

The history about common intention law land property essay

Law



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When the courts deal with cohabiting couples they begin by trying to find an express agreement between the parties as to the beneficial interests in their property. For an express agreement to be valid it must comply with the Law of Property Act 1925[4] which requires it to be evidenced in writing. It is highly unlikely that many cohabiting couples will put such an agreement in writing, therefore the courts will have to examine their relationship further in order to decide whether an implied trust can be established.

Common Intention

In 1970 the case of *Pettitt v Pettitt*[5] came before the House of Lords, although this case concerned a resulting trust, it was noted that when dealing with constructive trusts the court should consider all the surrounding circumstances of a relationship. The House of Lords came to accept that an agreement which was not in writing would be enforceable in equity where it constituted a 'common intention' formed between both parties. This case was followed by *Gissing v Gissing*[6], also heard in the House of Lords, which created the possibility of looking behind the formal arrangements between parties to uncover their informal, common intention. It is therefore the common intention of the parties that is to be taken as the root of any equitable interest in a property.[7] In this case it was held that Mrs Gissing had not gained a beneficial interest in the property because spending money on temporary items such as furniture was not the same as contributing to the purchase price of a property. Although this case did not provide for a constructive trust to be created, it was important because The House of Lords had accepted that common intention of the parties played an important part in deciding whether to grant an equitable interest in a

property. This is of great importance to cohabiting couples because there is often no express agreement and looking to common intention is often the only way to establish a fair division of property. The case law following the decision in *Gissing* caused a lot of contradictions. Cases such as *Cowcher v Cowcher*[8], *Grant v Edwards*[9] and *Coombes v Smith*[10] all provided different interpretations of common intention which caused a great deal of uncertainty. In *Cooke v Head*[11] a small contribution to the mortgage repayments and significant practical contributions to the construction of the property were found to amount to conduct which common intention could be taken from. Yet in *Thomas v Fuller – Brown*[12] substantial improvement works to the property were held insufficient. Lord Justice Slade stated, 'A man who does work by way of improvement to his cohabitee's property without a clear understanding as to the financial basis on which the work is to be done does so at his own risk',[13] suggesting that an agreement as to the effect of doing such work should take place before any work is carried out. It can be said that an agreement as such is highly unlikely to exist in reality. Many cohabitants choose to live together, become excited at the new venture and get carried away redecorating and making improvements to their new home without considering the effect of such work on the division of equitable interest in the event that they later separate. In the case of *Lloyds Bank v Rosset*[14] Lord Bridge expressed the view that the previous approaches to common intention lead to too much uncertainty and so he sought to tighten up the circumstances in which the courts could find a constructive trust when property is held in one party's sole name. He identified a two stage test that could be applied. He suggested that a

constructive trust could only be found if: (1) there is common intention to share ownership; and (2) the party seeking to establish the constructive trust has relied on the common intention to his or her detriment.[15] He then went on to say that two forms of constructive trust could be created. Firstly, where there has been an agreement between the parties to share ownership, evidence of an actual conversation agreeing shared ownership of the property is required. A mutual belief if not communicated would fail to be enough,[16] and that it must be clear that the agreement is to share ownership not occupation.[17] If it is not possible to find evidence of an express agreement to share then one may need to be inferred on the mutual conduct of the parties. In tightening up the law on this area Lord Bridge held that the only situation where an inference can be drawn is if direct contributions to the purchase price of a property or mortgage payments have been made. He made very clear that 'it is at least extremely doubtful whether anything less will do'.[18] The strictness of this approach means that if one partner purchased a home in their sole name and made mortgage repayments while the other partner paid all of the bills then the partner paying the bills would not acquire an equitable interest in the property because there was no direct contribution to the purchase price. Neither does it allow a constructive trust to be created in situations where a discussion is not evident but an unspoken common intention between the parties exists. Parties often adjust their lifestyle due to realities of relationships such as the birth of a child or unemployment and in doing so, intentions are usually adjusted. However, applying Rosset where there is no discussion as to the change of intentions will therefore deny a party a right to a share in the

property. It is clear that the principles laid down by Lord Bridge in Rosset often limit the claims of cohabitants in cases where a claim may be appropriate.[19]Further, it can be said that when Lord Bridge set out to tighten up the circumstances in which the court could find a constructive trust, although he made it very clear he also made it very narrow, perhaps too narrow. Hudson makes a very valid point when he says ' the test seeks to impose a very rigid framework on the family which can be said to be the most complex area of society'.[20]The Court of Appeal moved in a number of different directions in the 1990's in an attempt to side step the test in Rosset in favour of more flexible, case-by-case approaches.[21]The 1990's saw a move towards the balance sheet approach and family assets approach which are considered below.

