Legal Solutions' (2009) 62 *Current Legal Problems* 316, 321-329.
[10] [1984] Ch 317, 320.

suggests that he was 57 years old (and 'a businessman') at the time of the Court of Appeal's decision in 1983 and so he would have been aged around 35 at the start of the relationship.[11] Fox LJ stated that Valerie 'entered upon her relationship with the defendant knowing that there was no prospect of him marrying her'.[12] The 2002 Panorama television programme provided the additional detail that 'Valerie met Patrick at his driving school the day she passed her test. He'd been married but his Catholic ex-wife refused to give him a divorce.'[13] According to Valerie's account on this television programme, the couple moved in together seven months after this meeting. Cohabitation was much less common in England at that time than at present and, on Valerie's account of the matter, the parties began to cohabit only because she was pregnant.[14] A child was born to the couple in April 1962. In July 1963, when Valerie was again pregnant, a house in North London was purchased for £4,900. The house was purchased in Patrick's sole name and he borrowed £4,500 on mortgage. At this time, it would have been normal for a family home to be held in the sole name of the male partner, even if the couple had been married. Fox LJ stated that:

> The balance of the purchase price and the costs of the purchase were paid by the defendant out of his own moneys. The plaintiff made no financial contribution; she had nothing to contribute. As to the reason for buying the house the judge said that he had no doubt that it was an important factor in the decision that the defendant realised that it was much better use of money to buy an asset – a house – rather than rent a flat (which was what he was doing previously).[15]

---

[11] 'Plea by Mistress Rejected' *The Times*, 27 July 1983, 3. This newspaper report suggests that Valerie was aged 40 at the time of the decision (July 1983) which does not, in fact, tally with her having been aged 20 in the summer of 1961.
[12] [1984] Ch 317, 332.
[13] The quote here, and those which in the following text are attributed to the Panorama programme, are from the transcript available on the BBC website (see n 8).
[14] Some indication of contemporary judicial attitudes can be found in *Diwell v Farnes* [1959] 1 WLR 624 (although, of course, this case deals with a cohabitation which ended, rather than began, at around the relevant time; the cohabitation in *Diwell* actually started in 1941). The majority of the Court of Appeal in *Diwell* overturned the decision at first instance that the female claimant was entitled to a half share in a home in the sole name of her partner, holding instead that she was entitled to a share proportionate to her contributions to the purchase price of the property. There was a reference by Omerod LJ (ibid, 631) to the proposition that it would not be possible to enforce a contract based on immoral consideration. While *Diwell* was less generous in its treatment of cohabitants than of spouses, the approach which the Court of Appeal declined to apply to cohabitants was based on the view, influenced by s 17 of the Married Women's Status Act 1882, that the maxim that 'equality is equity' could be applied in a sweeping manner where spouses had contributed to the acquisition of a family home. This more generous approach was, in any case, rejected by the House of Lords in the later cases of *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.
[15] [1984] Ch 317, 327.

The second child was born in October 1963. The parties lived together in the house until 1980. Valerie changed her name by statutory declaration and 'their friends and acquaintances believed them to be married'.[16]

When the children of the relationship were young, Valerie did not work but stayed at home to care for them. In the late 1960s, 'as a result of qualifying as an instructor in flower arrangement she was able to earn a little by giving lessons in flower arrangement'.[17] The amounts involved were, however, small. In 1972, Valerie began a driving instruction business. While the business was initially on a limited scale, by 1975 Valerie was earning an appreciable amount and, from 1977 or 1978 until she left the defendant in 1980, she was earning roughly £60 per week net of expenses.[18] Valerie's money was spent in various ways. She 'made gifts of clothing and other things to the defendant and the children', paid for the telephone bills (by agreement with the defendant 'because she spent a lot of time on the telephone talking to her friends') and bought various household chattels. She also paid for the housekeeping and the rates but this was done with the benefit of a generous housekeeping allowance from the defendant (£60 per week in the later stages of the relationship), which was calculated so as to take account of the rates.[19] At one point, Valerie also redecorated the house, since she preferred wallpaper to paint.[20]

The 'figure' of the male defendant is notably absent from the judgments in the case. Patrick King Burns represented himself before the Court of Appeal[21] but no comment is made on this in the judgments. We are given no sense of his age or of the nature of his employment or the motive for his unwillingness to marry (although, as has been mentioned above, other sources shed light on these issues). Fox LJ felt that it was 'evident that in a number of respects he treated her very well. He was generous to her, in terms of money, while the relationship continued. And, what in the long term is probably more important he encouraged her to develop her abilities in a number of ways, with the result that she built up the successful driving instruction business.'[22] Fox LJ may also have had in mind the fact that in 1972 Valerie 'took flying lessons and qualified as a pilot of light aircraft in 1973',[23] as well as her qualifying as an instructor in flower arrangement. In terms of the ending of the relationship, and the defendant's role in this, the Court of Appeal judgments state only that relations between the parties had deteriorated in the final two years of the relationship[24] and that Valerie 'left' the defendant in 1980.[25] A newspaper

[16] Ibid, 320 per Waller LJ.
[17] Ibid, 328 per Fox LJ.
[18] Ibid.
[19] Ibid.
[20] Ibid, 330.
[21] See ibid, 320. The summary of the arguments shows the defendant having simply contended that the trial judge had correctly applied *Pettitt* and *Gissing*. Contrast the more elaborate argument on behalf of the claimant: ibid, 319-320.
[22] Ibid, 332 per Fox LJ.
[23] Ibid, 328 per Fox LJ.
[24] Ibid, 320 per Waller LJ.
[25] Ibid, 320 per Waller LJ; 328 per Fox LJ.

report of the Court of Appeal's decision suggests that she 'moved out of their bedroom after he went on an overseas trip with a female personal assistant'.[26] According to Valerie's account given many years later on Panorama, having turned a blind eye to Patrick's affairs for many years, she finally confronted him and told him 'You've got to make a choice, it's either me or ... you know ... the lifestyle'. He refused to change and 'so that was it'.

The Decision

Valerie sought a declaration that the home was held on trust by the defendant in equal shares for herself and the defendant or, alternatively, in such shares as the court saw fit. She also sought a sale of the house, in which the defendant was apparently still living,[27] and an appropriate division of the proceeds of sale. She was unsuccessful at first instance, before Dillon J (although no written judgment appears to be available in respect of this stage of the litigation). On appeal, the Court of Appeal also rejected her claim and, subsequently, the Appeal Committee of the House of Lords refused leave to appeal.[28]

Valerie's claim to a beneficial interest in the home was based on a number of arguments. She relied, first, on an indirect contribution to the acquisition of the house through the income from her driving instruction business; secondly, on a contribution in the form of the redecoration of the house and the purchase of household chattels and fixtures and fittings; and, finally, she relied upon the fact 'that the plaintiff had been held up to the world as his wife by the defendant [and] had maintained the home and brought up their children during a period of 16 years'.[29] Applying the 'common intention' analysis developed in *Gissing v Gissing*,[30] both May LJ and Fox LJ concluded that no common intention had existed between the parties that the beneficial ownership of the house would be shared. A difficulty with the claim based on indirect financial contributions was that any contribution from her earnings had, in substance, only begun in 1975 – twelve years after the purchase of the property. This suggested that, at the time of the initial purchase, no common intention had existed between the parties. While it would be possible for the parties to form a common intention at some time subsequent to the purchase, for example on the occasion of the early discharge of the mortgage or the making of capital improvements to the property,[31] there was nothing to indicate that this had taken place on the facts of the case. Similarly, the limited contributions to the redecoration of the house and the purchase of household chattels were not regarded as sufficient to indicate the existence of a common intention.[32]

---

[26] 'Plea by Mistress Rejected' *The Times*, 27 July 1983, 3.
[27] Ibid.
[28] [1984] Ch 317, 345. The petition was refused on 17 November 1983 by Lord Diplock, Lord Scarman and Lord Brightman.
[29] Ibid, 319.
[30] [1971] AC 886.
[31] [1984] Ch 317, 327 per Fox LJ.
[32] Ibid, 329-330 per Fox LJ.

