Unjust Enrichment for Cohabiting Couples: Reassessing the Common Intention Constructive Trust

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UNJUST ENRICHMENT FOR COHABITING COUPLES: REASSESSING THE COMMON INTENTION CONSTRUCTIVE TRUST

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PhD

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2022

ABSTRACT

This thesis considers the use of unjust enrichment in the cohabitation context in England and Wales. The increasing prevalence of unmarried cohabitation combined with continuing Government refusal to reform the law means that there remains a danger of significant vulnerability at the end of cohabiting relationships, particularly where one party has not contributed financially to acquisition of the property. The lack of legislative reform means that development of the law will have to come from the courts. The current law requires parties to use the law of trusts to argue over the beneficial interest of their home. In order to move the law forward and respond to the vulnerability often experienced by the less economically powerful partner, new and creative ways forward are needed. The doctrine of unjust enrichment has been used for disputes between cohabiting couples in Canada and Scotland and has often been the subject of academic attention. This thesis undertakes a sustained, detailed examination of how the doctrine might work in this context in England and Wales, looking at each of the constituent elements of an unjust enrichment claim and using restitutionary scholarship to provide a new perspective on cohabitation disputes. Criticisms of the common intention constructive trust – the current doctrine used in this area – are drawn on to question whether unjust enrichment might provide novel development initiatives for longstanding institutional issues with the trust. This thesis therefore considers the legal valuation of caring and other domestic responsibilities within the home, the nature of intention and the resulting power balance between the parties, and the focus within the current law on questions of ownership. The aim is to question whether unjust enrichment might provide a way forward for the law which corrects some of the problems with the current law and is therefore advantageous for litigants.

ACKNOWLEDGEMENTS

This thesis could not have been written without all the guidance I received. Thanks to my supervisor, Andy Hayward, for being always kind and consistently generous with his knowledge, and to my examiners, Tom Allen and Anne Barlow for their helpful comments, questions and discussion. Thanks also to Johanna Jacques, Henry Jones, Lana Ashby and Andreas Televantos for discussing elements of this thesis with me, and for the guidance of Chris Bevan and Rod Edmunds. On a personal note, thanks should go to my flatmates in Flat 111 of Neville House, Ustinov College for the (seemingly) endless wine and to my sister Hannah Bannister for always being positive. Thanks also to Hannah Davita Ludikhuijze, who I feel sure now knows far more about unjust enrichment than any other non-law academic in the country. I should mention my dog, Miffy, for his constant companionship. To Dean Stamp, for everything. And to my parents, Christine and Peter Bannister, without whom none of this would have been possible.

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INTRODUCTION

When an unmarried cohabiting relationship breaks down, judges have no statutory discretion to distribute assets between the couple to cover the needs of both parties. Cohabiting couples must therefore rely on property law should they wish (or indeed need) to claim economic recompense from their ex-partner at the end of their relationship. The primary doctrine is the common intention constructive trust, which requires a common intention about the beneficial ownership of the property, coupled with detrimental reliance on this common intention.

Property law was not designed to deal with complex disputes between interdependent parties at cohabitation breakdown and, despite the courts developing a doctrine with application primarily in the context of the family home, several issues remain. This thesis considers how the common intention constructive trust could be developed in the future by understanding the trust as based on the doctrine of unjust enrichment, leading to reorientation of principles within the law. The doctrinal basis of the trust has thus far remained unclear. Developing the law along the lines of unjust enrichment may produce several significant advantages which respond to the issues with the current law.

The structure of this introduction is as follows. First, the aims of the thesis are explained, covering the core argument which will be advanced and the contribution to knowledge made. It will be demonstrated how this research fits within the wider academic literature. Second, the context and background to this thesis will be discussed. This section will describe the issue of cohabitation reform and identify some of the gendered issues in the current law. Further, past reform attempts will be examined to show that, while legislation is preferable, judicial creativity will likely be needed to develop the law. Third and finally, the structure of the thesis is explained.

I. AIMS

The aims of this thesis are both doctrinal and theoretical. This thesis asks what the implications would be – in both theory and practice – if unjust enrichment was the ‘driver’, ‘event’ or theoretical explanation for the obligations which may arise between cohabiting couples. Understanding the basis on which the law creates obligations is vitally important in order to

allow principled development. Under Peter Birks' schema,[1] all events which trigger the creation of obligations can be placed within four categories: obligations created due to wrongs; obligations created with the consent of the parties; obligations created due to the unjust enrichment of the defendant; and a miscellaneous category.

The common intention constructive trust, which imposes trustee obligations on the defendant to hold property for the benefit of the claimant, must have an event on which the creation of these obligations is based. There is no suggestion that the defendant has committed any wrong, as even if the defendant can be said to have acted unconscionably there is no duty which has been breached. Prima facie, the doctrine looks as if it may be based on the consent of the parties. However, the permissibility of imputation of intentions, the residual use of fairness and the fictitious and arbitrary nature of the search for intentions makes it difficult to view the common intention constructive trust as an obligation created purely by consent.[2] The notion of 'common intention' is well known to be at least to some degree fictitious and artificial, as couples generally do not put their mind to, let alone expressly articulate, their property entitlements.[3] The question therefore remains as to whether unjust enrichment might act as a sufficient basis on which the defendant's obligations are created, and this thesis asks what the implications would be should unjust enrichment act as the triggering event for obligations arising at the end of a cohabitating relationship.

This is not just a doctrinal problem. The impetus for this thesis, and for thinking about the development of cohabitation disputes, comes from increasing academic awareness of the vulnerabilities that may be experienced by cohabiting couples at the end of their relationship. The background to this issue is discussed below. Much of the investigation undertaken in this thesis therefore involves discussing not only how unjust enrichment might influence development of the law, but also how that development would impact cohabitants. This impact

[1] Peter Birks, 'Misnomer' in WR Cornish et al, *Restitution: Past, Present and Future* (Hart 1998); Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 UW Austl L Rev 13, 17. See however Steve Hedley, 'The Taxonomic Approach to Restitution' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004), who criticises Birks' categories. They are used here as helpful tools for examining the rationale underpinning the law.

[2] Sir Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67(2) CLJ 265; William Swadling, 'The common intention constructive trust in the House of Lords: an opportunity missed' [2007] 123 LQR 511, 518. See Chapters One and Five.

[3] See for example: John Mee, 'Jones v Kernott: Inferring and Imputing in Essex' [2012] Conv 167; Rebecca Probert, 'Trusts and the Modern Woman: Establishing an Interest in the Family Home' (2001) CFLQ 275; J D Davies, 'Informally Created Trusts of Land and Some Alternatives to Them' [1990] LQR 539; Martin Dixon, 'A Case Too Far?' [1997] Conv 66; Etherton (n 2); Hilary Biehler, 'The Scope of Common Intention Constructive Trusts: Where to Draw the Line?' (2018) 32(2) Tru LI 63.

involves protecting the economically weaker party from the economically stronger party leaving the relationship with an unjust economic benefit. In this way, this thesis considers an unjust enrichment response to the socioeconomic circumstances of cohabiting couples. An unjust enrichment perspective may offer a new angle on debates such as the valuation of domestic responsibilities within the home, the search for the parties' intentions and the remedy which the claimant may expect at the end of their relationship. The law which exists is a product of the doctrine which created it. The category of event which creates these obligations therefore has significant social implications.

A) Research Questions

This thesis is based on the argument that unjust enrichment could and should lie at the foundation of the common intention constructive trust. The argument advanced is not that unjust enrichment should *replace* the common intention constructive trust, but instead that the acceptance of unjust enrichment as the basis of the obligations imposed at the end of a cohabiting relationship would have significant implications for litigants and future legal development. This involves a judicial development of the trust from within to question some of the concepts which have evolved in the case law – including the valuation of so-called domestic contributions, the nature of the intentions of the parties and the remedies which the claimant can expect. The key question asked by this thesis is what the law applying to disputes at the end of cohabitation relationships would look like if it were based on unjust enrichment in this way.

This involves development *from within* rather than *wholesale replacement* of the common intention constructive trust, bearing in mind that, first, legislation is unlikely in the short-term (as will be discussed below) and second, replacement of the common intention constructive trust is, at this stage, unlikely. As Barlett and Kennedy argue from a feminist perspective, 'arguments that deviate significantly from precedent or accepted doctrine are often considered "extreme" and thus are less likely to be successful than moderate proposals'.[4] This is a constraint on radical legal change. While still requiring judicial creativity, step-by-step development of the law along the lines of unjust enrichment as a basis is perhaps more palatable to judges than the transplanting of unjust enrichment doctrine wholesale. As a result, it is therefore a more strategic basis on which to argue for modifications to the law.

[4] Katherine T Barlett and Rosanne Kennedy, 'Introduction' in Katherine T Barlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 2.

This means that, rather than questioning whether the common intention constructive trust should be removed from the law, this thesis considers a reorientation of the trust so that it operates in a manner commensurate with unjust enrichment principles. Judicial recognition of unjust enrichment as the basis of these trust obligations provides access to concepts such as 'enrichment' or claimant-oriented unjust factors which will be explored in this thesis, and which may lead to legal development which is advantageous for litigants. This argument is forward-thinking, not backward-looking. Previous case law on the common intention constructive trust is not about unjust enrichment. The doctrinal basis of the trust thus far has been unclear, and this thesis therefore argues that regarding *future* development it might be advantageous to use the doctrine of unjust enrichment as the event triggering obligations on relationship breakdown. In several key areas, unjust enrichment may clarify or offer new perspectives, and in doing so may respond to some of the common criticisms of the trust.

Although a major part of this thesis considers the socio-legal position of cohabitants and the vulnerabilities faced by the less economically powerful partner in the relationship, there are also substantial implications for the law of unjust enrichment. Unjust enrichment is a doctrine which has thus far been used primarily in the commercial context. Many of the most important developments in the doctrine have occurred in cases involving mistaken tax, for example.[5] This is in direct contrast to the experience of Canada and Scotland, where the seminal unjust(ified) enrichment cases were situated in the domestic context.[6] This thesis therefore questions the potential use of the doctrine of unjust enrichment in the domestic context in England and Wales. This has not been examined before, and this thesis therefore provides a novel insight on the functioning of various unjust enrichment principles when applied in this context. In order to answer the questions asked by this thesis, it will have to be explained how unjust enrichment works, and what would need to change to allow the doctrine to function satisfactorily in the domestic context. However, it is not the job of this thesis to set out a fully developed scheme of how unjust enrichment would work in any given case. Instead, the aim is to understand the implications of its use in this context, for the doctrine and for litigants of cohabitation property disputes.

[5] These cases include: *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558; *Sempra Metals v Her Majesty's Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561; *Prudential Assurance Company v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39, [2018] 3 WLR 652; *Investment Trust Companies v The Commissioners of Her Majesty's Revenue and Customs* [2017] UKSC 29, [2018] AC 275.

[6] For Canada, see *Pettkus v Becker* [1980] 2 SCR 834 (SCC) and *Peter v Beblow* [1993] 1 SCR 980. For Scotland, see *Shilliday v Smith* 1998 SC 725.

B) The Contribution of this Thesis

This thesis provides a novel way of examining issues that arise in disputes between cohabitants at the end of their relationship. Issues around domestic contributions, the nature of party intentions and remedies have existed for several decades, often since the inception of the common intention constructive trust in the early 1970s. The longevity of these controversies and the stalemate which has been reached (where no solution appears imminent) indicates that a more creative angle needs to be considered if judicial evolution is desired. If it is accepted that statutory intervention in the area is unlikely at least in the short term, it is necessary for reform to come from judicial development in the courts – though, of course, such reform requires judicial willingness. One option is to continue to develop the current law based on common intention and informal agreements about property rights, which can only serve to perpetuate the structural issues already present in the law. Alternatively, this thesis presents a theoretical re-evaluation of the law which positions unjust enrichment as the underlying principle and 'event' triggering the defendant's obligations towards the claimant. This alternative basis of the law provides potential for novel legal development.

Although the idea of unjust enrichment being used to understand disputes that arise on cohabitation breakdown is not new,[7] there has been no research in this jurisdiction which undertakes a sustained, detailed examination of the implications of an unjust enrichment claim in this area. Key to the contribution of this thesis are the differing senses of unjust enrichment used in the literature. Unjust enrichment in the descriptive sense involves use of the term 'unjust enrichment' to describe the relationship between the claimant and the defendant. Douglas et al for example say that they 'are interested in the concept as a means of getting to the nub of what it is that is regarded as unfair in the current law'.[8]

Most academics who have considered unjust enrichment in the cohabitation context have therefore not done so by applying the English doctrine, but instead by using a broader, more abstract concept which instead goes to the unfairness or perhaps unconscionability inherent in

[7] See for example: Gareth Jones, '*Pettitt v Pettitt*: A Post-Script' [1969] CLJ 196; Mark Pawlowski, 'Beneficial Ownership - Estoppel, Unjust Enrichment or Unconscionability - A Comparative Study' (1995) 10 Denning LJ 125; Simone Wong, 'When Trust(s) is not Enough: An Argument for the Use of Unjust Enrichment for Home-Sharers' [1999] Feminist Legal Studies 47; Simone Degeling and Mehera San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 Sydney L Rev 69; Simon Gardner, 'Family Property Today' (2008) 124 LQR 422; Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' [2009] MLR 25.
[8] Douglas et al (n 7) 30-31.

the law.[9] Others have used the Canadian doctrine in the English context without being clear that unjust enrichment in the Canadian sense is very different from the English doctrine.[10] Some academics have used unjust enrichment in the substantive sense – meaning application of the doctrine itself – but this research has focused on a particular case[11] or element of the law.[12]

This thesis therefore contributes by using unjust enrichment in the substantive sense to consider how the doctrine might improve the current law, considering restitution scholarship in order to do so. It explores how the doctrine of unjust enrichment could offer insight into elements of the law which have been subject to criticism, including domestic contributions, the search for intention and the focus on property ownership as opposed to economic benefit and disadvantage. It considers the differing contexts between most unjust enrichment cases and the cohabitation cases. There has been very little consideration of unjust enrichment's place in the domestic context in England and Wales, and this thesis introduces the domestic context to this so-far commercial-based doctrine.