The balance sheet approach

The case of Bernard v Josephs[22]entitled the courts to consider the ' mathematical equity contributed to the acquisition of the property'.[23]The essence of this approach is that a list of financial contributions which each party has made is drawn up by the court and an equitable interest proportionate to the contributions is granted.[24]Huntingford v Hobbs[25]demonstrated how the size of the interest would be proportionate to the contribution to the total purchase price. The balance sheet approach looks at the value contributed to the property rather than applying the harsh test set out in Rosset of direct contributions where ' it is doubtful that anything less will do'. It widened the type of contributions that could be considered, in Springette v Defoe[26]it was held a discount on the purchase price of a property could be taken into account when calculating an equitable

interest in the property. Contingent or future liabilities could also be taken into account.[27]Ultimately, it demonstrated that the courts are prepared to examine ' cogent evidence of the parties' true intentions' rather than to consider themselves bound by contributions made directly to the purchase price at the outset.[28]This approach can be said to be of greater benefit to cohabitants compared to the Rosset approach because it takes into account a wider range of contributions and it looks at contributions made throughout the course of the relationship. It is the practicality of a relationship that contributions will change throughout the duration due to a change in circumstances such as the birth of a child or unemployment and the balance sheet approach takes account of this.

The family assets approach

The courts then turned to look at the family assets approach. In most relationships which last a long time there will be a range of items that have been acquired for the use of the whole family which can include property, cars and other movable items. It can also be said that there is likely to be a lot of communal undertakings made and unspoken understandings as to the ownership of such said items. Waite J was clear that he considered the question of finding a common intention ' detailed, time-consuming and laborious'[29]and it was noted that it is often the case that a couple were ' too much in love at the time either to count the pennies or pay attention as to who was providing them'. For these reasons, it was said that the starting point for the courts should be to assume a party to have half of the total interest.[30]This can be seen to be in line with the familiar maxim that " equality is equity". Yet, four years later in the case of *Midland v*

Cooke[31]Waite LJ held that it is the judge's role to ' undertake a survey of the whole course of dealing between the parties' and take into account any conduct which ' throws light on the question of what shares are intended' before it bases a decision on the maxim giving parties an equal share. The fact that Waite LJ changed his views and interpretation of the law demonstrates that the law is not clear and Waite LJ himself is unsure of what test should be applied. This furthers the argument for reform of the law for a statutory scheme. The family assets approach seems to completely disregard the carefully prescribed rules that Rosset had set out. Using the family assets approach, bringing up children and working full- time and part - time to pay household bills can be seen as making contributions which would constitute the acquisition of rights in the property, as was the case in Midland v Cooke. The findings in Midland are contradictory to the dicta of Lord Bridge in Rosset that a common intention formed on the basis of conduct must be directed at the mortgage repayments and that it ' is difficult to see how anything less will do'.[32]The contrasting findings between these two doctrines are only one example of the confusion that exists with cohabitants' property rights. As Paul Matthews correctly states, ' the history of constructive trusts is littered with anomalies'.[33]

Proprietary Estoppel

The doctrine of proprietary estoppel was clearly set out in the case of Re Basham[34]to cover situations in which a representation or assurance is made to the claimant and the claimant relies on that representation to his or her detriment. It is important to point out that a representation can be made even without speaking as it can be made in the form of an impression.

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[35]The court's use of proprietary estoppel sees another interpretation of the law which is also contradictory to the earlier approach of common intention. It is normally sufficient if the claimant shows that he or she reasonably understood the words or conduct to be an assurance on which he or she would rely and it is irrelevant what the defendant's actual intentions were. It can be said that this is extremely unfair on the defendant who may find rights in his property being given to a person with whom he never intended to share ownership. The rule that equity will not perfect an imperfect gift is also undermined in relation to proprietary estoppel because in circumstances where there is a representation to transfer property rights and the promise has not been carried out then proprietary estoppel is perfecting the imperfect gift.[36]It can therefore be submitted that proprietary estoppel is not the appropriate doctrine to be applied to home rights when a cohabiting relationship comes to an end.