As for the claimant's work in bringing up the children and taking care of the home, Fox LJ agreed that, at the time of the purchase, the claimant 'contemplated living with the defendant in the house and, no doubt, that she would do housekeeping and look after the children'.[33] However, Fox LJ went on to state that:

> [T]hose facts do not carry with them any implication of a common intention that the plaintiff should have an interest in the house. Taken by themselves they are simply not strong enough to bear such an implication.[34]

Thus, Fox LJ found that the intention that the claimant would work in the home did not suffice to demonstrate the existence of a common intention at the time of the initial purchase. He also emphasised that the fact that she subsequently did act as envisaged, taking care of the children and of the home, did not serve to alter the parties' property rights.[35] Similarly, May LJ took the view that:

> [W]hen the house is taken in the man's name alone, if the woman makes no 'real' or 'substantial' financial contribution towards either the purchase price, deposit or mortgage instalments by the means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union.[36]

Waller LJ gave a judgment in which he appeared to be shaping up to hold in favour of the claimant. He showed sympathy with the 'imputed' intention approach favoured (in somewhat different forms) by both Lord Reid and Lord Diplock in *Pettitt v Pettitt*.[37] This involves imputing to the parties a fictional intention based on the intention that, as reasonable people, they would have held if they had directed their minds to the question of their separate property entitlements. The orthodox view is that this type of approach had been rejected in *Pettitt* and in *Gissing v Gissing*.[38] On one view of the matter, this approach is 'the one that got away', in that it represents an alternative path of development for the law which could have resulted in a much more potent set of remedies for claimants upon the termination of cohabitation. Waller LJ commented that '[i]f the law permits it a deemed intention between the parties would surely include some provision to make up for the statutory rights which marriage would have given in the event of a break up'.[39] However, he concluded his judgment (somewhat abruptly) by stating that, having

---

[33] Ibid, 327 per Fox LJ.
[34] Ibid, 327-328 per Fox LJ.
[35] Ibid, 330-331 per Fox LJ.
[36] Ibid, 345.
[37] [1970] AC 777. Note also the speech of Lord Reid in *Gissing v Gissing* [1970] AC 886.
[38] [1971] AC 886.
[39] [1984] Ch 317, 326.

read the judgments of May LJ and Fox LJ in draft, he was 'reluctantly persuaded that the law does not permit this court to impute a deemed intention on the facts of this case'.[40]

All the judges evinced sympathy in respect of the failure of Valerie's claim. As has just been explained, Waller LJ came close to upholding the claim. May LJ commented that, when one compared the result in the case to the one that would have prevailed had she been married, 'she can justifiably say that fate has not been kind to her'. However, in his opinion, 'the remedy for any inequity she may have sustained is a matter for Parliament and not for this court'.[41] Similarly, Fox LJ (having noted that the defendant had, in many respects, treated the claimant well during the relationship) commented that '[n]evertheless, she lived with him for 18 years as man and wife, and, at the end of it, has no rights against him. But the unfairness of that is not a matter which the courts can control. It is a matter for Parliament.'[42]

Assessing the Decision in Terms of Doctrine and Existing Authority

Writing in the wake of the decision, Lowe and Smith commented that '[i]n legal terms, the decision in *Burns v Burns* should occasion no real surprise', in light of the failure of the claim in *Gissing v Gissing*.[43] This view was quickly questioned by Dewar who drew attention to 'the equally recent Court of Appeal decision in *Gordon v Douce*[44] [which] points to the existence of an alternative method of disposing of such cases, the ramifications of which extend beyond the arid confines of the law of implied trusts'.[45] Dewar went on to argue for the existence of an 'alternative doctrine' existing alongside the 'orthodox doctrine', this alternative doctrine amounting to a version of the doctrine of proprietary estoppel. Unfortunately, Dewar's reliance on *Gordon v Douce* seems to have been misplaced. Dewar argued that 'the full explanation' for 'such a divergence of result' as between *Burns* and *Gordon v Douce* 'must lie in the fact that the two (differently constituted) Courts of Appeal applied different brands of implied trust doctrine on each occasion without apparent consciousness of the fact'.[46] However, there was, in fact, no appeal in *Gordon v Douce* in respect of the finding that the claimant was entitled to a 25% share in the beneficial interest.[47] The *only* issue in the Court of Appeal in *Douce* was the proper date of valuation of the parties' shares (although this is described by Dewar as 'the *other* issue on appeal' in the case).[48] It is true that the judgments of

[40] Ibid.
[41] Ibid, 345.
[42] Ibid, 332.
[43] 'The Cohabitant's Fate?' (1984) 47 *Modern Law Review* 341, 344.
[44] [1983] 2 All ER 228.
[45] 'Promises, Promises' (1984) 47 *Modern Law Review* 735, 735.
[46] Ibid, 736.
[47] [1983] 2 All ER 228, 230 per Fox LJ.
[48] Ibid, 735 (emphasis added). Note also that Fox LJ, one of the judges in *Burns*, was one of the two judges in *Gordon v Douce* (along with Bush J).

Fox and May LJJ in *Burns* present a conservative view of the 'common intention' analysis, tending to speak in terms of the 'resulting trust' and downplaying the aspects of the doctrine that are closest to proprietary estoppel. As was demonstrated by *Grant v Edwards*,[49] not long after the decision in *Burns*, somewhat different factors come into play in cases where there is an express common intention. However, while *Burns* does not offer a particularly crisp statement of the common intention doctrine as a whole, it is not clear that the judges in the case failed to apply that (limited) doctrine properly to the specific facts of the case, since there was no suggestion in the case that there had been express discussions between the parties in respect of sharing ownership of the house.