II. THE PROBLEM TO BE ADDRESSED

Cohabitation reform has been a pressing social issue for several decades. There has been a sharp increase in the number of cohabiting couples,[13] along with an increased societal acceptance of living together without being married.[14] However, unlike for married couples or civil partners where courts have wide discretionary powers under Part II of the Matrimonial Causes Act 1973 or Schedule 5 Civil Partnership Act 2004 (respectively), there is no statutory power to redistribute assets when cohabiting couples separate. Cohabitants also cannot claim maintenance against one another. If one partner faces significant hardship after their relationship ends, their only recourse is to the law of property and, possibly, contract. Private law is not designed to deal with the complexities which characterise disputes between former

[9] Doulgas et al (n 7); see also Wong (n 7).
[10] For example Pawlowski (n 7).
[11] Jones (n 7).
[12] For example, Degeling and Roque (n 7).
[13] Between 1996 and 2020, cohabiting couples increased from about 1.5m to 3.5m, an increase of about 137%. See Office for National Statistics, Families and Households in the UK: 2020 https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2020 accessed 28/09/2021.
[14] Even between 2006/07 to 2018/19 the proportion of people that disapprove of unmarried cohabitation fell from 14% to 8%. National Centre for Social Research, Family Life: Attitudes to Non-Traditional Family Behaviours https://bsa.natcen.ac.uk/latest-report/british-social-attitudes-37/family-life.aspx accessed 28/09/2021.

partners, and significant issues remain. These issues mean that any litigation is likely to be lengthy and costly, and further that the law is unlikely to appropriately deal with the economic harm often experienced by cohabiting couples after separation. That has prompted statutory reform attempts, none of which have been successful.[15]

Couples cohabit for a variety of reasons. Barlow and Smithson have defined four broad categories under which cohabitants may fit.[16] First, the 'ideologues', who are in long-term committed relationships but have an ideological objection to the institution of marriage which means they remain unmarried. Second, 'romantics', who cohabit as a step towards marriage. They aim to get married eventually but see marriage as a serious commitment which should only be entered when everything is right. Third, 'pragmatists' take a functional view, and decide whether to marry or not based on the legal and financial consequences of marriage. Fourth, 'uneven couples' are where one partner remains more committed to the relationship than the other. This may be, for example, where one person wants to get married and the other does not. Marriage, by triggering legal consequences on formal public displays of commitment, fails to protect certain members of these groups. Romantics (who are not making the ordinary legally rational choice of getting married to protect themselves) are particularly at risk should their relationship break down. However, members of uneven couples are often the most vulnerable as one party will usually be the more powerful party, holding all (or most of) the financial cards.

Unhelpfully, these vulnerabilities are exacerbated by the poor knowledge which many people have of the legal rights of cohabiting couples. A recent report published by the National Centre for Social Research found that 47% of people believe that common law marriage exists, which rises to 49% of cohabiting couples.[17] This could mean that about half of cohabiting couples mistakenly believe they have some entitlement to assets should their relationship breakdown and the parties separate. This issue is one which does not seem to be improving – a similar

[15] In particular the Law Commission's statutory proposals, see Law Commission, Cohabitation: Financial Consequences of Relationship Breakdown (2007) at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228881/7182.pdf accessed 28/09/2021; and Lord Marks' Cohabitation Rights Bill https://services.parliament.uk/Bills/2019-21/cohabitationrightsbill.html accessed 28/09/2021.

[16] Anne Barlow and Janet Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22(3) CFLQ 328.

[17] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: The 36th Report* (The National Centre for Social Research 2019) 123.

number of people shared this belief when the question was asked in 2008.[18] This is despite a high-profile Government backed campaign called the 'Living Together Campaign' which sought to provide advice to cohabitants on their legal rights.[19] It may be that the confusion is caused because in some cases cohabitants *are* treated the same as spouses, in particular regarding benefits and tax credits.[20] Regardless, the mistaken belief that couples have legal entitlements which do not in truth exist is one which risks causing a great degree of harm to cohabitants should they not protect themselves and find, once their relationship has broken down, that they in fact have few legal remedies.

Importantly, cohabitants may not make an active decision to cohabit instead of marrying. Cohabitation may often be used as a 'trial run' at marriage, and it is often difficult to decide when cohabitation started. Research has found that couples tend to 'slide' into cohabitation rather than have a precise or certain 'cohabitation date'.[21] Cohabitation is therefore not something which can be definitively defined. This practice of 'sliding' into cohabitation without any fully informed decision being made has the potential of increasing harm at the end of the relationship, as cohabitation has occurred without any thought as to long-term financial and legal impacts. Ignoring this aspect risks making the 'rationality mistake' noted by Barlow, where it is assumed that people will act within their relationships in a rational way.[22]

Given these issues, there remains significant danger that cohabiting couples may experience financial vulnerability at the end of their relationship. The common intention constructive trust fails to properly remedy this – and indeed is not designed to do so – and reform has therefore often been campaigned for. As will be seen below, legislative intervention has not been

[18] The figure in 2008 was 53%. Anne Barlow, Carol Burgoyne, Elizabeth Clery, Janet Smithson, 'Cohabitation and the law: myths, money and the media' in Alison Park, John Curtice, Katarina Thomson, Miranda Phillips, Mark C Johnson and Elizabeth Clery (eds) *British Social Attitudes: the 24th report* (Sage 2008) 29-52.

[19] See https://www.advicenow.org.uk/living-together, accessed 28/09/2021. See also Barlow et al (n 18).

[20] Means-tested social security benefits and tax credits treat cohabiting couples the same as married and civil partnered couples. Cohabiting couples are also often treated the same for personal protection from domestic violence, succession to rented tenancies of the family home and statutory wrongful death suits. See Anne Barlow and Nigel Lowe, 'National Report on Informal Relationships: England and Wales' *Commission on European Family Law* (2015).

[21] See for example Scott M Stanley, Galena Kline Rhoades and Howard J Markman, 'Sliding versus deciding: Inertia and the premarital cohabitation effect' (2006) 55 Family Relations 499; Wendy D Manning and Pamela J Smock, 'Measuring and modeling cohabitation: New perspectives from qualitative data' (2005) 67 Journal of Marriage and Family 989; and Jo M Lindsay, 'An ambiguous commitment: Moving into a cohabiting relationship' (2014) 6(1) Journal of Family Studies 120.

[22] Anne Barlow, 'Legal Rationality and Family Property: What Has Love Got to Do with It?' in Joanna Miles and Rebecca Probert, *Sharing Lives, Dividing Assets* (Hart 2009).

forthcoming, and judicial development has not dealt with many of the criticisms of the trust. Creative ways forward are therefore needed. This thesis considers one answer, which would be to base the trust on unjust enrichment, allowing a reorientation of the law towards restitutionary principles which may prove advantageous for litigants, particularly the economically weaker party.

The issues discussed above arise primarily due to the significant vulnerability which may be caused when an interdependent cohabiting relationship ends. The economically weaker party is often, in mixed-sex couples, the woman. This is because women are still less likely than men to work outside the home,[23] owing partially to the fact that women are more likely to take on domestic responsibilities such as childcare.[24] This means that the issues discussed in this thesis are highly gendered in nature.[25] In terms of language, a choice must be made between using gendered language – where the claimant is referred to as 'she' and the defendant as 'he' – and using gender-neutral language where both parties bare the pronoun 'they'. To pigeonhole all cohabitants into a heteronormative framework in which women are the victims has the potential to exacerbate discriminatory stereotypes and exclude same-sex couples (who face unique issues within the law). However, it must be acknowledged that the vast majority of claimants who litigate are women, claiming against their male partners. The discrimination which women continue to experience within the law is one of the most significant criticisms of the common intention constructive trust, and in order to highlight this aspect the claimant will be referred to using feminine pronouns whereas the defendant will be referred to using masculine pronouns.

[23] Office for National Statistics, *Women in the Labour Market: 2013* (2013) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25 accessed 28/09/2021.

[24] Office for National Statistics, *Women Shoulder the Responsibility of 'Unpaid Work'* (2016) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldertheresponsibilityofunpaidwork/2016-11-10 accessed 28/09/2021.

[25] This was made clear in much of the evidence to the Cohabitation Inquiry of the Women and Equalities Committee. See for example Resolution, 'Written Evidence, The Rights of Cohabiting Partners' (Women and Equalities Committee 2021); Rights of Women and Southall Black Sisters 'Written Evidence, The Rights of Cohabiting Partners' (Women and Equalities Committee 2021); Family Law in Partnership 'Written Evidence, The Rights of Cohabiting Partners' (Women and Equalities Committee 2021).

A) Reform

Development of the law has been consistently advocated for by reform bodies. In the paper 'Cohabitation: The Financial Consequences of Relationship Breakdown',[26] the Law Commission proposed legislative reform which dealt with uneven economic consequences of cohabitation. Economic gains and losses from the relationship were therefore to be shared equally by looking at whether the respondent has retained a benefit from the relationship or whether the claimant has been economically disadvantaged by the relationship as a result of qualifying contributions made by the parties. The proposed scheme was not legislated for. The Government in 2008 announced that it wished to first seek research findings as to the consequences of the recently enacted Family Law (Scotland) Act 2006, which was Scotland's own answer to the cohabitation problem.[27] In 2011, it was announced that 'the findings of the research into the Scottish legislation do not provide us with a sufficient basis for a change in the law'.[28] There have since been other attempted statutory interventions, including Lord Mark's Cohabitation Rights Bill,[29] introduced as a Private Members Bill in the House of Lords. Further, the Women and Equalities Committee are now preparing their report from their inquiry into the rights of cohabiting partners, considering inter alia the need for legislative reform to protect cohabiting couples.[30] However, save a radical change in Government direction, it seems unlikely that any statutory intervention will be made at least before the next general election.

Legislation is best able to deal with the complex interdependencies present in relationships and is therefore the preferable reform option. However, if as predicted the Government continues to refuse to intervene, any change in the law will have to come from the courts. The judiciary have taken an approach of developing property law in an increasingly specialised way to take account of the disputes that arise between cohabiting couples, a process that some have termed 'familialisation'.[31] The starting point was in 1969 when the House of Lords in *Gissing* held that a spouse could claim a proprietary interest in their partner's property if there was a requisite

[26] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).
[27] HC Deb 6 March 2008, Vol 472, Col 123WS.
[28] HC Deb 6 Sep 2011, Vol 532, Col 16WS.
[29] See https://bills.parliament.uk/bills/2639 accessed 28/09/2021.
[30] See https://committees.parliament.uk/work/1196/the-rights-of-cohabiting-partners/ accessed 28/09/2021.
[31] See John Dewar, 'Land, Law and the Family Home' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998); Andy Hayward, '"Family Property" and the Process of "Familialisation" of Property Law' [2012] CFLQ 284.

common intention between the parties.[32] Although the claim failed on the facts, the recognition of this trust based on common intention paved the way for a new device which could help those facing significant hardship due to the breakdown of their relationship. If the claimant can show that the parties had a common intention that the claimant was to have an interest in the family home and that they had detrimentally relied on this intention, a constructive trust is created in order to prevent the defendant from unconscionably resiling from this intention. Through multiple House of Lord and Supreme Court judgments,[33] the common intention constructive trust is now the primary doctrine for dealing with disputes between cohabitants.

Given that the doctrine exists to deal with agreements about property rights, it is no surprise that the common intention constructive trust often fails to adequately deliver results which remedy the discussed vulnerabilities of some cohabitants. The issues with the doctrine will be discussed in the first chapter, but this thesis will be organised around three criticisms of the trust: first, the relevance of so-called domestic contributions; second, the nature of intentions required for imposition of the trust and third, the remedies which may follow from a successful claim. After 50 years, the common intention constructive trust appears stale. This thesis will attempt to reignite judicial development in the area of cohabitation disputes by considering the use of unjust enrichment as the basis for the development of the law.

There is, of course, a separate debate about whether there should be reform of cohabitation rights at all.[34] It is not the aim of this thesis to make out the argument as to why cohabitation reform is needed. Several reasons have been advanced in this introduction and will continue to be alluded to when discussing the criticisms of the current law in the first chapter. However, for the purposes of this thesis, it will be assumed that the argument for reform has already been made out.

III. STRUCTURE

This thesis is broadly separated into two Parts. Part One will lay the foundation for an unjust enrichment basis of the law by considering the background of cohabitation disputes and unjust

[32] *Gissing v Gissing* [1971] AC 886 (HL).
[33] See *Pettitt v Pettitt* [1970] AC 777 (HL); *Gissing* (n 32); *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL); *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432; and *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[34] For the argument against, see Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6(6) Oñati Socio-Legal Series 1196; Rosemary Auchmuty, 'The Limits of Marriage Protection in Property Allocation When a Relationship Ends' [2016] CFLQ 303; Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' [2008] International and Comparative Law Quarterly 480.

enrichment. In Chapter One, the current law will be analysed. This will lead to a discussion of the weaknesses of the current law: broadly, these criticisms will focus on the prioritisation of financial contributions over domestic contributions, the often-artificial way in which the law examines the parties' intentions and the focus on ownership within disputes that arise at the end of a cohabiting relationship. The examination of these criticisms will provide a foundation for considering the development of the law using unjust enrichment.

Chapters Two and Three turn to the law of unjust enrichment. Chapter Two introduces the doctrine of unjust enrichment and will ask why unjust enrichment appears, prima facie, as a strong alternative to the common intention constructive trust. The doctrine will be described, and the historical development of unjust enrichment will be briefly explained in order to answer why unjust enrichment has not already been used in the domestic context in England and Wales. The chapter will then explain how unjust enrichment is to be used in this thesis, including the normative theory which provides justification for the doctrine's use in cohabitation property disputes. Chapter Three considers the current use of unjust enrichment in the cohabitation context, in particular undertaking an analysis of academic and judicial observations on the relationship between unjust enrichment and cohabitation. This will primarily involve examining the literature in England and Wales, but Chapter Three also casts an eye to Canada and Scotland to consider unjust enrichment use in the cohabitation context in these jurisdictions.