Unconscionabilty

A further approach which was based on looking to see whether there would be any unconscionabilty as a result of providing an equitable interest in a property began to emerge. It is submitted that this is a step away from earlier doctrines which looked at common intention and is instead merging the principles of a constructive trust together with proprietary estoppel in order to reach a decision that is most conscionable taking into account all the circumstances of a case. In 2004 the case of *Oxley v Hiscock*[37]came before the Court of Appeal, the judgement of Chadwick LJ is of great significance to this doctrine. He attempted to link the principles from previous case law and concluded that: What the court is doing is to supply or

impute a common intention as to the parties' respective shares (in circumstances in where there was in fact no common intention) on the basis of that which, in the light of all the material circumstances is shown to be fair.[38]It is important to note from this decision that the court is willing to "supply" a common intention. This means that the courts are prepared to interfere with what the actual intentions may be and place upon a couple what the courts think the common intention should be. This therefore means that a case is not decided on the actual facts but on what the judge thinks fit. Although it can be submitted that this is an example of the court going too far in its role and not looking for true intentions it is also submitted that in many cases there is no way of finding what a couples real intentions where at the time of moving in together. As mentioned previously, many couples begin to cohabit in a very informal way and a conversation will not take place as to what equitable rights each party has. It can therefore be said that the court needs to interfere and supply the parties with a common intention based on what they view to be fair. It is also the case that even if an agreement can be found, intentions are later altered and this can be discovered from a consideration of the full course of dealings in the relationship. An example of Chadwick LJ's test of unconscionability was applied in *Cox v Jones*. [39]In this case Mann J did not find any clear agreement as to what interest each person had but he found that there was some form of agreement and tasked himself with the role of deciding in what shares the interest should be held. In deciding this he did so on the basis of finding a solution ' that would be fair having regard to the whole course of dealing in relation to the property'. [40]An application of the Rosset test in

this case would have led to Ms Cox being denied an interest in the property. However, it was found that to do that would be unconscionable as there was clearly some intention that the property be jointly owned. Although the notion of unconscionability is gaining ground across equity generally, there are two main problems with this approach. Firstly, it is submitted that the Lord Bridge's speech in *Rosset* was clearly not intended to be as flexible as it is being portrayed in these cases.[41]As previously discussed, *Rosset* allows for nothing more than direct contributions to be considered but by applying the notion of unconscionability the whole course of dealing is considered. The two principles are therefore contradictory and it would be of great help if a judge were to state that the *Rosset* principle was inappropriate in the circumstances and to set out the principles that should apply. Yet, Chadwick LJ failed to do this and confusion still exists. Secondly, this approach attempts to combine the very different doctrines of constructive trust and proprietary estoppel which operate on different bases; the former institutional and the latter remedial.[42]For the two approaches to be combined it would mean that one would have to be altered significantly to accommodate for the other and it is submitted that this is too great of a task for the courts to complete.

The current position

In recent years there have been two landmark cases in relation to cohabitation breakdown. Firstly, the House of Lords in *Stack v Dowden*[43]and secondly the Supreme Court in *Jones v Kernott*.[44]The decision of *Jones v Kernott* was concerned primarily with interpreting *Stack v Dowden* and attempting to iron out the problems which had occurred in the

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cases following *Stack v Dowden*.^[45] *Stack v Dowden* introduced significant changes to the law of trusts of family homes. It recognised that beneficial ownership presumptively mirrors legal ownership and discussed how, in cases where that presumption is rebutted, beneficial interests should be quantified.^[46] Baroness Hale in her leading judgement held that although the 'search is for the parties' shared intention, actual, inferred or imputed' it is not for the court to impose its own view of what is fair. She suggested that *Rosset* had set the hurdle for a constructive trust 'rather too high'^[47] but she failed to set out anything as clear as a test or set of principles by reference to which future decisions could be made.^[48] At the time when the judgement was passed in the House of Lords, the proposals put forward by the Law Commission were being processed through Parliament. It can be submitted that Baroness Hale and the other House of Lords judges were sceptical to set out a clear test or set of principles as this was in essence what the Law Commission were doing. The Law Commission proposals were not implemented and the situation relating to beneficial interests in property when a cohabiting relationship ends was no clearer. It is submitted that *Stack v Dowden* was a great, missed opportunity to tidy up the law relating to trusts of homes.^[49] The English courts again rose to the challenge of determining unmarried cohabitant's shares in the family home in *Jones v Kernott*. This marked an important milestone in the judicial journey to laying down a set of rules applying to cohabitants' family home.^[50] In the leading judgements of Lord Walker and Lady Hale, a clear summary of the principles that will apply in a case between cohabiting couples where the legal title is vested in their joint names, but without any express declaration of their