The facts of *Burns* were not directly comparable to those in *Gissing* itself, given that the claimant wife in *Gissing* had worked full-time, except for a short period around the time of the birth of the couple's only child (although '[s]he, of course, did all the household work of cleaning and cooking').[50] Nonetheless, according to May LJ in *Burns*,[51] the claim in *Burns* was 'no stronger than that put by Lord Diplock' in the following key passage from his speech in *Gissing*:

> Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household.[52]

Even though there does not appear to have been any prior decision expressly ruling out a claim based on work in the home,[53] it seems difficult to argue that the conduct

[49] [1986] Ch 638.
[50] [1969] 2 Ch 85, 100 (CA) per Phillimore LJ. On contemporary assumptions about women's work, see Douglas, this volume.
[51] [1984] Ch 317, 331-332.
[52] [1971] AC 886, 909. A dictum of Lord Diplock in *Pettitt v Pettitt* [1970] AC 777, 826A-B was also relied upon in *Burns* [1984] Ch 317, 330 per Fox LJ; 342 per May LJ. However, the relevant dictum of Lord Diplock emphasises that the home improvement activities of the 'husband' while 'the wife does the shopping, cooks the family dinner or bathes the children' do not establish a common intention to alter the 'existing proprietary rights in the family home *on which they are undertaken*' (emphasis added). The italicised words appear to indicate that Lord Diplock was commenting on the effect of the activities of the 'husband', and not (directly at any rate) on those of the 'wife'. The dictum of Lord Hodson in *Pettitt* [1970] AC 777, 811B-D (referred to by Fox LJ in *Burns* [1984] Ch 317, 330) seems to be more in point.
[53] Note the remarks of Lord Lowry in *Hanlon v Law Society* [1981] AC 124, 200 (a costs case) which indicate a view that financial contributions, rather than 'contributions (using that word in a broad sense) … to the welfare of the home', are required to justify the inference of a common intention to

of Valerie Burns, in caring for the children of the family, could form the basis for an inference that there must have been an actual common intention between herself and Patrick Burns that she would have a share in the ownership of the house. Such an inference of fact seems all the more implausible since, firstly, the house was purchased in 1963, when the expectations of an average cohabitant may have been more limited than today and, secondly, the defendant was considerably older than the claimant, had already been through a marital breakdown and may well have been concerned to protect his separate property rights (making it less likely that he would have given the claimant the impression that she could hope to share in the ownership of the house).[54] Thus, it does not appear that, consistently with *Gissing*, the claim in *Burns* could have succeeded.

It is true, of course, that maintaining consistency with *Gissing* was not a notable concern of Lord Denning MR in a series of Court of Appeal decisions between *Gissing* and *Burns* (most of these decisions being made in the first few years after *Gissing*).[55] Lord Denning MR's approach to the relevant type of case had been that 'whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust'.[56] The emphasis in the relevant authorities was on the status of indirect financial contributions and it is unclear, in fact, whether or not Lord Denning MR would have been willing to uphold the claim of Valerie Burns if the decision had fallen to him.[57] If one were applying Lord Denning MR's test, the question would be

---

share the beneficial interest. In general, it may be that it was regarded as clearly established by *Gissing* that some form of financial contribution was necessary, so that counsel did not tend to rely on contributions in the form of work in the home. Note eg the rejection of the claim in *Wood v Wood*, Court of Appeal, 7 July 1982 (Lexis). While it appears likely that the claimant was looking after the couple's young daughter, no mention was made of this possible contribution in the case (although there was discussion of the claimant's having done odd jobs around the farm).

[54] The Panorama television programme (see note 8 above) includes a clip from a November 1983 'Sixty Minutes' programme in which Patrick Burns refuses to agree that the law as applied in *Burns* was unfair. The impression one gains is of a person with a strong sense of his own entitlements (who might indeed be the kind of person who would insist on his partner's agreeing to an opt-out if legislation were passed allowing the courts to adjust the rights of cohabitants upon the termination of their relationship).

[55] See *Falconer v Falconer* [1970] 1 WLR 1333; *Davis v Vale* [1971] 1 WLR 1022; *Hargrave v Newton* [1971] 1 WLR 1611; *Hazell v Hazell* [1972] 1 WLR 301; *Cooke v Head* [1972] 1 WLR 518; *Hall v Hall* (1982) 3 FLR 379. Note also the authorities in which Lord Denning MR supported the idea of a 'new model constructive trust' to be applied whenever 'justice and good conscience' required it, including *Hussey v Palmer* [1972] 1 WLR 1286 and *Eves v Eves* [1975] 1 WLR 1338. See also *Richards v Dove* [1974] 1 All ER 888 and the joint names case of *Bernards v Josephs* [1982] 1 Ch 391. Note, finally, the failure of the claim in *Carley v Smith*, Court of Appeal, 23 June 1980 (Lexis) (15 years of cohabitation, claim not based on child-rearing; Lord Denning not a member of the panel).

[56] *Cooke v Head* [1972] 1 WLR 518, 520.

[57] Certain comments of his in *Kowalczuk v Kowalczuk* [1973] 1 WLR 930 arguably suggest that he would not have been willing to do so. See ibid, 934 where Lord Denning MR commented that 'I would not be prepared to go so far as the registrar seems to have done in taking into account – under section 17 [of the Married Women's Status Act 1882] – her contributions in looking after and bringing up the family and in looking after the house, buying the food and so forth. Such contributions can be considered [when the court is exercising its discretion to adjust property rights

whether the facts of *Burns* would have justified the conclusion that the house had been acquired by the 'joint efforts' of the parties, this being a rather imprecise criterion. A possibly more expansive approach was suggested by a dictum of Lord Denning MR in 1981 in *Hall v Hall*[58] to the effect that the share to be obtained by a claimant 'depends on the circumstances and how much she has contributed – not merely in money – but also in keeping up the house; and, if there are children, in looking after them.'[59] However, it seems that Lord Denning was here discussing what would now be referred to as the question of quantification ('But what should that share be?')[60] – a question which would only arise if 'because of her contributions to the joint household'[61] or, as he put it earlier, 'to the establishment of the joint household',[62] she became entitled to a share 'by way of a resulting trust'.[63] It remains unclear whether Lord Denning felt that the claimant's contributions had to have a financial aspect, with non-monetary contributions in terms of childcare and similar work then 'piggybacking' on the financial contributions at the quantification stage,[64] or whether non-financial contributions alone would have been sufficient to get over the initial hurdle of establishing a trust in favour of the claimant.

Even if one concludes that Lord Denning MR, operating at full stretch as it were, would have found a way to hold in favour of Valerie Burns if it had been up to him, it does not seem plausible to regard the result reached in *Burns* as representing a backlash against the liberal approach implemented by Lord Denning in the 1970s. It would, in fact, have been an extremely bold step for the Court of Appeal to have upheld the claim in *Burns* in the face of *Gissing*.[65] Since the result in *Burns* was dictated by the application of conventional doctrine to the facts, there does not appear to be room to regard that result as a reaction by the Court of Appeal against the liberties taken by Lord Denning with the doctrine of precedent in his treatment of family home cases with different facts. In fact, Lord Denning's relatively generous approach in cases such as *Falconer v Falconer*,[66] *Hazell v Hazell*[67] and *Cooke v Head*[68] did not come in for any criticism in *Burns*.[69] Overt disagreement with Lord Denning

---

in the divorce context] but not under section 17 of the Act of 1882.' Note, however, that the claim in this case was weakened considerably by the fact that the disputed house had been acquired by the defendant prior to the marriage.

[58] (1982) 3 FLR 379.

[59] Ibid, 382.

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Compare *Midland Bank v Cooke* [1995] 4 All ER 562.

[65] Greater scope to take a new direction would have been available to the House of Lords but, as mentioned earlier, leave to appeal was refused by the Appeal Committee of the House of Lords: see text to note 28 above.

[66] [1970] 1 WLR 1333.

[67] [1972] 1 WLR 301.

[68] [1972] 1 WLR 518.