Part Two of the thesis considers the implications of unjust enrichment on three related criticisms of the current law. Chapter Four looks at domestic contributions. One of the major issues with the common intention constructive trust is that financial contributions are prioritised over domestic contributions. Chapter Four examines whether domestic contributions can be considered 'enrichments' of the defendant, and therefore whether the application of unjust enrichment could reduce the gap between financial contributions on one hand and domestic contributions on the other.

Chapter Five considers the way in which parties' intentions are currently examined within the law. It reveals the normative theory justifying the law as a quasi-contractual principle of upholding informal agreements about consensual property dealings and argues that the law should instead question whether the defendant should be able to retain benefits from the relationship which were provided, for the relationship, at the claimant's expense. This requires a discussion of the possible unjust factors to be used in this context, and considers the way in

which the claimant's autonomy could be protected within a societal system which places great expectations on women to perform certain roles within the family home.

Chapter Six, finally, pieces together the preceding chapters and considers the remedies available to the claimant after a successful claim. It criticises the current monopoly which property law holds over these disputes, arguing that a focus on ownership induces an unrealistic construction of women within the law, who must act in an extraordinary way, beyond that of an 'ordinary' wife, in order to achieve a successful claim. This chapter therefore posits that a better law dealing with these issues would provide a more flexible remedial structure, allowing cohabitants to claim a property interest if needed, but also allowing personal monetary payments.

By positioning unjust enrichment as the event triggering obligations at the end of cohabiting relationships, a reassessment of the common intention constructive trust is possible. Unjust enrichment doctrine may offer new perspectives on longstanding criticisms of the trust, enabling development of the law in the direction of increased protection of the economically weaker party. Although requiring judicial creativity, this thesis argues that piecemeal advancement of the law in a manner consistent with unjust enrichment doctrinal principles would provide a realistic alternative to the continuing use of the common intention constructive trust.

CHAPTER ONE – THE CURRENT LEGAL FRAMEWORK

This chapter analyses the common intention constructive trust and related doctrines, including the express and resulting trusts and proprietary estoppel. The aim of this chapter is to explain some of the key issues with the law in its current form, providing a useful foundation on which to examine the changes which using unjust enrichment as the obligation-creating event could bring to the area. The common intention constructive trust allows parties to enforce otherwise unenforceable agreements about land ownership on a quasi-contractual basis. One of the criticisms of the law is that it is simply not designed to deal with the social problems that stem from the lack of legal protections for cohabiting couples. The focus of the law is instead on ownership disputes, and it is this focus which causes several issues which will be discussed in this chapter. In Part Two of the thesis, these issues will be considered from an unjust enrichment perspective.

Although the common intention constructive trust is the most important device for cohabitation disputes, other doctrines remain useful for cohabitants and for the argument made in this thesis. Express trusts conclusively identify the beneficial interests of the parties – however, where couples move into each other's home, or where an express trust simply has not been executed, other devices will have to be used. Resulting trusts have recently been relegated to the side-lines in cohabitation disputes but are especially relevant for this thesis as one theory as to the creation of resulting trusts is that they respond to the unjust enrichment of the defendant. Finally, proprietary estoppel is a useful doctrine for cohabitants but, it will be argued, cannot act as the primary doctrine for these disputes. However, proprietary estoppel will be referenced throughout this thesis to provide insights where necessary.

This chapter is structured as follows. First, doctrines useful for cohabitants in more narrow and specific circumstances will be considered. These doctrines are not directly impacted by understanding the obligations which arise at the end of a cohabiting relationship as based on unjust enrichment but will be helpful for the analysis throughout this thesis. Second, the common intention constructive trust will be analysed. Three issues will be discussed: the preference for financial contributions over domestic contributions and the consequential devaluation of unpaid work in the home; the fictitious and artificial way in which courts

consider the intention of the parties; and the overwhelming focus on ownership within the law, which feeds into the previous two issues and underpins the aim of upholding informal agreements, rather than dealing with the defendant receiving an economic benefit at the claimant's expense.

I. MINOR DOCTRINES USEFUL IN SPECIFIC CIRCUMSTANCES

The common intention constructive trust is the primary doctrine used for disputes between cohabiting couples. However, there are several other doctrines useful for cohabitation disputes in particular circumstances. These are the express trust, resulting trust and proprietary estoppel. Nothing in this thesis doubts their relevance to cohabitation disputes, but this chapter suggests that the narrow focus and application of these doctrines means that they cannot be of primary use for cohabitants at the end of their relationship. Resulting trusts and proprietary estoppel are useful for this thesis in providing different perspectives on debates within the law. The resulting trust may allow proprietary restitution for the unjust enrichment of the defendant, whereas proprietary estoppel provides insights into the weighing up of benefit and detriment within informal relationships. Before we get to either of those, a brief note will be made on express trusts.

A) Express Trusts

If the parties declare the way in which the beneficial interest of the property is held, this will be enough to establish a valid and enforceable express trust, as long as the declaration was in signed writing,[1] and is not subject to fraud or mistake.[2] An express trust can therefore often operate to solve disputes regarding ownership of the home, being a definitive record of the intentions of the parties at the time of purchase. A trust of this nature can be declared on transfer by filling in Panel 10 on Transfer Form TR1. However, although filling in this Panel is in theory mandatory, experience suggests that many couples continue to omit to do so. Moran suggests that the Land Registry will accept the validity of a conveyance even if Panel 10 is left blank,[3] a view confirmed by Pawlowski and Brown's research in which a majority of practitioners thought that the Local Registry in their district would not require the Panel to be

[1] Law of Property Act 1925, s53(1)(b).
[2] *Goodman v Gallant* [1986] Fam 106 (CA); and see the frustrations of Ward LJ in *Carlton v Goodman* [2002] EWCA Civ 545, [2002] 2 FLR 259 [44]. More recently, this was confirmed in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [67].
[3] Alan Moran, 'Anything to Declare? Express Declaration of Trust on Land Registry Form TR1: The Doubts Raised in Stack v Dowden' [2007] Conv 364, 369.

completed.[4] Academics and judges alike have therefore argued that filling in this box should be compulsory.[5] Given that a declaration of trust at the point of conveyance would solve a great many issues in the law – not to mention legal costs and time – it is no wonder that great frustration has been expressed at this state of events.[6]

There has never been any real doubt that an express trust is conclusive as to the beneficial interests of the parties. In *Pettitt*, Lord Upjohn made clear that if there is a declaration stating where the beneficial title lies then this concludes the issue of title between the parties.[7] Again, in *Goodman v Gallant* it was said that if the conveyance contains an express declaration of trust 'there is no room for the application of resulting, implied or constructive trusts unless and until the conveyance is set aside or rectified'.[8] *Stack v Dowden* continues this trend, where Baroness Hale stated that no-one doubts the conclusive nature of an express trust.[9]

Cohabitation occurs in a great number of ways. Should all cohabitants decide to buy a house in their joint names – and to execute a declaration of trust – the problem at the heart of this thesis could disappear overnight. However, the diversity of cohabitants means that a great many will not have executed an express trust. For those who simply move into their partner's home, it is very unlikely that the parties will have made a written declaration of their respective shares. Couples are unlikely to consider strict legal entitlement and will usually prioritise their relationship instead.[10] Individuals may feel uncomfortable protecting their own financial contributions by making a declaration of trust, even when they have contributed most of the purchase price or are placing the property into joint names. In a survey by Douglas et al, one respondent acknowledged advice given to him at the time of transfer, stating that 'it was explained to me that I could protect my extra contribution, but [my partner] was pregnant,

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[4] Mark Pawlowski and James Brown, 'Joint Purchasers and the Presumption of Joint Beneficial Ownership – A Matter of Informed Choice?' [2013] Tru LI 3, 10.
[5] *Stack v Dowden* (n 2) [52]; Martin Dixon, 'Choppy Waters (Property Rights of Unmarried Couples)' [2011] Conv 87.
[6] *Carlton v Goodman* (n 2) [44]: 'ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENFICIAL INTEREST IS TO BE HELD. It is not very difficult to do'. In *Walker v Hall* [1984] FLR 126 at 129, Dillon LJ threatens solicitors with a negligence action unless they advise clients to declare the beneficial interest in the property. See also Elizabeth Cooke, 'In the Wake of *Stack v Dowden*: The Tale of TR1' [2011] Fam Law 1142.
[7] *Pettitt v Pettitt* [1970] AC 777 (HL) 813.
[8] *Goodman v Gallant* (n 2) 110.
[9] *Stack v Dowden* (n 2) [49], [67]. See also *Clarke v Meadus* [2010] EWHC 3117 (Ch), [2011] 1 P&CR DG18 [42], [83] and more recently *Pankhania v Chandegra* [2012] EWCA Civ 1438, [2013] 1 P&CR 16.
[10] Anne Barlow and Craig Lind 'A matter of trust: the allocation of rights in the family home' (1999) 19 LS 468 473; *Pettitt* (n 7) 820; John Mee, 'Joint Ownership, Subjective Intention and the Common Intention Constructive Trust' [2007] Conv 14, 16.

sitting there next to me, and you just don't do that'.[11] Focusing on express trusts as a potential solution ignores the power balance between parties in a relationship, where the more economically powerful partner will hold all the cards. Development of the law, therefore, will need to permit informal ways of obtaining a remedy at the end of the relationship.

This thesis considers unjust enrichment as a theoretical justification for claims made at the end of a cohabiting relationship, and therefore leaves untouched the effect of an express trust. Where an express trust has been declared, this should be seen as conclusive as to the question of legal and equitable title between the parties. However, the rigidity of the express trust, while providing certainty to commercial actors, means that should circumstances change parties will be left relying on an out-of-date arrangement of property interests (unless expenditure is spent on updating the trust). It is for that reason that disputes at the end of cohabitation relationships might do better to take into consideration economic benefit and disadvantage of the parties instead of questioning property ownership.

B) Resulting Trusts

The position of the resulting trust in the cohabitation context has varied over the years, from acting as the primary device to being relegated as (nearly) irrelevant. This is particularly important, as the resulting trust has continued to retain strong links to unjust enrichment. Chambers has argued that resulting trusts respond to an absence of intention to benefit the recipient, and positions unjust enrichment as the doctrine demonstrating when this intention is absent.[12] Under Chambers' thesis, should the use of unjust enrichment reveal the claimant did not intend to benefit the defendant, a resulting trust will be imposed. Chambers' thesis has held some sway with the judiciary,[13] though it should be immediately noted that it is not the only theory concerning the principles behind the resulting trust.[14] The resulting trust's connection to unjust enrichment, however, provides an impetus to exploring the role the resulting trust continues to play in cohabitation disputes.

Traditionally, the resulting trust takes on two possible forms: the 'automatic' resulting trust and the 'purchase money' resulting trust. It is the latter which is relevant here: if the claimant

[11] Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitation and Conveyancing Practice: Problems and Solutions' [2008] Conv 365, 373, alterations in original.
[12] Robert Chambers, *Resulting Trusts* (OUP 1997).
[13] See *Air Jamaica v Charlton* [1999] 1 WLR 1399 (PC); *Twinsectra v Yardley* [2002] 2 All ER 377 (HL).
[14] See *Westdeutsche Landesbank v Islington LBC* [1996] AC 669 (HL) and William Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72.

contributes financially to the acquisition of property placed in the legal name of the defendant, it will be presumed that the defendant holds the property for the benefit of the claimant, in proportion to the claimant's contribution. As this is only a presumption, the defendant is entitled to prove that the claimant did in fact intend to benefit the defendant and thereby rebut the presumption.

The relevance of the resulting trust for disputes between cohabiting couples has varied. In *Pettitt v Pettitt*[15] and *Gissing v Gissing*,[16] the form of trust used was generally not made clear. Lord Diplock, for example, found it unnecessary to distinguish between implied, resulting and constructive trusts,[17] though Lord Pearson appeared to prefer the resulting trust.[18] Over the next two decades, until the 1990s, courts were unmoved by the need to clarify with precision which class of trust was being used. In *Burns v Burns*, for example it was held that 'whether the trust which would arise in such circumstances is described as implied, constructive or resulting does not greatly matter'.[19] Clarity seems to have been obtained in 1991, when Lord Bridge in *Lloyds Bank v Rosset* refers to the common intention trust as constructive.[20] The resulting trust was used in *Walker v Hall*[21] and *Springette v Defoe*,[22] where the Court of Appeal decided that the shares of the relevant property should be held in proportion to the contribution of the parties,[23] but Chadwick LJ in *Oxley v Hiscock*[24] later affirmed decisions in cases such as *Midland Bank v Cooke*[25] which made clear that the Court of Appeal in *Springette* had incorrectly applied *Lloyds Bank v Rosset*.[26] Chadwick LJ preferred to apply a broader test taking into account a range of behaviours to quantify the parties' property interests, meaning that the common intention constructive trust was preferred over the resulting trust, which could only provide a beneficial interest in proportion to contributions to the purchase price. This aspect of Chadwick LJ's judgment was supported in *Stack v Dowden*[27] and more forcefully in *Jones v Kernott* where it was said that:

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[15] *Pettitt* (n 7).
[16] *Gissing v Gissing* [1971] AC 886 (HL).
[17] *Gissing* (n 16) 905.
[18] *Gissing* (n 16) 901.
[19] *Burns v Burns* [1984] Ch 317 (CA) 326.
[20] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL).
[21] *Walker v Hall* (n 6).
[22] *Springette v Defoe* (1992) 24 HLR 552 (CA).
[23] *Walker v Hall* (n 6); *Springette v Defoe* (n 22).
[24] *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211.
[25] *Midland Bank v Cooke* (1995) 27 HLR 733 (CA).
[26] *Rosset* (n 20).
[27] *Stack* (n 2) [60].