beneficial interests, is set out at paragraph 51. The judgement created a basic set of principles to apply to unmarried couples when the court is faced with determining the beneficial interest in the family home. It was said that the starting point is that equity follows the law and both parties are joint tenants according to the law and equity. However, this is only a presumption and it can be displaced if a different common intention can be proved. It was made clear that the common intention can be taken from their conduct. If it is clear that original intentions have been changed then the court can give judgement based on what is fair and consider the whole course of dealing of the relationship. It was also expressed that each case will turn on its own facts and therefore there are many factors which the court can take into consideration when deciding what is fair. It can be said that 'if an agreement to share is found, then imputing an intention where no actual intention on size of sharing can be deduced is perfectly sensible'.^[51] However, it can also be argued that the law should always strive for certainty and principle as opposed to permitting judges to do as they thought fit.^[52]

Is reform necessary?

Although, these two cases are seen as landmark decisions, the earlier cases remain important because Stack and Kernott failed to overrule previous authority and because their principles are broad so there is still room for those earlier cases to apply.^[53] It is important to point out that both Stack and Kernott are cases where property is owned in joint names, therefore the principles provide little assistance in situations where property is held on one party's name and the old cases such as Rosset remain to be relied upon. The Supreme Court's decision in Jones will certainly not be the last work on the

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rules applying to unmarried cohabitants' family home, but it has clarified the principles laid down in Stack, leaving a basic judicial regime to follow.

[54] There are still a number of problems with the principles laid out in Kernott. The main problem being that the existing principles have not been overruled. Rather than make the law of trusts easier it can be said that this in fact makes it more confusing as it is uncertain what rules to apply. Further, it is uncertain whether the principles set out in Kernott are to apply to the acquisition of beneficial rights in the home or whether they are to apply only to the quantification of the interest. If they are to apply to the quantification of the interest then the harsh test in Rosset may still be applied in ascertaining whether an interest arises which will lead to harsh and unfair outcomes. It is submitted that the principles do not reflect the realities of a relationship. It can be argued that the court's view of relationships is a lot 'tidier' than what they are in reality. In the real world unmarried couples rarely enter into express agreements regarding what should happen to property should the relationship end. In fact, 'human emotional relationships simply do not operate as if they were commercial contracts and it is idle to wish they did that'. [55] At no point will an ordinary cohabiting couple identify a particular moment as being so significant that they will need to take legal advice to regularise who owns what right in the property. [56] In reality, many cohabiting relationships start with one partner gradually moving into the home of another, it starts with a toothbrush being left, then a few clothes before it becomes easier to stay over at the home on a more permanent basis. When this happens a couple are excited and caught up in the fun of it all that they do not stop and have a conversation as

to what effect moving in together would have on the beneficial interest in the property. Further, a change in circumstances may mean one partner makes more financial contributions to the property than the other. Again, it is highly unlikely that a couple would have a conversation as to the beneficial interests in the home following the change. Often parties will privately disagree about their respective rights in a property and for this reason it is not discussed.[57] Many people may think that the expression of such disagreement may result in the relationship ending therefore the discussion does not take place. It can therefore be said that for many cohabiting couples, a common intention does not exist. Commonwealth jurisdictions have turned against the common intention constructive trust in relation to the home, precisely because it required the court to try to find a common intention which had frequently never been considered at all by the parties. [58] Further, Kernott provides the court with a right to impute a common intention and it can be argued that it is not necessarily a 'common intention' of the parties if the court is imputing it. It can, in fact, be said to be a common intention of the court. Without an express agreement it is hard to ascertain the true intentions of the parties as they will be locked away in the parties' minds. However, the courts must be cautious not to impose an interest which may seem extremely unfair to one party. Lord Wilson, the dissenting judge in *Jones v Kernott*, disagreed with the majority about the desirability of imputing a common intention to the parties. He thought that with it, the court would be more focused on what it viewed to be a fair outcome rather than looking to the evidence for a common intention. However, it can be said that even when looking at the evidence in front of