[69] Although May LJ seemed to prefer Brightman J's majority approach in *Eves v Eves* [1975] 1 WLR 1338 to Lord Denning's 'new model' constructive trust approach in that case.

seems to have been confined to his dictum in *Hall*, discussed above, which may or may not go further than his approach in the earlier cases.

This Part has considered the decision in *Burns* itself. Part 2 will now consider the impact of an important piece of legislation that is relevant to the issues raised by *Burns*. It will be concluded that the relevant provisions, although serving an important function, do not provide a substitute for possible judicial or legislative reform in respect of property claims based on a cohabitant's contributions and sacrifices during the relationship. Part 3 will then discuss, in light of the decision in *Burns*, the issues in respect of possible judicial reform.

SCHEDULE 1 OF THE CHILDREN ACT 1989 AND THE *BURNS* SCENARIO

Since *Burns v Burns* was decided, there has been a significant change in the statutory position, in the form of Schedule 1 of the Children Act 1989.[70] According to Ruth Deech, *Burns* is generally cited as an example of a case where hardship can occur '[b]ut this argument overlooks the passage… of Sch 1 of the Children Act 1989'.[71] In a more detailed and cautious discussion, Rebecca Probert also sees some potential in this section,[72] which seems to have been underused in the past.[73] Schedule 1 gives the court the power to order the making of periodical payments or the transfer of a lump sum or the settlement or transfer of property, either to the child or to the applicant for the benefit of the child. The applicant can be 'a parent or guardian of a child, or… any person in whose favour a residence order is in force with respect to a child'.[74] As Probert explains, it is possible for an allowance for the child's carer to be included within periodical payments for the child.[75] However, as she also notes, '[t]he case-law is consistent in holding that any property settled on, or for the benefit of the child, must revert to the settlor once the child attains the age of majority'.[76] Probert mentions the possibility, however, that a broader interpretation could be taken. She suggests that it might be argued that, in some cases, 'the potential benefit to the child requires a future benefit to the mother'.[77] The argument would be that it might be best in some circumstances that the parent caring for the child should 'be freed from the necessity of seeking employment [during the children's minority] and that this requires that the carer should be

[70] See Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307) (July 2007) 36-38; 169-171.
[71] R Deech, 'Cohabitation' [2010] *Family Law* 39, 42.
[72] Note 9 above, 336-338.
[73] Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper* (Law Com Consultation Paper No 179) (May 2006) 81-84.
[74] Schedule 1, para 1(1).
[75] Note 9 above, 336.
[76] Ibid, 337.
[77] Ibid.

entitled to retain at least some part of the property's value even after they have attained their majority'.[78]

For present purposes, the key point about Schedule 1 is that it looks forward rather than backwards. In other words, it does not address the sacrifice made by a cohabitant in relation to *past* child-care activity. Even if its full potential were realised, it would simply operate to prevent a former cohabitant from sustaining further loss as a result of *future* child-care activity (after the termination of the cohabitation). As has been mentioned, there is the possibility that a claimant who cares for the children of the relationship after its termination might end up retaining some property after the children reach their majority. However, if this were to occur, it would simply be paid for by *further* sacrifice on the part of the former cohabitant, in addition to that which occurred during the currency of the relationship. Thus, it is difficult to see how Schedule 1 can be regarded as providing a remedy for perceived injustice resulting from the cohabiting relationship and its termination – even though it may reduce the scope for further loss to the claimant, on top of that which has already been sustained by the time that the relationship ended. It must be remembered that no order would be possible under Schedule 1 unless the claimant continues, after the termination of the cohabitation, to have responsibility for child-care. Thus, there would be no possibility of a remedy under this legislation if it happened, for whatever reason, that the children of the relationship went to live with the defendant after the end of the relationship (although, presumably, it would very often happen that the partner who had been looking after the children during the relationship would continue to do so after its termination). Similarly, Schedule 1 would be of no value if the cohabiting relationship lasted until after the minority of children – in *Burns*, for example, the children of the relationship were aged 18 and 17 at the time when Valerie Burns first issued proceedings against her partner[79] (and 21 and 19 at the time of the Court of Appeal's judgment).

Overall, in terms of the possible need for reform, it does not appear that the landscape is decisively altered by the enactment, since *Burns v Burns*, of Schedule 1. The discussion now turns to the issues surrounding the potential role of the law of trusts in accomplishing reform.

POSSIBLE JUDICIAL REFORM THROUGH THE LAW OF TRUSTS

To many people with an interest in family law, *Burns* may be seen to have been wrongly decided, with the courts allowing the technicalities of the law of trusts to stand in the way of social justice. The issues surrounding possible judicial law

[78] Ibid.
[79] The first child was born on 29 April 1962 and the second child on 9 October 1963: [1984] Ch 317, 320 per Waller LJ. Valerie Burns issued proceedings on 14 January 1981, approximately six months after leaving her partner: ibid, 318.

reform through the law of trusts are explored in this final Part of the Chapter. The point is made, first, that it is questionable whether it would be legitimate, in democratic terms, for the courts to embark on radical reform of the law in this important area without the input of the legislature. Secondly, consideration is given to the role of the law of trusts in possible judicial law reform. It is pointed out that the law of trusts is important in its own right and that adverse consequences, outside the cohabitation context, may result from distorting the principles of the law of trusts in order to provide a remedy to cohabitants in a wider range of cases. Finally, it is argued that if, as appears to be required in the interests of democratic legitimacy, judicial law reform must be confined to the incremental development of existing principles (principally, the common intention constructive trust), then the outlook on this front is not favourable. This suggests that, if reform is to occur, it should be undertaken by the legislature. The implication is that *Burns* was not wrongly decided, although it is a different question as to whether the legislature should intervene to alter the rules applying to property disputes arising upon the termination of cohabitation.

Doctrine and Democratic Legitimacy

In considering whether it is really for the courts to preside over 'the evolution of the law of property to take account of changing social and economic circumstances',[80] it is necessary to bear in mind that, in order to have democratic legitimacy, doctrinal development must build incrementally on existing legal principles. The point has been expressed as follows in the High Court of Australia:

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles… It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent' for every social, political or economic problem.[81]

It seems clear that, in terms of this issue, a free pass cannot be obtained simply by suggesting that the desired change in the law should be brought about through the intervention of equity. As is illustrated by the failure of Lord Denning's attempt in the 1970s to gain recognition for a 'constructive trust of a new model' which would apply whenever justice and good conscience require it,[82] the law of trusts is not subject to some peculiarly lax regime in terms of the scope for its development.

---

[80] *Stack v Dowden* [2007] UKHL 17, [46] per Baroness Hale.
[81] *Breen v Williams* (1996) 186 CLR 71, [46]-[47] per Gaudron and McHugh JJ (footnote omitted)
[82] See J Mee, *The Property Rights of Cohabitees* (Oxford, Hart Publishing, 1999) chapter 6.