> [I]n the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares.[28]

This is very clear: a presumption of resulting trust is not applicable in the cohabitation context. The dichotomy between commercial and domestic contexts has been doubted in subsequent cases, particularly where couples are also business partners. In *Marr v Collie*,[29] for example, a cohabiting couple bought properties as an investment. It was suggested that whether the resulting trust or the common intention constructive trust applied depended on the intentions of the parties, as there was no triumph of one presumption over another:

> If [joint beneficial ownership is not the parties' intention], or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer.[30]

This suggests that the resulting trust may be relevant, and that everything depends on the intentions of the parties. It should be noted that *Marr v Collie* is a Privy Council decision and is therefore not authority in England and Wales. Academic literature has heavily criticised the blurring of boundaries between domestic and commercial cases,[31] and the ordinary route of all

[28] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 [25].
[29] *Marr v Collie* [2017] UKPC 17, [2018] AC 631.
[30] *Marr* (n 29) [54].
[31] Alexander YS Georgiou, '*Marr v Collie*: The Ballooning of the Common Intention Constructive Trust' (2019) 82(1) MLR 145; Martin George and Brian Sloan, 'Presuming Too Little About Resulting and Constructive Trusts? Marr v Collie [2017] UKPC 17' [2017] Conv 303; Hilary Biehler, 'The Scope of Common Intention Constructive Trusts: Where to Draw the Line?' (2018) 32(2) Tru LI 63; Nick Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) Legal Studies 175. See *Crossco No.4 Unlimited v Jolan Limited* [2011] EWCA Civ 1619, [2012] 1 PC&R 16 [122], [129]-[130] where the common intention constructive trust was applied to a purely commercial arrangement. In Martin George and Antonia Layard, *Thompson's Modern Land Law* (7th edn, OUP 2019) 254, it is noted that subsequent judgments 'suggest that the commercial/domestic dichotomy remains the preferred approach for the English judiciary'.

cohabiting cases since *Marr v Collie* has been to rely on the common intention constructive trust rather than a resulting trust.

This is unsurprising, as the traditional view of resulting trusts has been a particularly narrow one. The reduced significance of the resulting trust in the cohabitation context has been attributed mainly to changing social and economic circumstances,[32] in which it was felt no longer appropriate to apply the presumptions of resulting trust. Instead, the House of Lords has seen fit to apply the common intention constructive trust. In *Pettitt* Lord Diplock suggested that '[t]he advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning democracy' meant that the presumptions applied to older generations were no longer relevant for the modern age.[33] The problem with the orthodox understanding of the resulting trust lies in its inability to respond to anything other than the purchase of the family home.[34] This is because a purely financial focus on the purchase of the home disproportionately disadvantages women,[35] who continue to be more likely to undertake domestic responsibilities and are therefore less likely to have the economic power to contribute financially to the acquisition of property. In addition, presumptions of intention in domestic cases are likely to be very different from presumptions of intention in commercial cases.[36]

The resulting trust relies purely on the intention of the claimant, asking whether the claimant intended to benefit the defendant and not, like the common intention constructive trust, asking whether the defendant intended to grant a property interest to the claimant. In this way, the unilateral nature of the resulting trust analysis places much more agency – and therefore power – on the shoulders of the claimant to retain a beneficial interest in her assets should she be able to show that she was not intending to benefit the defendant (a point discussed in Part Two). Of course, the traditional resulting trust analysis limits its application to situations where the claimant has contributed towards the acquisition of the property. However, should the resulting

[32] *Jones v Kernott* (n 28) [24].
[33] *Pettitt* (n 7) 26-27.
[34] However, in *Drake v Whipp* (1996) 28 HLR 531 (CA) the first instance judge allowed improvements to the property to be taken into account when applying a resulting trust.
[35] Nick Piska, 'Intention, Fairness and the Presumption of Resulting Trust After Stack v Dowden' (2008) 71(1) MLR 114, 124; *Jones v Kernott* (n 34) [24]. However, see Rebecca Probert, 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' [2001] CFLQ 275, which suggests that the law of trusts is not as discriminatory towards women as first appears, as most cohabiting women now work and therefore can contribute financially.
[36] *Stack v Dowden* (n 2) [42], [60].

trust respond to unjust enrichment, the potential circumstances triggering a beneficial interest for the claimant could be notably wider.

C) Proprietary Estoppel

A third doctrine a cohabitant may be able to rely on is proprietary estoppel. Proprietary estoppel is based on a representation made by the defendant to the claimant, which the claimant then detrimentally relies on. The court has a wide discretion as to what remedy may be granted to the claimant including the ability to grant no remedy at all should that be appropriate. This is clearly useful for cohabitants where the defendant has indicated to the claimant that they will receive a particular interest in the home.

Interestingly, there may be a degree of overlap between proprietary estoppel and unjust enrichment. This is because very often the defendant will have been enriched at the claimant's expense by the claimant relying on an assurance made by the defendant. As argued in Part Two, an advantage common between the doctrines might be the increase in available remedies beyond an equitable interest under a trust. However, due to the absence of any requirement of assurance by the defendant, unjust enrichment may prove a safer basis on which to develop the law. Further, as will be seen below, the concept of countervailing benefits may mean that cohabiting couples struggle to claim under proprietary estoppel, particularly where the claimant has lived rent-free in the defendant's house. Part Two discusses the unjust enrichment response to countervailing benefits.

According to Lord Walker, 'scholars agree that [proprietary estoppel] is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance'.[37] The boundaries between the requirements are blurred, and 'the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine'.[38] The court must look at the matter in the round. The purpose of the following analysis for this thesis is to show that, although often useful for cohabitants, proprietary estoppel cannot act as the primary doctrine for dealing with cohabitation disputes.

[37] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29].
[38] *Gillett v Holt* [2001] Ch 210 (CA) 225.

1. *Assurance*

The first requirement for a successful proprietary estoppel claim is that the defendant must have made an assurance (or promise or representation: the language varies) to the claimant that the claimant would receive a proprietary interest. The assurance given must have been 'clear enough'. This formulation comes from *Thorner v Major*,[39] where David Thorner did substantial work on the farm of his father's cousin, Peter Thorner. It was held that Peter had led David to believe that he would receive the farm after Peter's death. One of the key factual findings was that Peter had given David an insurance policy, saying 'that's for my death duties'.[40] This, coupled with other oblique remarks on subsequent occasions made it clear to David that Peter wanted him to inherit the farm. Their Lordships said that what was 'clear enough' depended heavily on context.[41] Peter Thorner was a countryman, a man of few words who never discussed money. Therefore, the assurances made where clear enough for David to succeed. As Sloan notes, this means that proprietary estoppel may provide justice for those who take on unpaid work in the belief – encouraged by the defendant – that they will receive a proprietary interest at a later date.[42]

However, although *Thorner v Major* ensured that context (including the personal characteristics and relationship of the parties) could be considered, it will often be the case in the cohabitation context that no clear express assurance is made by the defendant at all. *Southwell v Blackburn*[43] is a good example: there the assurance took the form of the defendant telling the claimant, in order to convince her to move in with him, that she would always have a home there and be secure in it. This is no clear assurance of a future property right, and yet the court held that it was a valid assurance for the purposes of proprietary estoppel. The Court of Appeal held that a promise that a person may stay in the house for as long as they wish potentially raises an equity in their favour,[44] and that the statement that the claimant 'would always have a home and be secure in this one' is clearly inconsistent with a promise of a home for the duration of the relationship only.[45]

[39] *Thorner* (n 37).
[40] *Thorner* (n 37) [94].
[41] *Thorner* (n 37) [56].
[42] Brian Sloan, 'Estop Me if You Think You've Heard It' (2009) 68(3) CLJ 518.
[43] *Southwell v Blackburn* [2014] EWCA Civ 1347, [2015] 2 FLR 1240
[44] *Southwell* (n 43) [7].
[45] *Southwell* (n 43) [9].

To put it at its mildest, the assurances in *Southwell* were clearly ambiguous, leading Hayward to argue that the treatment of the assurances 'lacked analytical rigour'.[46] Hayward further notes that *Southwell*'s status as a case on appeal may have inhibited the analysis due to the court not wishing to interfere with the decision of the first instance judge. *Southwell* suggests that in cohabitation cases courts will hold the assurance to a lesser standard of clarity, with assurances that are of doubtful clarity being regarded as 'clear enough'. Similarly, the Court of Appeal in *Liden v Burton*,[47] decided after *Southwell*, held that the defendant's representation that the claimant's contributions to the mortgage were 'for the house' meant 'towards the ownership of the house' and were therefore clear enough. Older cases, however, such as *Lissimore v Downing* and *Coombes v Smith*,[48] held that general promises to support were not sufficient to generate a proprietary estoppel. If this is true, cohabitants may struggle to claim in proprietary estoppel, as most claimants will not be able to show any clear promise of security of occupation of the family home. The nature of the language used in these cases, and in particular the question of conditional or qualified assurances, will be discussed in Part Two.

2. *Detrimental reliance*

After showing an assurance of a future property right, the claimant must then show that they have relied on the assurance to their detriment. Once it has been established that a representation was made, the burden of proof falls on the defendant to prove that the plaintiff was not induced by the representation.[49] This presumption can have decisive effect: in *Wayling v Jones*,[50] Mr Wayling had been in a relationship with the deceased, Mr Jones, that involved him working in Jones' hotel for low pay. The question, however, was whether this detriment was suffered in reliance of Jones' promise that Wayling would one day inherit the hotel, or rather because Wayling had cared for Jones. Ultimately, the presumption of reliance helped Wayling, as the defence could not prove that he would have stayed with Jones regardless of the promise, and therefore the proprietary estoppel claim was successful.

It may be that, although the claimant has in some way relied to their detriment on the defendant's promises, they have received countervailing benefits such that any detriment is

[46] Andy Hayward, 'Cohabitants, detriment and the potential of proprietary estoppel' (2015) 27 CFLQ 303. See also *Walsh v Singh* [2009] EWHC 3219 (Ch), where proprietary estoppel failed.
[47] *Burton v Liden* [2016] EWCA Civ 275, [2017] 1 FLR 310.
[48] *Lissimore v Downing* [2003] 2 FLR 308 (Ch); *Coombes v Smith* [1986] 1 WLR 808 (Ch).
[49] *Culliford v Thorpe* [2018] EWHC 426, [2018] BPIR 685 [67].
[50] *Wayling v Jones* (1995) 69 P&CR 170 (CA).

neutralised. *Sledmore v Dalby*[51] is a good example of this: although the court noted that there was an assurance that Mr Dalby would receive the house and that he had relied to his detriment on that assurance by doing work on the house, the court also noted that Dalby had lived rent-free for nearly twenty years. During that time, the home insurance and some improvements were paid for at the Sledmore's expense. Therefore, it was no longer inequitable to allow Dalby's expectations to be defeated.

It is therefore possible for a proprietary estoppel claim to fail even if detrimental reliance is proven. Unfortunately for cohabitants, they will often have been living rent-free in their partner's house for a significant period, meaning they may struggle to obtain a remedy. It should be noted that countervailing benefits were mentioned in only a broad-brush way in *Southwell v Blackburn*.[52] The reason is not clear, but it may indicate a judicial trend to take a less legalistic approach to countervailing benefits in cohabitation cases.[53] It should be remembered that *Southwell* is but one case, and it is unclear just how many conclusions we can draw from it. Countervailing benefits will be returned to in Part Two in the context of counter-restitution, a potential defence to unjust enrichment claims.

3. *Satisfying the equity*

Once a successful proprietary claim has been made out, the court must decide on a remedy (or may choose not to award a remedy). The aim is to achieve the 'minimum equity to do justice'.[54] There has been continuing controversy over whether the remedy focuses on the expectation of the claimant (caused by the assurance), or the detriment suffered by the claimant.[55] In *Jennings v Rice,*[56] Robert Walker LJ suggested that the remedy depends on the circumstances. If the relevant assurance was of a consensual nature, then it makes sense that the parties assumed the expectation created by the assurance and the detriment were balanced and therefore if possible the claimant should receive the property promised.[57] However, where the assurance is more vague, expectations of the claimant are less certain and therefore act as no more than a starting

[51] *Sledmore v Dalby* (1996) 72 P&CR 196 (CA).
[52] *Southwell* (n 43).
[53] Mark Pawlowski, 'Informality and Entitlement to the Family Home: Estoppel or Declaration of Trust? Part 1' [2015] Fam Law 175; Hayward (n 46).
[54] *Crabb v Arun District Council* [1976] Ch 179 (CA) 198; *Pascoe v Turner* [1979] 1 WLR 431 (CA) 437-438; *Gillett v Holt* (n 38) 235.
[55] This controversy is the central concern of the Supreme Court appeal from *Guest v Guest* [2020] EWCA Civ 387, [2020] 1 WLR 3480, the hearing for which took place on the 2nd December.
[56] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P&CR 8.
[57] *Jennings* (n 56) [45].

point.[58] If out of proportion with the detriment, then the equity will have to be satisfied another way.[59] A number of factors will be relevant, and there is no closed list.[60]

In general, cases have followed this view and focused on expectations where there has been an agreement between the parties.[61] However, the Court of Appeal in *Davies v Davies*[62] suggested that the scholarly weight was on compensating the detriment, so as to remove the reliance loss. This was justified on the basis that the detrimental reliance is what makes the reneging on a prior assurance unconscionable.