them, the court in essence, will always be imposing a common intention on the parties in truth by dint of selecting which evidence appears to shed a meaningful light on what their intentions must have been.[59]This can cause problems because as the Law Commission states, ' No court can substitute its views of what is ' fair' for what it appears to be the, more or less, clear intention of the parties.'[60]Yet this seems to be the case as Kernott provides the court with the option of imputing intention. It is argued that the law should assist cohabiting couples with beneficial interests in property on breakdown as parties to a relationship ' do not discuss finances and property as commercial men would'.[61]It is also acknowledged that cohabiting partners should be regarded as equals in many important senses, but as Bridge puts it ' we do not consider that the equality should necessarily be accorded recognition on separation by means of a presumed entitlement to an equal share of a particular property pool.'[62]The courts must be careful only to assist parties and not to create an intention. It submitted that by imputing intentions the court is going too far in its role of assisting parties to come to an agreement. Another issue with the current law is the failing of the Lords in Kernott to give an explanation of what is meant by ' fair' therefore meaning that all the previous case law must be considered by the court at first instance to determine whether giving an equitable interest in a property to one party would be fair. The Law Lord's purpose behind the principles in Kernott was to solve the problems with existing trusts law and provide greater assistance to cohabiting couples on breakdown and it can be submitted that although a step was taken in the right direction, many problems still exist. It is widely accepted that the range of property law

principles and approaches available produce an unnecessarily expensive and cumbersome process for the often distressed lay client.[63]

Conclusion

As can be seen, the law relating to constructive trusts is extremely confusing and often leads to unfair outcomes. The law has developed in a number of different directions throughout the past fifty years with the courts attempting to find an appropriate test to apply to cohabitation relationship breakdown. In *Jones v Kernott* a set of principles were established, but there are many problems still existing. Particularly, the fact that they only apply to jointly-owned properties so the harsh test of *Rosset* is still relied upon in the case of properties registered in one party's sole name. It is therefore submitted that a change in the law is required to adequately provide for cohabiting couples. The Law Commission in 2007 proposed a scheme to deal with this; the proposals are discussed within the next chapter. The Law Commission recognised that 'the constructive trust cannot accommodate 'contingent' intentions. It cannot simultaneously provide that the parties hold the property in particular shares while they stay together but will hold it on different shares should they separate'[64] and sought to create a scheme to remedy this issue and give greater protection to cohabitants. There is much academic support for the need to change the law.[65] This chapter considers the Law Commission's proposals and the legal position of cohabitants in Australia and Canada. Under the proposed scheme, provided cohabitants have lived together for a minimum period of two years or had a child together and made contributions to the relationship they can make a claim. An applicant will be successful if he can establish an economic advantage or

disadvantage. An economic advantage rewards contributions made by the applicant which have resulted in the respondent retaining some economic benefit to the exclusion of the applicant at the point of separation. This covers the obvious situations where direct financial contributions have been made but it also covers situations such as the applicant paying for the respondent's fees for professional training which enables the respondent to acquire better paid employment.[66] 'Qualifying contributions' are defined as 'any contribution arising from the cohabiting relationship which is made to the parties' shared lives or to the welfare of members of the family'.

[67] This seems to be a broad approach yet further reading provides that domestic contributions would not count for the purpose of determining whether one party had retained a benefit as a result of the other's contributions.[68] In fact, it becomes apparent that the types of contribution that can be linked to a "retained benefit" are narrow in scope.[69] The proposed scheme meant that physical improvements to property would give rise to a claim if it increased the value of the property; yet routine maintenance work would not.[70] Further, the payment of bills and other household expenses would not give rise to a claim unless the other party could not otherwise have afforded to pay the mortgage.[71] It can be argued that the proposals do not improve the previous position given by the case law surrounding qualifying contributions and it is therefore no surprise that the proposals were not implemented. Economic disadvantage is defined as a principle addressing the economic sacrifices, in terms of capital, income or earning capacity, incurred by the applicant as a result of his or her contributions. This can include loss of earnings as a result of child care