In relation to the connection between legal doctrine and democratic legitimacy in the present context, it should be remembered that even if '[i]t may be an article of faith for some that cohabitation is a superior relationship to marriage'[83] and another article of faith that cohabitants' rights should be increased, not everyone shares the same faith on these matters. What of the proverbial '*Daily Mail* readers' who object strongly to (what they see as) any attack on the institution of marriage; or those observers who see the process of attaching greater legal rights and duties to cohabitation as representing the triumph of the marriage model, with less conventional forms of personal relationship being forced into the same mould as traditional marriage? Do people holding these opinions not get a vote? The answer is, of course, 'no' if radical reform takes place through the courts.[84] The question is whether, if one is personally in favour of a particular change in the law, it is defensible to argue that the courts should implement that change, without reference to whether it would represent a legitimate development of existing legal principles. Jeremy Waldron, in *Law and Disagreement*,[85] argues plausibly for the central role of the legislature in resolving disagreements amongst citizens in respect of what the law should be. If one person argues, on the basis of one world-view, that their viewpoint is correct and another person, having another world-view, argues the opposite, who is to determine which one is right, if not the democratically elected legislature? The argument runs into greater complexities if the point at issue relates to what are argued to be basic human rights.[86] However, in the context of the debate on cohabitants' rights, it does not, at present, appear that human rights norms require any major change in the current law.[87] Moreover, as well as its merits as a matter of principle, the argument about democratic legitimacy as a bar to judicial law reform is lent practical importance by the fact that the courts in England and Wales appear, on the whole, to accept it in the present context. No drastic judicial reform of the rights of cohabitants has yet been forthcoming, in contrast to the position in, for example, Canada, Australia and New Zealand.[88]

A further point can be made concerning the legitimacy of judicial law reform, by reference to the law reform process in this area in the United Kingdom and

[83] Probert note 9 above, 325.
[84] Note Caroline Sawyer's radical suggestion ('Equity's Children: Constructive Trusts for the New Generation' (2004) 16 *Child and Family Law Quarterly* 31, 46) that equity should give birth 'to a sibling form of the 'common intention' constructive trust' which would recognise 'an obligation to share equitable interests founded on shared parental obligation to bring up children'. She explicitly argues (ibid, 48) that the courts would have the advantage of being 'more removed than the legislature from the direct political effects of public resistance'.
[85] (Oxford, Clarendon Press, 1999).
[86] For recent discussion, see M Tushnet, 'How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?' (2010) 30 *Oxford Journal of Legal Studies* 49.
[87] For discussion, see eg S Wong, 'Rethinking *Rosset* from a Human Rights Perspective' in A Hudson (ed), *New Perpectives on Property Law, Human Rights and the Home* (London, Cavendish, 2004); S Wong, 'The Human Rights Act 1998 and the Shared Home: Issues for Cohabitants' (2005) 27 *Journal of Social Welfare and Family Law* 265.
[88] See the discussion of these developments, and a critique on doctrinal grounds, in Mee note 82 above, Chapters 7-9.

Ireland. As is well known, the Law Commission published a report in 2007 containing recommendations for reform.[89] The Law Commission's proposals are complicated and subject to a variety of limitations. The Government subsequently indicated that it would take no action on the relevant report, pending an assessment of the efficacy and cost of the scheme in the Family Law (Scotland) Act 2006,[90] which 'has provisions which are similar in many respects to those which the Commission recommends'.[91] Recent legislation passed in Ireland, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, is partly concerned with the introduction of civil partnership for same-sex couples.[92] However, the Act also sets up a scheme for 'qualified cohabitants', which applies to heterosexual or same-sex couples who live together without marriage or civil partnership.[93] The availability of most of the remedies under the Act is dependent on the claimant establishing that, as a result of the relationship or of its termination, he or she is 'financially dependent' on the other cohabitant.[94] The broader significance of the varying approaches to legislative law reform is that they call into

---

[89] *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307) (July 2007). See G Douglas, J Pearce and H Woodward 'The Law Commission's Cohabitation Proposals: Applying Them in Practice' [2008] *Family Law* 351; D Hughes, M Davis and L Jacklin ''Come Live with Me and Be My Love' – A Consideration of the 2007 Law Commission Proposals on Cohabitation Breakdown' [2008] *The Conveyancer and Property Lawyer* 197; R Probert, 'A Review of Cohabitation: The Financial Consequences of Relationship Breakdown, Law Com. No. 307 (HMSO 2007)' (2007-2008) 41 *Family Law Quarterly* 521; G Douglas, J Pearce and H Woodward 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24.

[90] See in particular ss 25-29. See generally, T Guthrie; H Hiram 'Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006' (2007) 11 *Edinbugh Law Review* 208.

[91] See the Ministerial Statement by Bridget Prentice, Parliamentary Under Secretary of State, Ministry of Justice: *Response to paper on cohabitation and relationship breakdown* (6 March 2008).

[92] The Act came into force on 1 January 2011.

[93] See Part 15 of the Act. Section 172 provides that 'qualified cohabitants' must have lived together in 'an intimate and committed relationship' for at least 2 years, if they are the parents of one or more dependent children or, if not, for at least 5 years. There is an ill-conceived limitation in s 172(6) in respect of cases where one or both of the cohabitants is married to a third party; in order for the parties to constitute qualified cohabitants, the 'married' cohabitant must have 'lived apart from his or her spouse for a period or periods of at least 4 years during the previous 5 years' (so as to be eligible to seek a divorce under Irish law). For criticism of this aspect of the legislation, see J Mee 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (2009) 12 *Irish Journal of Family Law* 83, 84-86.

[94] See 173(2), relating to property adjustment orders, maintenance orders and pension adjustment orders. Financial dependency is not normally a prerequisite for the availability of orders for provision from the estate of a deceased cohabitant (see s 194) but its absence is a disqualifying factor where the relationship had terminated prior to the death of the cohabitant from whose estate provision is being sought (see s 194(5)). Thus, the drafters of the Act seem to have been thinking predominantly in terms of cases which resemble *Burns v Burns*, in that a claimant has sacrificed earning prospects in order to devote himself or (more likely) herself to child-rearing and work in the home. In the view of the current author, the cohabitation scheme in the Irish Act is seriously flawed. For criticism of aspects of the Bill which led to the 2010 Act, see Mee note 93 above (see in particular 86-89 on the requirement of financial dependency); J Mee 'Succession and the Civil Partnership Bill 2009' (2009) 14 *Conveyancing and Property Law Journal* 86. Some improvements were made to the Bill in the course of its passage through parliament (particularly in relation to the succession law provisions) but, unfortunately, the concept of 'financial dependency' has continued to be central to the statutory scheme. See generally, J Mee 'Cohabitation Law Reform in Ireland' (2011) 23 CFLQ 323.

question the legitimacy of any attempt by the courts to short-circuit the democratic process by, in effect, advancing a reform scheme of their own. A consideration of the range of possible judicial reforms suggests that they do not resemble the more nuanced (and potentially more limited) legislative schemes that have been enacted or discussed in England and Wales, Scotland, or Ireland.

The Role of the Law of Trusts

In light of the general point about democratic legitimacy made in the previous section, it is necessary now to take a step backwards and look at the fundamental question of why it might be considered that the law of trusts is the appropriate venue for the rectification of perceived injustice arising upon the termination of intimate cohabitations. Henry Kissinger famously (but, it seems, apocryphally) asked 'Who do I call if I want to call Europe?'[95] So, if you want to reform the law on cohabitants' rights, whom do you call? If the answer is not to be 'the legislature', it would seem necessary to identify an area of law, the existing principles of which hold out the possibility for appropriate development to address the problem at issue. It would be necessary that the candidate legal area is sufficiently mature to handle the challenge, so that if the infant law of restitution had been put on the line in 1970 we might have heard little more than a few gurgles. Even now, as a somewhat pampered adolescent, the law of restitution may not be in a position to give much assistance (although the possibility of a radical change of direction cannot be ruled out entirely).[96] Thus, in *Pettitt* and *Gissing*, after a brusque exchange with the law of contract, we were finally put through to the law of trusts.