Given the varied fact patterns which may make up a claim, the court has a great deal of flexibility. This is very useful for cohabitants, as a monetary payment avoids having to necessarily sell the property (albeit that the expenses involved might require the defendant to sell the property regardless). The advantages of monetary awards will be returned to in Part Two as a key advantage of unjust enrichment. It allows the court to be sensitive to the fact patterns of the parties' relationship and prioritise the need for a clean break.[63] This is far more nuanced than the common intention constructive trust, which responds only by granting a beneficial interest in the property. As Dixon has recently argued, 'proprietary estoppel is, therefore, uniquely placed to respond to the difficult family relations that have led to the litigation. Even a successful claim does not necessarily mean the defendant loses their land, or has to share it, or is even restricted in their testamentary freedom'.[64]Alongside this flexibility comes a great deal of uncertainty,[65] however, and the benefits of the more predictable common intention constructive trust is that the claimant, if succeeding in their claim, can be sure of obtaining an interest in the family home.

[58] *Jennings* (n 56) [47].
[59] *Jennings* (n 56) [50].
[60] *Jennings* (n 56) [52].
[61] *Culliford* (n 49) [81]; *James v James* [2018] EWHC 43 (Ch) [52]; *Habberfield v Habberfield* [2019] EWCA Civ 890, [2019] 2 P&CR DG19 [68]; *Thompson v Thompson* [2018] EWHC 1338 (Ch) [161].
[62] *Davies v Davies* [2016] EWCA Civ 463, [2017] 1 FLR 1286.
[63] *Gillett v Holt* (n 38) 237.
[64] Martin Dixon, 'Painting Proprietary Estoppel: Howard Hodgkin, Titian or Jackson Pollock?' [2022] Conv 30, 43.
[65] The Family Law Bar Association, 'Written Evidence: The Rights of Cohabiting Partners' (Women and Equalities Committee, 2021 https://committees.parliament.uk/writtenevidence/37658/html/ (accessed 11/04/2022).

II. ANALYSING THE COMMON INTENTION CONSTRUCTIVE TRUST

This thesis suggests an unjust enrichment basis for the development of the common intention constructive trust. Such a basis, if recognised by the judiciary, would open a new path for future development, enabling certain improvements to be made to the law. These improvements would in turn be helpful for cohabitants who must (absent legislation) rely on this law to get economic redress at the end of their relationship. This section therefore builds a foundation for an unjust enrichment analysis by exploring the issues with the law in its current form. It will be argued that these issues fall into three categories: first, the fact that parties must dispute in the language of ownership of property, second, the fact that financial contributions to the family home are preferred over domestic contributions and third, the way in which the law approaches the nature of party intention. Before each of these issues are looked at, however, it will be briefly explained how the common intention constructive trust operates in practice.

A) The Basics: How the Common Intention Constructive Trust Works

The common intention constructive trust works by imposing a constructive trust on the legal title holder of property – the defendant – to hold for another person – the claimant – should the parties have formed a common intention between them that the claimant should have a proprietary interest.[66] The claimant must further have relied on that common intention to their detriment. It should be noted from the outset that this trust applies only to those who are sharing their home as part of an intimate relationship.[67]

Much of the discussion in this thesis applies primarily to sole legal owner disputes (where the defendant alone has a legal interest in the property). This is because, as will be made clear below, claimants in sole legal owner disputes face much greater hurdles when seeking to show how the property is held. The starting point is that equity follows the law.[68] Therefore, in sole legal owner disputes, the claimant is presumed to have no equitable interest in the property. The claimant must pass three stages. First, in the 'acquisition stage', the claimant must show that the parties had a common intention for the claimant to acquire a share of the property. This

[66] In order to explain with maximum clarity, it will be assumed throughout this thesis that the claimant is seeking to acquire an interest in property (in sole name scenarios) or otherwise increase their beneficial interest in the property (in joint name scenarios). However, cases do exist where the claimant is seeking a possession order against a defendant who is asserting an interest in the property.
[67] *Stack v Dowden* (n 2) [42]. The common intention constructive trust has sparked a similar principle in commercial cases, known as 'the *Pallant v Morgan* equity'.
[68] *Stack v Dowden* (n 2) [53].

can be done in two ways. The claimant may be able to show an express common intention, where the defendant has made explicitly clear that the claimant is to have an interest in the property. An example is *Culliford v Thorpe*,[69] where it was held that the parties had made an express agreement to share the property. However, an express common intention must clearly involve the parties sharing property, and *James v Thomas*[70] indicates that assurances such as improvements benefitting both parties or that the claimant will be well provided for will not constitute a finding of express common intention. If express common intention cannot be found, the claimant may be able to show that a common intention can be inferred through the behaviour of the parties. At the acquisition stage, the only relevant behaviour which may serve to allow an inference of common intention is contributions to the purchase price of the property or contributions to the mortgage instalments.[71]

Once the claimant has shown there was a common intention between the parties that she was to obtain an interest in the property, the claimant must then demonstrate that she has relied on that common intention to her detriment.[72] The test for detrimental reliance requires 'conduct on which the [claimant] could not reasonably have been expected to embark unless she was to have an interest in the house',[73] according to Nourse LJ in *Grant v Edwards*. In *Grant v Edwards* itself, the claimant was successful in proving detrimental reliance due to the very substantial contributions she had made to the living expenses of the household, which allowed the defendant in turn to pay the mortgage.

If the claimant has shown a common intention for the claimant to obtain an interest in the property and can demonstrate detrimental reliance on that common intention, the court must then declare what share of the equitable interest the parties intended the claimant should have. This is known as the 'quantification stage'. As before, if there is an express common intention on the quantification of the claimant's share, this will settle the matter. However, if this cannot be shown, the court may use the parties' behaviour to infer a common intention. The court can consider a wide range of factors to examine the 'whole course of dealings' between the

[69] *Culliford v Thorpe* (n 49).
[70] *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 FLR 1598.
[71] *Rosset* (n 20).
[72] The need for detrimental reliance has been the subject of some controversy, and recently the High Court has suggested that it is no longer a requirement. See *Hudson v Hathaway* [2022] EWHC 631 (QB). This will be discussed in detail in Part Two. However, the orthodoxy is that detrimental reliance is still required.
[73] *Grant v Edwards* [1986] Ch 638 (CA) 648.

parties.[74] This includes the purposes for which the property was acquired, the nature of the parties' relationship, the presence of children and how the parties arranged their finances. The list of relevant considerations is not closed. Finally, should the court feel that they simply cannot infer any common intention from the parties' relationship, they are, at this stage, capable of imputing an intention.[75] This is an intention which the parties never had, but is one which the parties would have thought if they had put their minds to the question.

Should the parties have joint legal ownership of the property, equity follows the law and presumes that both parties also have an equitable interest in the property,[76] meaning there is no need for the claimant to go through the acquisition stage. The presumption is that each party will be entitled to 50% of the property – as equity is equality – and any diversion from this represents an unusual case.[77] Regardless, the claimant may seek to show that they are entitled to more than 50% of the equitable interest of the property, in which case they will need to go through the quantification stage as outlined above.

This is the basic legal framework. Significant problems with the law remain. The following sections will discuss many of these problems. This is not intended to be a comprehensive list of issues with the current legal framework and is instead intended to introduce some of the elements of the common intention constructive trust which leads to the continuing economic vulnerability of some cohabitants at the end of their relationship, and therefore the elements which may be improved upon in development of the trust along unjust enrichment principles.

B) The Problematic Focus on Ownership

To understand the criticisms of the common intention constructive trust, it is useful to consider what the trust aims to do. This is because much of the literature on the common intention trust situates it squarely within the context of the breakdown of informal intimate relationships. The trust exists as the only way (bar express and resulting trusts and proprietary estoppel mentioned above) to enable people to successfully claim against their former partners to an unmarried cohabiting relationship in order to obtain financial redress at the end of their relationship. The genesis of the common intention constructive trust can be traced back to the decisions by the House of Lords in *Pettitt v Pettitt*[78] and *Gissing v Gissing*,[79] over 50 years ago. Unsurprisingly,

[74] *Stack v Dowden* (n 2) [69].
[75] *Jones v Kernott* (n 28).
[76] *Jones v Kernott* (n 28) [16]-[17].
[77] *Stack v Dowden* (n 2) [68].
[78] *Pettitt* (n 7).
[79] *Gissing* (n 16).

their Lordships' decisions were not based on the social issues which occur due to cohabiting couples separating in the 21st century and were instead considering issues relating to spouses before the Matrimonial Proceedings and Property Act 1970 (later consolidated in the Matrimonial Causes Act 1973). The law is not designed to protect the less economically powerful partner and does no more than regulate proprietary interests between the couple.

The common intention constructive trust (or at least a prior version of this trust) therefore started life as a reaction to a similar (but not the same) problem. In *Gissing v Gissing*,[80] the wife contributed to the family home by spending money on furniture, improving the lawn, purchasing the family's clothes and doing all the housework and childcare. The husband had paid for the house itself. The case was decided before the Matrimonial Proceedings and Property Act 1970 was passed. Their Lordships held that, unless there was some agreement or understanding between the parties that the claimant was to have a share in the property, there could be no judicial discretion to redistribute assets between the parties. Their Lordships in the previous case of *Pettitt v Pettitt* had been careful to reject previous attempts by the Court of Appeal (led by Lord Denning MR) to create a wide judicial discretion around section 17 of the Married Women's Property Act 1882.[81] The House of Lords was clear that 'if the Divorce Division is not armed with adequate powers to make provision for the wife on the breakdown of the marriage, that is a matter for the legislature'.[82]

The legislature did decide that it wanted married couples to be provided for on divorce and enacted the Matrimonial Proceedings and Property Act 1970, later consolidated by the Matrimonial Causes Act 1973. The common intention constructive trust was never intended to act as a redistributive framework for couples at the end of their relationship and was therefore not designed to cope with the complex interdependence which is often a feature of intimate relationships.[83] It fits within property law by permitting informal creation of property rights in a certain context. As Mee argues, 'the problem is that the law of trusts is important for reasons other than its role in respect of resolving disputes between cohabitants'.[84] Trusts law is a vital commercial engine, and is therefore rationalised more easily when viewed from a commercial

[80] *Gissing* (n 16).
[81] *Pettitt* (n 7).
[82] *Pettitt* (n 7) 901.
[83] AJ Cloherty and DM Fox, 'Proving a Trust of a Shared Home' (2007) 6(3) CLJ 517, 519-520.
[84] John Mee, '*Burns v Burns*: The Villain of the Piece?' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (2011 Hart) 191.

perspective.[85] Trusts law therefore cannot really get to the heart of the injustice that the law is trying to fix.[86] Douglas et al point out that what we should care about is the unjust enrichment of the defendant at the claimant's expense, not the intentions of the parties regarding property interests.[87]

However, as mentioned, the common intention constructive trust remains as the primary recourse to court by former cohabiting partners, and the temptation has therefore been to use the trust to deal with economic vulnerability at the end of an informal intimate relationship. This dissonance between the aims of the trust and the social need for the trust creates significant issues. The trust is triggered by informal agreements around ownership which would be unconscionable for the defendant to resile from.[88] The evidence brought to court is therefore relevant only insofar as it indicates intentions surrounding the ownership of the property, and the outcome of any claim in the area is necessarily a beneficial interest under a trust (unlike proprietary estoppel, as argued above, and unjust enrichment, as will be argued in Part Two).

Forcing unmarried couples to dispute in terms of ownership – and not in terms of the unjust economic benefit received by the defendant – has led to many of the issues with the law discussed in this chapter. This means that, when inferring a common intention, financial contributions to the acquisition of property are preferred and prioritised over domestic contributions. This is because financial contributions to acquisition, including payment of the purchase price and/or mortgage instalments, are more readily considered relevant to the question of ownership of property. Domestic contributions, such as homemaking and childcare, are much more difficult to understand as showing an intention between the parties that the homemaker or child-carer should have an interest in the property.

The focus on ownership of the family home also prevents a number of people from making a claim. For renters, a transfer of tenancy (under Schedule 7 of the Family Law Act 1996) or succession to the tenancy on death of a partner (under the Housing Act 1988 section 17) is possible. However, couples who are renting their home will be unable to claim under the

[85] On which see John H Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 Yale LJ 165 for an analysis of the commercial use of trusts in the United States.
[86] Simon Gardner, 'Quantum in *Gissing v Gissing* Constructive Trusts' [2004] LQR 541, 546-547, suggesting that the true driver for intervention in this area is the nature of the parties' relationship.
[87] Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' [2009] MLR 25, 28-30.
[88] Though note that technically the parties need not have agreed anything, as the court can impute intentions at the quantification stage and, as is discussed below, there are significant doubts as to whether the court's inferences of intention are realistic. See Chapter Five for more details.

common intention constructive trust, even though these relationships may also exhibit economic imbalance between the parties, with one person receiving an economic benefit at the expense of the other leading to continuing economic vulnerability. In principle, there is no reason to exclude renters from the law. One advantage therefore of development of the law towards a focus on economic benefit of the defendant at the claimant's expense (and therefore away from ownership) is that couples who rent their home will be treated the same as couples who own their home. This will be discussed further in Part Two.

The consequence of the above is that the focus on ownership can be seen as first, a cause of many of the problematic aspects of the legal framework and, second, as unnecessarily forcing cohabitation disputes into a property mould which do not reflect the societal problem of economic vulnerability at the end of cohabiting relationships. Development of the law according to unjust enrichment principles may allow disputes over entitlement to financial resources (rather than ownership) after a relationship and therefore could liberalise the law and avoid the issues discussed here.