responsibilities.[72]However, it is important to note that the economic disadvantage has to be a present or future loss. The Law Commission were not prepared to look back at the whole of duration of the relationship and the loss suffered within, but to look at the effect such contributions will have on future loss. Yet the scope of the principle is again limited by the need to link the disadvantage suffered to a contribution that has been made.[73]What is perhaps strange is the fact that what is considered a contribution differs in relation to a retained benefit and an economic disadvantage. When it came to quantifying how property should be divided the Law Commission proposed that the courts should reverse a retained benefit and share economic disadvantage. When deciding whether to do so the court must bear in mind the list of discretionary factors[74]and the ' economic equality ceiling'. This means that the welfare of any child of both the parties is to be the paramount consideration. The financial needs, obligations and resources of both parties are to be taken into account as well as their conduct. It can be said that the list of factors to be taken into account are similar to those considered in divorce proceedings. When granting financial relief to cohabitants it was proposed that the court should have available to them the option to make a periodical payments order, this can be secured or unsecured, a lump sum payment order which can be paid by instalment, a property adjustment order, property settlement order, an order for sale, pension sharing orders and interim payment orders on account pending a full trial or final settlement. Again, these are similar orders available in matrimonial proceedings. One of the alternative proposals of reform was for the provisions of the Matrimonial Causes Act 1973 to be extended to

cohabitants but this was rejected and the above scheme was preferred yet many similarities can be seen between the scheme and the Matrimonial Causes Act. The proposals were not implemented for many reasons; among these is the fact that it did not necessarily make the position of cohabitants that much clearer. Granted, it demonstrated a step away from looking for a common intention and towards assessing the economic advantages and disadvantages in the relationship. However, the Law Commission's broad-brush approach means that the applicant would still have to prove the past contributions which have resulted in the economic advantage or disadvantage and this could lead to the same difficulties that currently exist with trusts law. It can also be argued that the proposals were too narrow and only considered the cohabiting form of relationship. No consideration is given to other types of household, such as blood relatives or friends. Therefore, for those who fall outside the scheme, the law of constructive trust will need to be used to establish an equitable interest in the property. It is suggested that the Law Commission should have taken account of all forms of cohabitation in its proposals. Further, it failed to give a clear explanation of how the courts would calculate the financial settlements^[75] especially how future loss would be valued. If England and Wales introduced a statutory scheme for financial support for cohabitants it would not be alone. Yet, from the perspective of a number of the commonwealth jurisdictions, the scheme proposed by the Law Commission is quite limited in its application.^[76] New Zealand has adopted a uniform property law scheme applying to married and unmarried couples alike with the Property (Relationships) Amendment Act 2001. Australia has extended the provisions for married couples to

cohabitants and in Canada, most states also have such legislation. Closer to home, Scotland also provides a scheme for property adjustment for cohabitants on relationship breakdown. This section will focus on the approach in Australia and Canada. Australia differs from comparable jurisdictions in that it has consistently extended rights to cohabiting couples over the past 25 years.^[77] The starting point when looking at the position of de facto's^[78] is the decision of the High Court in *Baumgartner v Baumgartner*.^[79] It was found that because the cohabiting couple had pooled their income a beneficial interest in the home could be established although a common intention was not found. It was decided in this case that a proprietary interest by way of constructive trust would be ordered where failure to do so would be 'so contrary to justice and good conscience' that it could not be permitted.^[80] It was this case which started the Australian courts applying the test of unconscionability. A series of cases followed which made clear that direct contributions to the purchase price and mortgage instalments still count towards interest in the property.^[81] It is also the case that assisting the payment of the mortgage by paying other expenses will also acquire an equitable interest,^[82] as well as working unpaid in the family business.^[83] The English courts also used the test of unconscionability (this is discussed in the previous chapter) however, as with the English model, there are issues with the Australian model and it is not as clear what non-financial contributions would lead to an equitable interest in property. The Australian parliament could see the injustice of the situation where cohabitants had no statutory rights to financial remedy and therefore created a right. In 2008 with the Commonwealth law reforms, Australia gave cohabitants the same

property rights as married couples which are provided for under the Family Law Act (Cth). This means that cohabitants do not need to use the complexity of constructive trusts case law to obtain an equitable right to a property. The reform meant that the four step process for adjusting the property of married couples is now applied to de facto relationships as well. [84]The court will have regard to direct and indirect financial contributions, non-financial contributions, the future needs of the parties and what is, overall, a just and equitable outcome.[85]The court can award that maintenance be paid from one party to another, although this is a less frequently used form of relief, it still demonstrates the wider range of remedies available to cohabitants in Australia compared to those in England and Wales. There were concerns expressed regarding the imposition of a legal framework on people who had often chosen not to marry for the simple reason that they did not want their relationship to be bound by a legal framework. However, it was considered that the new law in Australia was required to provide assistance to the vulnerable people who were unaware of their lack of legal rights and this outweighed the argument regarding autonomy.[86]The position relating to autonomy in England is discussed within Chapter 4. Since the amendments to the Family Law Act (Cth) have been implemented there has been success in the courts with the wider range orders being available to judges.[87]It is interesting to note that the reform to the Family Law Act 1975 (Cth) happened in 2008, this is roughly the same time as the Law Commission were proposing reform to the law in England and Wales. There are also some similarities between the amendments to the Family Law Act in Australia and the reform proposed by the Law Commission,