The attraction of the law of trusts was originally the existence of the presumption of resulting trust. The ancient doctrine of the purchase money resulting trust is rooted in historical conditions that no longer prevail. Hundreds of years ago, when a person made a conveyance of land without consideration, it was most likely that the person taking the conveyance was intended to be a trustee. Accurately reflecting the likely genuine intention of the parties in the relevant period of history, equity was willing to presume, in the absence of rebutting evidence, that the original owner intended to create a trust. This doctrine was subsequently developed to cover the analogous case of the purchase of property in the name of another. By force of inertia, the presumption of resulting trust remained part of the law even after the passing away of the historical circumstances which originally justified it.[97] A key problem for a cohabitant claiming a share of his or her

---

[95] See eg the comments of Gideon Rachmann, chief foreign affairs commentator for the Financial Times: blogs.ft.com/rachmanblog/2009/07/kissinger-never-wanted-to-dial-europe.

[96] Note Lord Walker's comments on the law of unjust enrichment in *Stack v Dowden* [2007] UKHL 17, [23], [28].

[97] Some modern restitution scholars have, in my view, sought to rewrite legal history by suggesting that the relevant aspects of resulting trust doctrine do not simply reflect historical circumstances which no longer prevail but rather represent a defensible commitment by the law to a particular attitude to the reversal of unjust enrichment. See eg: P Birks, *An Introduction to the Law of Restitution* revised edn (Oxford, Clarendon Press, 1989) esp 54-73; P Birks, 'Restitution and Resulting Trusts' in

partner's property is that the parties are, or at least the claimant is, unlikely to have given attention to the parties' separate property entitlements. The utility of a presumption of intention is that it bridges that gap in a claimant's case by placing the onus on the defendant to prove that the claimant did *not* have the requisite intention, an onus which is difficult to discharge given the fact that the claimant is unlikely actually to have considered the question. The modern common intention trust, although it differs in various respects from the purchase money resulting trust, is still heavily entangled with the older doctrine. Crucially, the purchase money resulting trust turns on the payment of the purchase price for the acquisition of property. Thus, the aspect of the law of trusts that made it seem attractive as a venue for law reform has an inherent focus on financial contributions, in the sense of something which can be interpreted as a payment towards the purchase price of property. It is, therefore, understandable that a legal analysis which has been developed out of the purchase money resulting trust will be limited in its ability to deal with the *Burns* scenario.

In thinking about the role of the law of trusts as a possible location for law reform in this area, it is crucial to remember that the law of trusts, like all areas of the law, has its own function to perform within the legal system. Like impatient visitors to a distant country, irritated at the locals' inability to speak the visitors' language, lawyers concerned only with the achievement of the goal of affording cohabitants greater remedies may chafe at the limitations of equity and trusts. The problem is that the law of trusts is important for reasons other than its role in respect of resolving disputes between cohabitants. We are not talking here about abstract theoretical purity and logic[98] which could appeal only to anorak-clad property-law scholars. Rather, having a sensible law of equity and trusts is important because it impacts upon people's lives (as do all areas of the law). If we develop new rules with a view to increasing the remedies available to cohabiting couples, without somehow ensuring that these rules will apply only to cohabiting couples, then the new expanded rules will obviously be available to those who are not in cohabiting relationships. Thus, the common intention constructive trust is frequently argued in cases not involving spouses or cohabitants, for example in cases involving friends, business partners, parents and children.[99] This is not to argue that people falling into these categories should not receive just treatment from the law but rather that generous rules, devised on the basis of a perception that it is appropriate to treat cohabiting couples on a par with married couples, do not necessarily make sense when applied outside the cohabitation context.

S Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem, Hebrew University of Jerusalem, 1992) 335; R Chambers, *Resulting Trusts* (Oxford, Oxford University Press, 1997); R Chambers, 'Resulting Trusts in Canada' (2000) 38 *Alberta Law Review* 378; P Birks, *Unjust Enrichment* 2nd edn (Oxford, Clarendon Press, 2005) esp 150-152 and 304-307. For one counter-argument, with a historical focus, see J Mee, '"Automatic" Resulting Trusts: Retention, Restitution, or Reposing Trust?' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010).
[98] Compare Probert note 9 above, 332.
[99] See eg: *Yaxley v Gotts* [2000] Ch 162; *Crossley v Crossley* [2005] EWCA Civ 1581; *Turner v Jacob* [2006] EWHC 1317 (Ch).

More specifically, there are obvious dangers in any rule that would require the court to find the existence of an actual common intention in circumstances where, on the normal rules of evidence, no such common intention should be found to exist.[100] The point is that the central proposition behind the common intention analysis – that the court should declare the existence of a trust when a person has acted to his or her detriment on the basis of a common intention that the claimant would obtain a share in the ownership in the home – cannot be regarded as isolated and free-standing. Surely the legal system is not so primitive, our commitment to intellectual coherence in the law so slight, that the central concept underlying an important doctrine can be seen as lighter than air, requiring no support or justification in principle? The relevant proposition, at the centre of the common intention doctrine, can only remain in place if it can be explained by reference to the principles of justice underlying equitable rules in this area. Thus, the basic idea, as expressed by Lord Diplock in *Gissing v Gissing*, is that a remedy should be available when the legal owner of property has led the claimant to act 'to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land'.[101] On the basis of this, or any other plausible foundation in principle for a doctrine that depends on the claimant having acted to her detriment on the basis of a common intention, it is necessary that there have been a genuine common intention on the basis of which the claimant can be said to have acted. If the court finds that a common intention existed, when it really did not, then there is no doctrinal foundation for a remedy.

The advocate of a remedy in these circumstances would effectively be arguing that the foundation in justice for a remedy has nothing at all to do with the logic of the common intention analysis but resides elsewhere, in the special features of cohabitation and, perhaps, in its putative functional similarity with marriage. The potential for collateral damage seems clear when the courts are being urged to ignore the logic of the doctrine they are applying in order to provide remedies for one set of claimants who are thought to be deserving for other reasons. The doctrine being distorted for this purpose will lose all coherence – as has surely happened in this area of the law of trusts – leading to unpredictability, complexity, and potential overkill when that doctrine is invoked by claimants outside the context of cohabitation. This leads to negative consequences for real people (who incidentally may, in their spare time, be cohabitants), who are entitled to expect that the law of equity and trusts – like, say, the law of torts or the law of contract – makes sense and is fit for its range of purposes.

From the point of view of avoiding an inappropriate impact outside the cohabitation context, it would be preferable if radical judicial innovation could be

---

[100] See below (under the heading 'The Limited Potential of the Common Intention Analysis') for discussion of the issues which arise where a common intention can be found to exist but it is unclear how to quantify the share of the claimant.