C) Differing Treatments of Financial and Domestic Contributions

Should the claimant not be able to show an express common intention that the claimant was to have a beneficial interest in the property – a relatively common situation for claimants as couples do not often talk of property rights – the claimant will have to ask the court to infer the necessary common intention from contributions to the family home. At the acquisition stage, Lord Bridge has made clear there are only two contributions which will allow such an inference, stating that 'in this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do'.[89]

This means that there is a significant limitation on the behaviours considered relevant to the inference of a common intention. Importantly, domestic contributions such as homemaking and childcare are not considered to be relevant to party intention about ownership of the home. In a society where women are still more likely to take on unpaid work in the home than men, this has the practical consequence of devaluing women's contributions to the family and

[89] *Rosset* (n 20) 133.

making it more difficult for women to successfully claim.[90] Lord Bridge, in deciding that domestic contributions should not create an inference of common intention, argued that:

> [I]t would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property.[91]

This problematic narrative of 'natural woman's work' indicates a judicial trend of prioritising financial contributions to the acquisition of property over the provision of domestic services in the home.[92] This narrative has great heritage in the common intention constructive trust case law. In *Eves v Eves*,[93] for example, the claimant's work was required to be exceptional before a constructive trust was recognised, with the court picking out behaviours which go beyond what a female partner would ordinarily be expected to do.[94] *Thomson v Humphrey* is another good example:[95] in that case the claimant cared for the defendant's mother and took on 'general housekeeping'[96] responsibilities. The judge found that these were 'normal domestic chores' that 'in relationships where only one partner has a job, are usually carried out by the one who is not working'.[97] It should be noted that the normality of one party working outside the home (taking on market-oriented conduct) and therefore contributing more to the financial responsibilities of the home is never commented upon. Yet it is at least partially their status as

[90] Resolution, 'Written Evidence, The Rights of Cohabiting Partners' (Women and Equalities Committee, 2021) https://committees.parliament.uk/writtenevidence/37411/html/ (accessed 11/04/2022).
[91] *Rosset* (n 20) 131.
[92] See generally Sam Bannister, 'Domestic Contributions as Unjust Enrichments: Commodifying Love?' [2021] CFLQ 275.
[93] *Eves v Eves* [1975] 1 WLR 1338 (CA). See Kevin Gray and Francis Gray, *Elements of Land Law* (OUP, 5th edn 2009), 893-894.
[94] For criticism of the fact that women must do extraordinary or abnormal work, see: Leo Flynn and Anna Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance (1995) 3(1) Feminist Legal Studies 105; Simone Wong, 'Would you "Care" to Share Your Home?' (2007) 58(3) NILQ 268; Ellen Gordon-Bouvier, 'Crossing the Boundaries of the Home: a Chronotopical Analysis of the Legal Status of Women's Domestic Work' (2019) 15(4) International Journal of Law in Context 479.
[95] *Thomson v Humphrey* [2009] EWHC 3576 (Ch), [2010] 2 FLR 107.
[96] *Thomson* (n 95) [39].
[97] *Thomson* (n 95) [44].

normal responsibilities within the home which denies the relevance of domestic contributions when seeking to infer a common intention at the acquisition stage.

These narratives are not merely historical. In the recent case of *Dobson v Griffey*,[98] the claimant's heavy renovation of the property was considered 'understandable in the context of the relationship', referable to her 'love and affection' for the defendant rather than 'mercenary considerations'.[99] This is a reflection of the dicta in the much older case of *Grant v Edwards*:

> Setting up house together, having a baby and making payments to general housekeeping expenses (not strictly necessary to enable the mortgage to be paid) may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house.[100]

In the more recent case of *Pillmoor v Miah*, it was said that 'in sole name cases the circumstances which can lead to the inference that there was to be an agreement as to the sharing of the beneficial interest need to be exceptional before one can draw that inference'.[101] It appears that the devaluation of domestic contributions within the law is part of a wider judicial narrative of keeping these responsibilities within the private sphere of the home, as gifts motivated by the love and affection of the defendant. Under this narrative, they tell us nothing about the parties' intention regarding ownership of the property. This is partially because these responsibilities are not seen to have any economic relevance or impact on the family. These narratives will be challenged in Part Two, which will argue that the concept of 'enrichment' commodifies domestic contributions, understanding these behaviours as economically impactful and therefore reinterpreting the question as one of unjust economic benefit.

After *Rosset*, a string of cases took on a particularly strict approach to finding a common intention. In *Springette v Defoe*,[102] Dillon LJ held that, in the absence of an express declaration of beneficial interests, 'the court will hold that the joint purchasers hold the property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly

[98] *Dobson v Griffey* [2018] EWCA 1117 (Ch).
[99] *Dobson* (n 98) [84]-[85].
[100] *Grant* (n 73) 657.
[101] *Pillmoor v Miah* [2019] EWHC 3696 (Ch) [27].
[102] *Springette* (n 22) (CA).

to the purchase price'.[103] His Lordship rejected any ability for the court to do what is 'fair' and suggested that the payment of the mortgage in equal shares was not enough to prove a common intention of equality.[104] The presumption of resulting trust was therefore not displaced, and the parties were held to share in proportion to their financial contributions to the purchase price. A similar result was reached in *Huntingford v Hobbs*,[105] where again a resulting trust was imposed, with the shares demarcated by financial contributions. This time, however, the Court of Appeal took mortgage payments into account when considering the holding of the beneficial interest.[106] This shows that cases in the early 1990s took a restrictive view of the common intention constructive trust, focusing on financial contributions to acquisition of the property alone.

In some ways this restrictive approach may be thought of as surprising. In *Gissing v Gissing* it was suggested by Lord Reid that there is no reason for a distinction to be drawn between a wife contributing towards the purchase price (including mortgage instalments) and paying utility bills.[107] In other words, the practical effect of making indirect contributions to the property (such as by paying utility bills) and therefore allowing the defendant to pay the mortgage is the same as simply paying the mortgage directly. Lord Bridge's decision to restrict relevant behaviour to financial contributions to the acquisition of the property therefore does not sit well with established authority. Further, in the later case of *Le Foe v Le Foe* indirect financial contributions such as payments of household bills were held to be sufficient to infer a common intention at the acquisition stage (albeit this decision was unnecessary as the claimant had paid directly to the mortgage).[108]

Gardner has argued that *Rosset*'s restrictive interpretation of the law may be understood as part of a string of cases which involve the House of Lords preferring the bank as mortgagee over the interest of those in occupation of the house.[109] The factual context in *Rosset* was that Mrs

[103] *Springette* (n 22) 556.
[104] *Springette* (n 22) 557.
[105] *Huntingford v Hobbs* [1993] 1 FLR 736 (CA).
[106] *Huntingford* (n 105) 660-661.
[107] *Gissing* (n 16) 896.
[108] *Le Foe v Le Foe* [2001] 2 FLR 970.
[109] Simon Gardner, 'A Woman's Work…' (1991) 54(1) MLR 126, 128. Gardner mentions cases including *City of London Building Society v Flegg* [1988] AC 54 (HL) in which interests of those in actual occupation of property were overreached by the mortgagee, and *Abbey National Building Society v Cann* [1991] 1 AC 56 (HL), where the House of Lords denied an overriding interest over property had come into being as against the mortgagee where the loan was used to complete the purchase of the property. See also Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007) 55-61.

Rosset, the claimant, was attempting to show she had an overriding interest and therefore that her interest was binding on Lloyds Bank under the Land Registration Act 1925 section 70(1)(g).[110] Mrs Rosset's argument that she had a beneficial interest under a common intention constructive trust was therefore an attempt to establish a proprietary interest which predated the mortgagee's interest and could act as an overriding interest as against the bank. If Gardner is right, Lord Bridge's restrictive dictum has less to do with disputes between couples in intimate relationships and more to do with establishing priority interests as between occupier and creditor. As Dixon has argued, 'it must be remembered that such cases actually raise questions of property law […] the manipulation of property law is not the best way, and certainly not the only way, of achieving necessary and desirable social goals'.[111] This is an example of the logic of property law controlling the law applying to disputes between cohabiting couples, and an indication that moving away from proprietary interests in land (and towards unjust economic benefit) might be advantageous.

At the quantification stage, the circumstances used to infer a common intention between the parties is significantly wider than those permissible at the acquisition stage. In *Midland Bank v Cooke*,[112] it was held that, after the partner without legal title successfully acquires an equitable interest (at the acquisition stage), to quantify that interest the judge 'must take a survey of the whole course of dealings between the parties relevant to the ownership and occupation of the property'.[113] Direct financial contributions are not the only relevant consideration for this purpose. As Gardner has argued, this case involved the court accepting the possibility of finding an agreement where there was none – the evidence was that the couple had not considered what their shares would be.[114] Dixon therefore suggests that *Cooke* involves 'a remarkable finding, hardly supported by authority'.[115] However, in *Oxley v Hiscock* Chadwick LJ held that in the absence of an express agreement, each party is entitled to the share that the court considers fair in light of the whole course of dealings between the parties.[116]

This approach to quantification was nuanced in the decision in *Stack v Dowden*. It was held that 'the search is to ascertain the parties' shared intentions, actual, inferred or imputed, with

[110] Now the Land Registration Act 2002 Schedule 3 Paragraph 2.
[111] Martin Dixon, 'Acquiring an Interest in Another's Property' (1991) 50(1) CLJ 38, 40.
[112] *Midland Bank v Cooke* (n 25) (CA). See also *Drake v Whipp* (n 34) at 537, where the court follows *Cooke* in examining the parties' entire course of conduct to quantify a beneficial interest of the claimant.
[113] *Midland Bank v Cooke* (n 25) 745.
[114] Simon Gardner, 'Fin de Siecle Chez Gissing v Gissing' [1996] LQR 378, 381.
[115] Martin Dixon, 'A Case Too Far?' [1997] Conv 66, 71.
[116] *Oxley v Hiscock* (n 26) [48].

respect to the property in the light of their whole course of conduct in relation to it'.[117] The court, however, could not simply do what it thinks fair – rejecting the approach of Chadwick LJ above.[118] Baroness Hale noted that, in joint name cases, it would be a rare that the presumption of equity following the law, granting each party 50% of the property, would be displaced. The Court is aided in its search for the parties' intentions by reference to a list of factors – which is not closed – that ought to be considered as part of the whole course of dealings between the parties.[119] The Supreme Court returned to the issue in *Jones v Kernott.*[120] In this case, it was repeated that the goal of the court in quantifying the claimant's share is to ascertain the common intention of the parties. This can be done by examining the whole course of dealings between the parties. If a common intention cannot be found, the court may impute an intention, which involves finding an intention where, in reality, none existed. Imputation was held to be a last resort, where evidence that the claimant was intended to have a share can be found yet there is no evidence of the precise shares intended. This would involve the court deciding what reasonable people in the parties' shoes would have decided.[121]

The decisions in *Stack* and *Jones* therefore indicate a more flexible approach to proving a common intention at the quantification stage than is permissible at the acquisition stage. However, it is questionable to what extent subsequent judges have considered the whole range of circumstances existing between the parties as permitted by the 'whole course of dealings' test. In *Stack v Dowden* itself, Baroness Hale primarily used financial contributions to determine beneficial interests.[122] The trial judge had made findings on the length and nature of the parties' relationship (part of Baroness Hale's relevant factors[123]), but her Ladyship held that:

> This is not an adequate answer to the question. It amounts to little more than saying that these people were in a relationship for twenty-seven years and had four children together. During this time Mr Stack made unquantifiable indirect contributions to the

[117] *Stack* (n 2) [60].
[118] *Stack* (n 2) [61].
[119] *Stack* (n 2) [69].
[120] *Jones* (n 28).
[121] *Jones* (n 28) [46].
[122] *Stack* (n 2) [87]-[89].
[123] *Stack* (n 2) [69].

> acquisition and improvement of one house and quantifiable direct contributions to the acquisition of another.[124]

This then seems to go against Baroness Hale's own factors, including the nature of the relationship and the presence of any children of the relationship who needed a home, and positions financial contributions as a more relevant consideration. Baroness Hale also noted that the parties did not pool their resources and that Ms Dowden met most outgoing financial obligations herself. She therefore ignored arguments that Ms Dowden earned more, making it unsurprising that she contributed more,[125] and that the very fact that the parties jointly bought the house when otherwise they kept their finances separate may indicate a different intention.[126] This has led George to suggest that Baroness Hale de facto prioritised financial contributions over domestic ones.[127] As Probert argues, 'for all the rhetoric in recent cases about examining the whole course of dealing and taking a wide range of contributions into account, it is clear that financial contributions are still accorded more significance than others in quantifying interests in the family home'.[128] The decision therefore ultimately prioritises financial considerations.