such as the consideration of non financial contributions and the two year time limit to make a claim. Yet, reform was widely accepted in Australia and rejected in England and Wales. It may be the case that the English reforms did not go far enough. What it does demonstrate is that the government in England and Wales is aware that reform is required but the proposals put forward by the Law Commission in 2007 were not adequate. Perhaps a scheme more similar to that of the Australian Commonwealth would be more appropriate in England and Wales?

Canada Almost all federal statutes now treat unmarried partners who have cohabited for at least a year the same way as they treat married persons.[88] Some Canadian provinces have extended their matrimonial property schemes to include cohabitants. In 2001, Saskatchewan was the first province to include cohabitants under the matrimonial scheme.[89] Manitoba then followed in 2004. However, the majority of Canadian territories and provinces use the application of unjust enrichment to establish property rights for cohabitants. The leading Canadian case in this area is *Pettkus v Becker*,[90] in this case a couple cohabited for 19 years on a farm and ran a bee-keeping business. The woman made a claim for half the share in the business and the land. The court was unanimous in deciding that she should be entitled to a constructive trust to avoid unjust enrichment to her former partner. Dickson J gave the leading judgement and set out the position regarding unjust enrichment by saying; This case was followed by *Peter v Beblow*[91] which set out unjust enrichment in a 3 stage test. Cory J held that there must be '(1) an enrichment; (2) a corresponding deprivation suffered by the person who supplied the enrichment; and (3) absence of any juristic reason for the

enrichment itself.’[92]The more recent case of *Kerr v Baranow*[93]heard in the Supreme Court of Canada clarified the law surround unjust enrichment. It was held that the first two stages of Cory J’ test are to be given a straightforward economic approach and the third stage is an analysis of whether or not it is fair or just that the applicant be compensated. The unjust enrichment claim available to cohabitants has been subjected to critical commentary. In particular, the principles relating to the determination of the appropriate remedy and its quantum are rather complex and uncertain.

[94]Further, it can be said that the third stage of the test for unjust enrichment can be complex, time consuming and lead to cases being decided on a case to case basis rather than a strict test approach. It can be seen in the last few decades, that Canadian jurisdictions have increasingly imposed obligations on and accorded rights to cohabitants. This has mainly been done by regarding cohabitants as ‘ spouses’ for specific purposes or extending the coverage of Acts to include ‘ common law partners’. Yet in jurisdictions where change is yet to be seen the focus remains on unjust enrichment. It is submitted that a scheme similar to unjust enrichment would not be adequate in England and Wales. One of the primary aims of the Law Commission was to move away from the mass of case law associated with constructive trusts and to simplify the law by providing a statutory scheme of financial rights. It can be said that following the Canadian unjust enrichment approach would simply lead to another mass of case law and cohabitants’ financial rights would be no greater. After looking at other jurisdictions it seems that as a society we are failing to ensure fair and adequate financial provision for large numbers of individuals.[95]There are

undoubtedly cases where financial hardship is suffered as a result of the inadequacies of the current law and cohabitants are strictly confined to reliance on property rules in order to claim a share in property. It can be said that 'the time has come to recognise that the law of trusts should have no role to play in the context of the family home'.^[96] It is submitted that in order to achieve certainty a statutory scheme should be implemented to provide cohabitants with a statutory right to claim financial support. This would also bring England and Wales in line with many other jurisdictions. Yet, the Law Commission's proposals in 2007 did not adequately provide for this. It can be submitted that it failed to consider cohabitants other than those in a relationship, the types of contributions that could be considered were too narrow and it required evidence of past contributions which could lead to the same difficulties that arise in relation to trusts law. Further, it was suggested that the proposals would be damaging to the institution of marriage. This is discussed within the next chapter.