[101] [1971] AC 886, 905.

expressly confined to the 'family' context, as was Lord Denning's 'family assets' doctrine[102] and as would be, say, an approach based fully on 'imputed intentions' (not merely in the context of quantification) or on reasonable expectations as in New Zealand.[103] This would ensure that rules designed to benefit cohabitants would not be applied in, for example, a business context, or as between people in a very different relationship to that which prevails between cohabitants. This argument does not depend on any desire to keep property law or the law of trusts 'pure', in the sense of being theoretically pristine and uncontaminated by the reality of human life and relationships. Instead, it points out that the argument by some commentators, that there are special features of the cohabitation situation (for example its putative functional similarity to marriage) which justify creating special legal doctrines to apply to cohabitants, does not justify extending those special doctrines to those in relationships which lack the special features of the cohabitation situation.

However, the difficulty with the idea of developing special rules of limited application is that the democratic legitimacy argument, and the general attitude of the English courts in this area, suggests that the courts should not arrogate to themselves the task of devising a quasi-legislative scheme to regulate the property rights of cohabitants. If the courts stick with this line, drawn firmly in *Pettitt* and *Gissing*, then they are confined to trying to develop existing principles of equity to deal with family, personal and business relationships in general. If the courts are proceeding on this basis, this complicates claims by commentators that the law of trusts is engaged in 'allocating' property rights upon the termination of a relationship[104] and that it is seriously at fault because it does not 'ascribe a value' to unpaid work in the home. If one is asking the question, 'is it just, in the abstract, that a cohabitant who has worked in the home should have a claim upon the termination of the relationship?', one is likely to get a different answer than if one is asking the question, 'does the fact that a cohabitant has worked in the home prove that there must have been an actual common intention between the cohabitants that the claimant would get a share in a home in the name of the other cohabitant?'

What has been said thus far does not amount to an argument against somehow developing the law of equity and trusts, on a principled basis, so as to do better justice in disputes between people across the full range of family, personal and business relationships. Nor does it amount to an assertion that the law deals fully satisfactorily with all claims which may arise amongst family members other than cohabitants (so that all problems would be eliminated if the special position of cohabitants could be dealt with by legislation). However, in relation to 'family' claims arising outside the cohabitation context, it is important to remember that 'it

---

[102] See the statement of this doctrine by Lord Denning MR in the Court of Appeal in *Gissing v Gissing* [1969] 2 Ch 85, 93. The doctrine was rejected by the House of Lords in *Pettitt v Pettitt* [1970] AC 777 and in *Gissing v Gissing* [1971] AC 886.
[103] See *Gillies v Keogh* [1989] 2 NZLR 327; *Lankow v Rose* [1995] 1 NZLR 277.
[104] See eg: A Hudson, 'Equity, Individualisation and Social Justice: Towards a New Law of the Home' in A Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home* (London, Cavendish, 2004) 2.

is not the place of law to provide a remedy for every disadvantage'[105] and that equity 'cannot smooth out all of the inequities arising from human relationships'.[106] The creation of more sweeping (and more invasive) rules, involving a higher level of discretion, has the effect of diminishing predictability, potentially involving more people in litigation and the threat of litigation, setting family members against each other in a context of heightened tension, and risking remedies being unjustly granted in favour of claimants who can exploit the open-endedness of the law to present an unmeritorious claim in a plausible way.

The Limited Potential of the Common Intention Analysis

As a final aspect of considering the possibility of judicial law reform, it is necessary to examine whether, by developing existing principles of the law of trusts on an incremental basis, it would be possible to develop a framework which could deal satisfactorily with property disputes arising upon the termination of cohabitation. In this context, it is necessary to emphasise the limitations of the common intention trust doctrine, notwithstanding the more sanguine approach of some other commentators. The unfortunate reality seems to be that the 'common intention' constructive trust doctrine represents an elaborate set of legal cul-de-sacs – a maze in which the courts have become stranded. Judicial stumbling about inside this maze can be viewed by commentators in different ways. One temptation is to take a view coloured by sympathy for claimants and uncomplicated by a willingness to engage with the somewhat tedious principles of the law of trusts (which may, not unreasonably, be regarded as 'tiresomely confused, rather than interesting').[107] This leads to a cheer being sent up each time a decision is made which favours a claimant, irrespective of whether the reasoning in the case is defensible in principle, followed by groans when we end up in the hedge yet again. Many new dawns have been hailed, and retrospective steps lamented, over the years: *Burns v Burns* (booh!), *Grant v Edwards*[108] (hurrah!), *Lloyds Bank v Rosset*[109] (booh!), *Midland Bank v Cooke*[110] (hurrah!), plucky little *Le Foe v Le Foe*[111] (holistic hurrah!), *Oxley v Hiscock*[112] (hurrah! 'fairness'!), *Stack v Dowden*[113] (hurrah! 'context' even if not 'fairness'!)

If one views the cases with a dispassionate eye, it is difficult to see that progress is really being made. Cases such as *Oxley v Hiscock* and *Stack v Dowden*, sometimes regarded as representing an important step forward, were largely concerned with what may loosely be referred to as the problem of 'quantification' –

---

[105] Probert note 9 above, 343.
[106] Mee, *The Property Rights of Cohabitees*, 320.
[107] See Sawyer note 84 above, 34.
[108] [1986] Ch 638.
[109] [1991] 1 AC 107.
[110] [1995] 4 All ER 562.
[111] [2001] 2 FLR 970.
[112] [2005] Fam 211.
[113] [2007] UKHL 17.

in other words, the issue of what happens when it can be established that there was a common intention between the parties that ownership should be shared but the parties never addressed their minds to the question of what shares each person should have. The question of 'quantification' is a difficult one but it should be recognised that the fact that it even arises represents, in a sense, the limited 'pay-off' for the many disadvantages of the common intention trust (in terms of its complexity, expensiveness to apply, confused theoretical foundation and so on). Under the purchase money resulting trust, the battered old hat from which Lord Diplock pulled the common intention rabbit, the question of quantification cannot arise as a separate issue. When the purchase money resulting trust doctrine is applied, a person who contributes to the purchase price of property is presumed to obtain a share under a resulting trust and the share will always be proportionate to the contribution in question. What Lord Diplock's sleight of hand in *Gissing* achieved was the separation of the question of the possible existence of a common intention from the question of what share the claimant should obtain if he or she acted to his or her detriment on the basis of the common intention.[114]

Cases such as *Midland Bank v Cooke*,[115] *Oxley v Hiscock* and *Stack v Dowden* really do no more than try to tap this potential in the common intention doctrine, which was explicit from the very beginning.[116] Although the claimant in *Midland Bank v Cooke* succeeded in obtaining a one-half share, the courts are still likely in many cases to give weight to direct financial contributions by the parties, leading to a lower share for the claimant (as occurred for example in *Oxley v Hiscock*). In addition, problems remain for claimants where it is not possible to infer a common intention in the first case, which was the position in *Burns*. Commentators differ as to how frequently a scenario like that in *Burns*, involving a long-term cohabitation where the claimant has cared for the children of the relationship, is likely to arise in modern times.[117] However, whatever view one takes on that point, it will clearly happen with a reasonable degree of frequency that the defendant will have purchased the disputed property prior to the start of the relationship, thus making it very difficult for the claimant to succeed, irrespective of the nature of his or her contributions, as is illustrated by *James v Thomas*.[118] Moreover, a more generous approach in relation to indirect financial contributions, mentioned in *Stack v Dowden*,[119] would not necessarily help a claimant whose financial contributions began some time after the initial purchase of the home (as, in the case of Valerie Burns, whose 'contribution' was not, in fact, limited to work in the home).