The House of Lords in *Stack v Dowden* were also critical of the restrictive approach taken to finding common intention in the acquisition context in *Lloyds Bank v Rosset*.[129] It was held that Lord Bridge may have 'set that hurdle rather too high in certain respects'.[130] As *Stack* was a joint names case, any comments about the acquisition stage were obiter. An early Privy Council (and therefore again non-binding albeit persuasive) sole name case was encouraging: in *Abbott v Abbott* Baroness Hale said that the Court of Appeal had put undue significance on *Rosset* and that the law had moved on.[131] In applying *Stack,* Baroness Hale noted that the parties had a joint bank account and joint liability for the mortgage loan, holding that the wife had acquired an interest in the property. Following this, several sole name cases have utilised the broader whole course of dealings test at the acquisition stage. Unfortunately, none of them have

[124] *Stack* (n 2) [86].
[125] *Stack* (n 2) [11].
[126] *Stack* (n 2) [133].
[127] Robert H George, 'Stack v Dowden – Do As We Say, Not As We Do?' (2008) 30(1) JSWFL 49, 54; see also Rebecca Probert, 'Equality in the Family Home' (2007) 15 Feminist Legal Studies 341, 348.
[128] Probert (n 128).
[129] *Rosset* (n 20).
[130] *Stack* (n 2) [63].
[131] *Abbott v Abbott* [2007] UKPC 53, [2007] All ER (D) 432.

stepped beyond *Rosset* as all results are consistent with orthodox application of Lord Bridge's principles.[132]

Sole name cases post-*Stack* have therefore continued to focus almost entirely on financial contributions. One example is *Graham-York v York*.[133] Miss Graham-York attempted to claim a beneficial interest of her home, in which her partner Mr Norton York had held sole legal title.[134] Miss Graham-York had mental illnesses including Asperger's syndrome and PTSD, and Mr York had a 'proclivity for violence'.[135] The relationship was 'plainly abusive in every sense of that word'.[136] Yet the court did not take into account the parties' characteristics or the nature of the relationship when considering the intention of the parties, except for a comment that it was unlikely Norton York intended Miss Graham-York to have a share given his mercenary considerations.[137] However, the Court of Appeal upheld the judge's 'generous' 25% for Miss Graham-York. In denying a larger share, Tomlinson LJ said that it was possible to be 'led astray by the length of the cohabitation' and set this length against the fact that the claimant's financial contributions did not amount to much.[138] This shows that contributions are de facto the main consideration when analysing beneficial interests. Greer and Pawlowski, criticising the court for ignoring the wider course of dealings, have suggested that a form of muted resulting trust was applied.[139]

Again, in *Dobson v Griffey*,[140] the judge appears to rely solely on the financial contributions of the defendant and not the labour or domestic contributions of the claimant,[141] as the latter were 'understandable in the context of their relationship'.[142] This suggests that the claimant's labour was of less importance than the defendant's financial upkeep of the claimant when considering whether a trust was established. The 'whole course of dealings' test in *Hapeshi v Allnatt* appears to reduce into a discussion of 'who paid for what', with financial matters taking

[132] See Brian Sloan, 'Keeping Up with the Jones Case: Establishing Constructive Trusts in "Sole Legal Owner" Scenarios' (2015) 35 Legal Studies 226, which contains an analysis of a number of cases post-*Jones v Kernott* and their compliance with the *Rosset* rules. See also Matthew Mills, 'Single Name Family Home Constructive Trusts: is *Lloyds Bank v Rosset* Still Good Law?' [2018] Conv 350.
[133] *Graham-York v York* [2015] EWCA Civ 72, [2015] HLR 26.
[134] *York* (n 133).
[135] *York* (n 133) [10].
[136] *York* (n 133) [19].
[137] *York* (n 133) [16].
[138] *York* (n 133) [26].
[139] Sarah Greer and Mark Pawlowski, "Imputation, fairness and the family home — Graham-York v York" [2015] 79 Conv 512, 520.
[140] *Dobson* (n 98).
[141] *Dobson* (n 98) [84].
[142] *Dobson* (n 98) [85].

precedence. The judge therefore took into account that the respondent provided the discount for the house and paid the mortgage instalments, whereas the claimants did not pay the mortgage instalments.[143] All facts which the judge 'bore in mind' were of a financial nature. In *O'Kelly v Davies*, the judge took into account that the claimant worked consistently, and the defendant did not, that the claimant provided the income for the family home and paid the mortgage.[144] Again, these are all financial matters. Most recently, *Pillmoor v Miah* confirms that:

> In sole name cases the circumstances which can lead to the inference that there was to be an agreement as to the sharing of the beneficial interest need to be exceptional before one can draw that inference, and, secondly, that taking part in the business of the spouse or, for instance, carrying out works on the property, which isn't the case here, do not give rise to such inference in the ordinary course.[145]

Despite recent cases, such as *Amin v Amin*[146] and *Tolmie v Taylor*,[147] that suggest the dealings relevant for acquisition cases may be wider than that suggested in *Rosset*, no claimant has successfully acquired an interest by relying purely on behaviour which falls outside payments to the purchase price or to mortgage instalments. It would therefore seem that, despite in theory a more abstract, 'whole course of dealings' test taking precedence, financial contributions in practice still play a vital role. Financial contributions may be but one in a long list of relevant factors when determining the common intention of the parties, but as shown above many of the more recent authorities use financial contributions to the family home, or the lack thereof, to determine the outcome.

The consequence of the distinction between financial and domestic contributions is that women, who remain far more likely to take on domestic contributions within the home,[148] may often find it more difficult to successfully claim under the current law. This is especially true

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[143] *Hapeshi v Allnatt* [2010] EWHC 392, [2010] 1 WLUK 397 [50].
[144] *O'Kelly v Davies* [2014] EWCA Civ 1606, [2015] 1 WLR 2725 [29], quoting the trial judge.
[145] *Pillmoor* (n 101) [27].
[146] *Amin v Amin* [2020] EWHC 2675 (Ch).
[147] *Tolmie v Taylor* [2021] EWHC 1055 (Ch).
[148] Partially because the gender pay gap means that it is often cheaper for couples if the woman stays at home. Family Law in Partnership, 'Written Evidence: The Rights of Cohabiting Partners' (Women and Equalities Committee, 2021) https://committees.parliament.uk/writtenevidence/37694/html/ (accessed 11/04/2022).

should the parties undertake traditional gender roles – in this case, women would find it very difficult to assert an interest in the family home. It is therefore possible for couples to live together for decades, have children together, and then for the economically stronger partner to leave with no obligations to the economically weaker partner.[149] As discussed, the rationale for the distinction between financial and domestic contributions appears to come from the requirement that the requisite common intention must be about ownership of the home, and not more general financial provision. However, the law risks discriminating against those who undertake domestic responsibilities, to the advantage of those who work outside the home. The gulf between judicial treatment of financial and domestic contributions is one of the key areas that unjust enrichment may improve upon, as will be analysed in Part Two in the context of commodifying domestic contributions and thereby conceptualising them as 'enriching' the defendant.

D) The Nature of Party Intention

As has been made clear, the law is focused on finding and giving effect to the intentions of the parties. This is a perfectly reasonable basis on which to recognise equitable interests and fits the common intention constructive trust into the broader legal context of informal creation of proprietary interests. However, it may be asked whether searching for party intention is an appropriate rationale on which to rest cohabitation disputes. Five issues exist with the court's search for intention which resonate with this thesis's focus on unjust enrichment. These issues will become important in Part Two, where unjust enrichment's claimant-oriented angle will be explored as it relates to the parties' intentions.

1. *The fictitious and arbitrary nature of intention*

It appears to be accepted that the search for intentions is fictitious, leading to arbitrary and artificial results. It is therefore difficult to say that the obligations created by the common intention constructive trust are based on the consent of the parties. This has been judicially recognised.[150] In *Midland Bank v Cooke*, the court felt that:

[149] Resolution, 'Written Evidence: The Rights of Cohabiting Partners' (Women and Equalities Committee, 2021) https://committees.parliament.uk/writtenevidence/37411/html/ (accessed 11/04/2022).
[150] *Aspden v Elvy* [2012] EWHC 1387 (Ch), [2012] 2 FLR 807 [128].

> There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of homebuyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.[151]

These couples – who have not given any thought to ownership of the family home – remain beyond the pale of equity's assistance as the law continues to require an agreement before recognising a trust. It cannot be assumed that couples act according to legal rationality and therefore will make an agreement about ownership. Cohabitants have a generally poor understanding of their legal rights,[152] and research has shown that even those with knowledge of the legal consequences of their actions do not necessarily allow this knowledge to impact their decision-making.[153] It is unfortunate that, despite widespread knowledge that parties are not likely to have formed a common intention about ownership of the family home, the law continues to require such intentions. The dissonance between social reality – that parties will not have made an agreement about the family home – and the legal requirements – a common intention about ownership – has created a situation where the law is applied fictitiously. Lord Neuberger criticised for this reason the list of factors elucidated in *Stack* to be considered at the quantification stage. In His Lordship's opinion, the presence of children says very little about ownership of the family home, as does the parties' financial arrangements.[154] The use of assets separate from the home do not necessarily indicate the parties' intentions regarding ownership of the home, as the home exists as 'special' property (and is not, therefore, similar to a bank account or car).[155]

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[151] *Midland Bank v Cooke* (n 25) 746.
[152] See discussion of the common law marriage myth in Part Two and John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: The 36th Report* (The National Centre for Social Research 2019).
[153] See for example Anne Barlow, 'Modern Marriage Myths: the Dichotomy Between Expectations of Legal Rationality and Lived Law' in Rajnaara Akhtar, Patrick Nash and Rebecca Probert (eds), *Cohabitation and Religious Marriage: Status, Similarities and Solutions*; Simon Duncan, Anne Barlow and Grace James, 'Why Don't They Marry? Cohabitation, Commitment and DIY Marriage' (2005) 17(3) CFLQ 383.
[154] *Stack* (n 2) [132].
[155] See generally, Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007).

Further, the high bar at the acquisition stage combined with a broader judicial discretion at the quantification stage means that relatively small financial contributions to the acquisition of property can allow claimants to access the quantification stage where all circumstances will become relevant. Practically, it is odd that a claimant may acquire an interest only on proof of an express agreement or financial contribution to the purchase price, but that on quantification the court may then completely invent an intention. At this point, a claimant who cannot point to any contribution to the purchase price may get nothing, yet the smallest contribution may see the claimant obtaining a significant share of the property.[156] This is arbitrary and unprincipled, and it should be noted that in *Midland Bank v Cooke* itself the acquisition stage was passed purely due to a wedding gift – with half attributed to the claimant – being used to pay for the property.[157] This allowed the claimant to access the quantification stage, where the court declared she held a 50% interest in the property.

As will be seen in Chapter Three, common intention has been rejected in other jurisdictions as the trigger for imposition of a constructive trust in this context. The Supreme Court of Canada in *Kerr v Baranow* noted that 'the notion of common intention may be highly artificial, particularly in domestic cases […] The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties'.[158] This was one reason given for the court in defending the use of unjust enrichment over the common intention trust. It may be that, instead of forcing the facts into a proprietary mould by finding a fictitious common intention about ownership of the property, the law could find an alternative basis on which to rest disputes that arise at the end of a cohabiting relationship.[159] This thesis argues that unjust enrichment may work as this alternative, as further developed in Part Two.

2. *The behaviour which may allow courts to infer a common intention*

As mentioned above, courts may discriminate by the choice of behaviour thought relevant to infer a common intention between the parties. Courts have continuously held that behaviour such as homemaking and childcare does not demonstrate an intention to hold an interest in the property, but instead to merely support their partner and develop closer ties with them. There is a trend for judges to consider domestic contributions as motivated by 'love and affection'

[156] Craig Rotherham, 'The Property Rights of Unmarried Couples: The Case for Reform' [2004] Conv 268, 277.
[157] *Midland Bank v Cooke* (n 25).
[158] *Kerr v Baranow* 2011 SCC 10 [26].
[159] J D Davies, 'Informally Created Trusts of Land and Some Alternatives to Them' [1990] LRQ 539.

rather than considering that they indicate intentions around ownership of the home. This narrative can be seen in *James v Thomas*,[160] where the judge thought that:

> [Mrs James] worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas were making their life together as man and wife. The Cottage was their home: the business was their livelihood. It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest.[161]

As a reminder, the law appears to require 'exceptional conduct', which harkens back to the idea that women must do something 'extraordinary' – outside the 'natural' behaviour of women – in order to obtain a share.[162] The normalisation of gendered activities within the home causes judges to consider them as irrelevant to ownership and therefore as without value in the search for the parties' common intention. It is therefore the nature of the search for the parties' intentions – where anything not referable to ownership of the home is considered irrelevant – which allows these narratives to blossom.

Part of the issue, therefore, is that the law remains focused entirely on agreements around ownership of the property. The requirement for the court to find common intentions between the parties about interests in the family home has allowed the judiciary to make value judgements about the motivations of parties when providing certain contributions to the home and to the family. This can cause problematic judgments. In the recent case of *Klienhentz v Harrison*, for example, the fact that a same-sex couples' relationship was non-monogamous was considered relevant by the judge in denying the claimant a share of the property, as 'in many ways, it was not akin to marriage, at least as marriage is normally understood, given their acceptance that each of them would be free to see other men even, on occasions, on more than a short-term basis'.[163] These are value judgments about the interpretations which can be attached to differing types of behaviour within a relationship. In the past, these judgments have

[160] *James* (n 70).
[161] *James* (n 70) [36].
[162] Kevin Grey and Susan Francis Grey, *Elements of Land Law* (5th edn, OUP 2009) 893-894.
[163] *Kleinhentz v Harrison* [2020] EWHC 3439 (Ch) [82].

disproportionately disadvantaged women by refusing to consider 'normal' unpaid work within the home as indicative of an intention to share the home.

3. *Power relations between the parties*

The court, as above, may make inferences as to the claimant's motivations when contributing to the family home, but the claimant's motivations alone are not relevant. Individual party intention is relevant only insofar it was shared by their partner and communicated between them. For example, in *Dobson v Griffey*,[164] the claimant had undertaken a large amount of renovation work on the property. However, it was noted by the judge that the defendant had not wanted the claimant to undertake that work, primarily because he did not think much of her DIY skills. The judge thought this relevant for the intention between the parties. The common intention constructive trust is, supposedly, based on consensual property dealings,[165] and the owner of the property must manifest an intention to share the beneficial ownership with another person, followed by detrimental reliance on this intention which would make it unconscionable for the defendant to resile from the agreement.

Of course, requiring the defendant to intend to give the claimant a beneficial interest before the court will acknowledge that they have lost a share of their property to the claimant is not unreasonable. However, this makes the defendant's intentions regarding the property of foremost relevance, regardless of what the claimant has done. This can have concerning effects. In *Graham-York v York*,[166] discussed above, the defendant's domestic abuse towards the claimant, including his 'threatening proclivities' and the fact that the relationship was 'abusive in every sense of the word' merely served to show that the defendant was unlikely to have intended the claimant to obtain any interest in the property. Survivors of domestic abuse may therefore be less likely to succeed under the law due to the likelihood that the defendant will not have intended the claimant to obtain an interest.[167] By allowing the defendant's intentions to prevent the claimant obtaining a share in the property, the law takes seriously the defendant's property rights, and protects his autonomy in freely dealing with his property. In order for the claimant to obtain a share, the defendant must have willingly parted with his property. Although this makes sense in terms of informal agreements about property within Land Law,

[164] *Dobson* (n 98).
[165] *Dobson* (n 98) [10]. This will be explored in Part Two.
[166] *Graham-York v York* (n 133).
[167] Rights of Women and Southall Black Sisters, 'Written Evidence: The Rights of Cohabiting Partners' (Women and Equalities Committee, 2021) (https://committees.parliament.uk/writtenevidence/37609/html/ accessed 11/04/2022).

it does not make sense in a family setting when significant vulnerability is possible at the end of a relationship.