---

[114] See further Mee, *The Property Rights of Cohabitees*, 151-155.
[115] [1995] 4 All ER 562.
[116] See *Gissing v Gissing* [1970] AC 886, 908-909 per Lord Diplock.
[117] Contrast R Probert, 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' (2001) 13 *Child and Family Law Quarterly* 275, 277 with G Douglas, J Pearce and H Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24, 34.
[118] [2007] EWCA Civ 1212.
[119] See [2007] UKHL 17, [12] per Lord Hope; [26] per Lord Walker; [63] per Baroness Hale.

If the common intention constructive trust were to be developed so as to give a remedy in a case such as *Burns,* it would be necessary for the law to permit the inference of a common intention on the basis of the fact that the claimant engaged in child-care activities.[120] Probert suggests that 'the logic of accepting that a common intention can be inferred from indirect contributions also points in favour of accepting domestic contributions as generating a common intention…. Indeed, it might be thought that the argument is more compelling in the case where one member of the couple remains at home to care for a young child'.[121] It is true that, depending on the circumstances, it may well be *more* plausible to infer the existence of a common intention on the basis of domestic contributions when compared with indirect financial contributions. The difficulty is that, in most instances, it does not seem objectively plausible to infer the existence of an actual common intention on the basis of either form of contribution. Probert notes 'the acceptance at the highest level that a distinct set of rules is appropriate when dealing with the family home'.[122] But, if one is operating within the confines of a doctrine which depends on the making of genuine inferences of fact, what is meant by the existence of 'a distinct set of rules'? If the question being asked is still: 'Was there a genuine common intention?', then the answer will very often (even in the context of disputes over the family home) be 'No'. The problem with the common intention analysis is not that judges (or property lawyers) insist on giving the wrong answers to questions concerning the inference of common intentions. The problem is that the questions are not adapted to give the kind of answer that many family lawyers would understandably like to hear.

Some commentators feel that recent cases such as *Oxley v Hiscock* and *Stack v Dowden*[123] supply the magic wings which would allow the courts to escape the maze. However, on a fair reading neither *Oxley* nor *Stack* represents anything like an intellectual 'breakthrough' or 'revolution', notwithstanding the enthusiasm of commentators such as Kevin Gray and Susan Francis Gray in their leading textbook.[124] It is important not to invest too much significance in mere rhetoric (e.g. Baroness Hale's insistence in *Stack* that 'context is everything').[125] Furthermore, it is misleading to construct a neat opposition between Baroness Hale and Lord Neuberger, with Baroness Hale being seen as advancing a revolutionary 'family law'-style solution and Lord Neuberger being seen as offering a powerful dissent based on a clear restatement of orthodox trusts law principles. None of the speeches in *Stack* is impressive in terms of quality of doctrinal analysis and the impact of *Stack* on the law is both limited and complex. The case makes a useful contribution to the extent that it reduces the likelihood that the common intention constructive trust

---

[120] This paragraph discusses the question of whether a common intention can be said to exist in the first case, rather than the question of quantification.
[121] Note 9 above, 342.
[122] Ibid.
[123] Note also *Abbot v Abbot* [2007] UKPC 53.
[124] K Gray and SF Gray, *Elements of Land Law* 5th edn (Oxford, Oxford University Press, 2009) 880-882.
[125] [2007] UKHL 17, [69].

will be applied inappropriately to prevent joint ownership of the family home at law being reflected in joint beneficial ownership.[126] However, it should be borne in mind that this development involves a modest reduction, rather than any increase, in the scope of equitable intervention in this area.

Stack has refocused attention on the question, raised by the speech of Waller LJ in *Burns*, of whether it is possible to 'impute' an intention.[127] One leading commentator has taken the view that the decision of the House of Lords in *Stack* allows the court to impute a common intention to the parties where none existed, so that a claimant can expect a half share in a family home which is held in his or her partner's sole name, provided that the parties' relationship can be regarded as 'communal'.[128] However, this interpretation of *Stack* appears to the current author to be misconceived and any imputation of intention envisaged by *Stack* seems to be confined to cases where a common intention has been established and the only dispute is as to the quantification of the respective shares. The recent Court of Appeal decision of *Kernott v Jones*[129] suggests that (as matters currently stand, at any rate) it is not realistic to expect the law to move towards a new approach of recognising claims based on the imputation of fictional 'reasonable' intentions.

CONCLUSION

The argument in this chapter has been that, even if many do not like the implications of the decision, it is difficult to argue that *Burns v Burns* was wrongly decided on its own terms (although the Court of Appeal did present a rather limited version of the common intention analysis in respects unrelated to the actual facts of the case). Unlike the position following *Gissing v Gissing* in respect of married couples, no legislative reform has followed in the wake of *Burns v Burns*. It is arguable that Waller LJ was correct to suggest that the problem in cases such as *Burns* is not 'one which could readily be dealt with by legislation'.[130] The Law Commission's proposed legislative model seems very complex and, though perhaps not for this reason, may not be enacted in the near future.[131] This chapter has

[126] Unfortunately, the value of this contribution was partially undermined by the questionable finding in *Stack* itself that the claimant was entitled to more than a joint share.
[127] See, in particular, [2007] UKHL 17, [17]-[22], [33] per Lord Walker; [60] per Baroness Hale; [125]-[127] per Lord Neuberger.
[128] S Gardner, 'Family Property Today' (2008) 124 *Law Quarterly Review* 422.
[129] [2010] EWCA Civ 578. See, in particular, ibid, [76]-[77] per Rimer LJ.
[130] [1984] Ch 317, 326. The complexities involved in devising an appropriate legislative scheme are considered in J Mee, 'Property Rights and Personal Relationships: Reflections on Reform' (2004) 24 *Legal Studies* 414.
[131] While the then Labour Government explained its failure to act upon the Law Commission's proposals on the basis of the need to learn from the Scottish experience (see text to note 91 above), it has been argued by G Douglas, J Pearce and H Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24, 26 that the explanation may also relate to 'a more deep-seated concern to avoid being charged by its political opponents with 'undermining marriage' by seeming to improve the position affecting those who choose to avoid that status'.

doubted the legitimacy, in democratic terms, of radical judicial reform in this area and has also suggested that the current common intention trust analysis is not a promising avenue for future development on an incremental basis. This may seem a pessimistic outlook, but where is it decreed that every type of dispute that can arise in society can easily be dealt with by legal means? It may be, however, that something will eventually give – if legislative reform does not occur, then some creative or accidental misreading of existing equitable doctrine may supply the opportunity for the courts to widen the circumstances in which they give a remedy in disputes in the cohabitation (or the wider family) context. *Stack v Dowden* does not represent this sort of turning point, though perhaps the hyperbole surrounding the case may create a suitable climate for a more radical new departure. Such a departure would probably not be defensible in democratic terms – especially if it occurs against the background of a conscious decision by the legislature not to implement legislative reform – but, if the courts were to choose to ignore this obstacle, it is difficult to see who could effectively call them to account. Nonetheless, the clear insistence by Fox and May LJJ that this kind of reform is more appropriately a matter for Parliament establishes *Burns v Burns* as a landmark to guide future judges, if they are willing to heed it.