The law, as refined by the judiciary, thus takes a particular angle: intention is relevant insofar as it shows consensual property dealings between the parties. In this way the defendant's autonomy is protected by not permitting his property from being removed against his will. It should be noted, however, that the opposite viewpoint is not considered by the law: the fact that the claimant's autonomy when making contributions to the family home (comprising time, money and effort) should be respected, and that the claimant's intention may not be for the defendant to retain the benefits of her contributions at the end of the relationship. The claimant's autonomy is however taken seriously in unjust enrichment law, which adopts claimant-oriented unjust factors as explored in Part Two. The starting point in the current law is that the defendant is to retain all assets after the relationship, unless the claimant can prove the parties both intended otherwise. This has the significant effect of granting much power to the defendant in these disputes. By taking a claimant-oriented approach and using relational autonomy to take seriously the interdependence developed during the relationship, unjust enrichment might be able to alter somewhat the power-dynamics within the law.

4. *Interpretation of language*

The search for party intention – particularly express common intention – requires the court to interpret the language used by the parties. Bottomley has argued that this exercise prefers men.[168] She suggests that the construction of gender identity leads to the different use and interpretation of language by men and women. Bottomley argues that specificity is more conductive towards men, meaning that the requirement that the parties must have made an agreement about *ownership* as opposed to a more general agreement about wealth or economic distribution may refer to a more masculine way of speaking. This indicates that when forming these agreements there is a clear gendered power difference between the parties as the law ignores the relational aspect of the relationship, preferring instead a quasi-contractual ideal based on the autonomy (in the neo-liberal sense) of the parties.[169] Further, Bottomley notes that silence is more often interpreted positively by women.[170] This means that the man's continual

[168] Anne Bottomley, 'Self and Subjectivities: Languages of Claim in Property Law' (1993) 20(1) Journal of Law and Society 56.
[169] Sharon Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) Journal of Law and Society 617. See the discussion of relational autonomy in Chapter Two and in Part Two.
[170] Anne Bottomley (n 168), 61-63.

refusal to be drawn on the subject of property rights, coupled with his usual relatively higher economic power than the woman, means that men will often enjoy a much greater level of power than women inside the relationship. Where the man has continually refused to make any commitments as to property rights other than in the most general of terms, Bottomley notes – using *Coombes v Smith*[171] as an example – that:

> One could easily be forgiven for thinking that by this time the woman should have known better and withdrawn from a hopeless situation. Unfortunately, economic as well as emotional dependency now came into play: she had a child and only a part-time low-paid job. She had no assets of her own. She continued to rely on his assurances and to seek what evidence she could to confirm that his promises would eventually be performed.[172]

This highlights a concerning tendency for the law, when considering discussions between the parties, to trend towards more positive outcomes for men than for women by forcing women to fit into a more stereotypically masculine way of using language to make a successful claim. This can be seen, for instance, in the need for the claimant to show 'mercenary' motivations as to her contributions to the property.[173] Further, Bottomley suggests that women are more likely to be uncomfortable bringing up property issues, a problem exacerbated by the fact that women are more usually the non-legal owner, and thus the party that must take action to ensure their legal protection.

5. *Experiences of same-sex couples*

All four of the issues discussed above are highly gendered in nature and show that women often struggle to a greater degree than men to show a common intention between the parties that they were to have an interest in the property. However, separate issues are experienced by same-sex couples. The issues here have not been researched to the same extent, and the number of cases is fewer, but some trends can be spotted.

[171] *Coombes v Smith* (n 48).
[172] Anne Bottomley (n 168) 63.
[173] As discussed, it is only if the claimant is acting on the intention of having an interest in the property that a claim is possible. *Stack v Dowden* (n 2) [69].

Flynn and Lawson argue that the courts commercialise and therefore commodify same-sex relationships,[174] with the result that men in same-sex relationships are often more successful under the law than women in mixed-sex relationships. This is partially because the courts feel more able to infer a common intention from commercialised conduct. The gendered issues, including the societal expectation of unpaid domestic work, breaks down in relationships between two men or two women. The issues of relational autonomy are therefore unlikely to be the same. In *Wayling v Jones*,[175] a case about proprietary estoppel, the evidence was that Mr Wayling would have continued working in Mr Jones' hotel business even if Jones had not promised Wayling the hotel after his death, though he would have left had Jones retracted the promise. The court assumed from this evidence that Wayling meant that he had expected to inherit the hotel, and therefore would have left if he was not getting it. This analysis unseats the emotional bonds of the parties: it creates a commercial relationship, where Wayling was staying with Jones (and continued working for him) not for emotional reasons, but instead for the expectation of the hotel business.[176] This should be compared to *James v Thomas,* for example, where the (female) claimant's commitment is referred to as a consequence of her life with her partner 'as man and wife', which is subsequently used to deny the claimant a share of the property.[177]

A similar point can be made about *Culliford v Thorpe*.[178] Here, a relationship between two men was ultimately decided on a semi-contractual model as the judge upheld an informal agreement between them. The substantial DIY work undertaken by the defendant, Mr Thorpe,[179] and the care that Thorpe provided for Mr Culliford throughout various illnesses were ignored. As Gordon-Bouvier argues, this again can be seen as a commercialisation of the relationship, where domestic work is seen as less important than market conduct.[180] In both cases the parties claiming an interest in the property are not seen to be acting as part of a family, and their conduct is not seen as a gift made out of love and affection. The practical justice achieved for both Mr Wayling and Mr Thorpe was a consequence of the commodification of their

[174] Flynn and Lawson (n 94).
[175] *Wayling* (n 50).
[176] Flynn and Lawson (n 94).
[177] Refer to discussion above. See *James* (n 70) [36].
[178] *Culliford* (n 49).
[179] The usual model of defendant as owner of the property and claimant as attempting to acquire a share of that property is interrupted here, as the defendant was the partner of the deceased, and was defending a claim for possession of the property by his deceased lover's family.
[180] Gordon-Bouvier (n 94) 492.

relationship. The language and narratives of these cases involving same-sex couples is in opposition to that applied to women in mixed-sex relationships.

As a final point on the approach to same-sex relationships, it should be noted that recently, in *Klienhentz v Harrison*,[181] a man (Mr Klienhentz) in a same-sex relationship failed to show any interest in his former home, owned entirely by the defendant (Mr Harrison). It did not form part of argument that the Klienhentz had given up his job to care for Harrison when he was diagnosed with HIV, as Klienhentz sought to show only that there was an express agreement. The judge thought this was correct, as 'there is no serious basis on which such an intention could be inferred'.[182] Again, this is a focus on quasi-contractual informal agreement rather than inference of contributions in a same-sex case, but the denial of any relevance for domestic responsibilities fits with the mixed-sex cases explained above. The context of the case is particularly interesting: as mentioned above, the relationship between the parties was not exclusive, and in the judge's view that the relationship 'might be seen as falling short of being one which was akin to marriage'.[183] This formed part of the judge's reasoning in deciding that Harrison would not have intended for Klienhentz to have a beneficial share of the property. Indeed, the judge thought that 'one issue which arises is whether the relationship between [the parties] is sufficient to bring into play the common intention constructive trust principle as opposed to, for example, considering the resulting trust principle'.[184] The attempt to fit a same-sex relationship into a 'marriage-like' mould, particularly in order to allow access to proprietary rights, dates back to *Fitzpatrick v Sterling Housing Association*[185] and *Ghaidan v Godin-Mandoza*.[186] It will be interesting to see how courts in the future deal with relationships which do not conform to the heteronormative 'marriage-like' standard, especially given the increasing variety of intimate relationships.

III. CONCLUSIONS

This chapter has indicated several key concerns with the current legal framework applicable to cohabitation disputes. Should the parties make an express declaration of trust, that will be the

[181] *Kleinhentz v Harrison* (n 163).
[182] *Kleinhentz* (n 163) [139].
[183] *Kleinhentz* (n 163) [87].
[184] *Keinhentz* (n 163) [87]. The judge decided he had no doubt the common intention constructive trust should apply, helped in this decision by the case of *Gallorotti v Sebastianelli* [2012] EWCA Civ 865, [2012] 2 FLR 1231 where the common intention constructive trust was applied between two close friends.
[185] *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 (HL).
[186] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

end of the matter between them as far as beneficial property interests are concerned. However, express trusts are very unlikely where one party has moved into another's house, or where the property is taken in the sole name of one partner. In those cases, any property interest must arise informally. The resulting trust will become highly relevant when considering how unjust enrichment may allow proprietary restitution, and proprietary estoppel may provide helpful insights into the countervailing benefits question.

As far as the common intention constructive trust goes, the primary concern is that, as a doctrine concerned with informal property agreements, the trust has no ability to consider unjust economic benefit of the defendant and must only determine ownership of property. This has the effect of causing two key problems with the law: first, that financial contributions to acquisition of property are preferred over all other forms of behaviour within the family home, and second, that party intention is interpreted in a way which often disadvantages women. That these issues are both gendered is of vital importance to this thesis, as is has been shown that women are less likely to be able to make a successful claim under the law than men. This is the consequence of judicial narratives which colour motivations for homemaking and childcare in such a way as to make them irrelevant to the question of ownership of property.

Any improvement which treating unjust enrichment as the obligation-creating event can make in the area must focus on the detangling of cohabitation disputes from questions about ownership of property, which may have the consequent effect of opening up claims to domestic contributions and may rebalance the power-dynamics between the parties to these disputes when searching for the parties' intentions. The judicial development of the law in that direction would represent an increased utility of the law by cohabitants and would fill the gap – though certainly not perfectly – caused by the lack of Parliamentary intervention in the area. The next chapter introduces unjust enrichment and considers how the doctrine will be used throughout this thesis.

CHAPTER TWO – INTRODUCTION TO UNJUST ENRICHMENT

To analyse potential future use of unjust enrichment as the event triggering obligations in the cohabitation context, it is important to first consider unjust enrichment doctrine and its theoretical justification. The aim is to provide a foundation for the examination of the doctrine's use in the cohabitation context in Part Two of this thesis, by drawing attention to the aspects of unjust enrichment which will require further consideration. Much of this chapter is therefore about defining the way in which unjust enrichment is used throughout this thesis.

The first section sets the scene by tracing the development of the unjust enrichment doctrine, to indicate the reasons it has not been used judicially to explain cohabitation disputes. The much later recognition of unjust enrichment as part of English private law than it enjoyed in similar jurisdictions means that unjust enrichment faces the challenge of developing and re-orientating a well-established common intention constructive trust. Taking on this challenge requires the commercial foundation of the doctrine to be re-considered. The second section then considers the key elements of unjust enrichment, going through the necessary requirements for a successful unjust enrichment claim before looking at possible defences and remedies. Issues relevant for an analysis of unjust enrichment in the cohabitation context will be highlighted.

This chapter then thirdly examines the status of unjust enrichment within English private law. This section argues that unjust enrichment may involve multiple causes of action, responding to a plurality of normative rationales, and that the requirements for a successful claim may change depending on the context and normative principle on which they are based. This consequence of this argument is that unjust enrichment need not respond in the domestic context in the same way it does in the commercial context. Finally, this chapter questions what the normative rationale applying to an unjust enrichment claim between cohabitants may be – ultimately, this section argues that the normative rationale comes from the protection of and respect for the parties' autonomy, meaning both freedom of self-determination and relational autonomy.

I. DEVELOPMENT OF UNJUST ENRICHMENT

Reform of cohabitation rights has been on the agenda for decades. If that reform does not come from Parliament, then it will have to come from the courts.[1] However, this does not explain why, of all potential future directions, this thesis has chosen to examine the use of unjust enrichment for future development of the law. This section is intended to explain why unjust enrichment is relevant to the cohabitation context, and why it has not yet been subject to substantial judicial consideration in the context of cohabitation.

Unjust enrichment was judicially recognised as part of English and Welsh private law in 1991 in *Lipkin Gorman v Karpnale*[2] where it was held that the defendant casino had been unjustly enriched when a partner from the claimant solicitor's firm withdrew cash from the firm's client account and spent the money at the casino. However, the doctrine has a long and fragmented history. It is not the purpose of this section to explain in detail the history of unjust enrichment, but a summary may be useful to discover why unjust enrichment has not yet achieved use in the cohabitation context in this jurisdiction (unlike in, for example, Canada), and why it might be considered as a way of understanding disputes at cohabitation relationship breakdown. Although *Lipkin Gorman* was the first use of unjust enrichment as a private law doctrine, it had earlier been recognised judicially in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* by Lord Wright:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.[3]

Unjust enrichment has been traced all the way back to Roman law by David Ibbetson,[4] who notes that the Roman jurist Gaius thought there was a residuary group resting next to contract

[1] This has been acknowledged by Baroness Hale in *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432 [46].
[2] *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL).
[3] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).
[4] David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) Ch 14.

and tort known as 'obligations arising from various other causes'.[5] In English law, both Ibbetson and Virgo suggest that *Moses v McFarlane*[6] was the conception of the doctrine which would later come to be known as unjust enrichment.[7] The development of unjust enrichment as a unified legal doctrine was notably slow, made more challenging by two peculiarities of the law. First, common law remedies were separated into four forms of action: money had and received to the defendant's use; money paid for the defendant's use; quantum meruit (services provided for the defendant); and quantum valebat (goods provided to the defendant). The modern creation of the unjust enrichment doctrine required all four forms to be recognised as responding to one unified cause of action. Second, early case law which is now recognised as being involved with unjust enrichment was argued and decided along the lines of quasi-contract. This involved the claimant arguing that money given to the defendant was subject to an implied promise to give the money back, rather than understanding that an independent cause of action existed for the defendant's unjust enrichment of that money.

The road to recognition in English law was made possible by Lord Goff and Gareth Jones' book *The Law of Restitution*,[8] which was itself inspired by American work on the subject.[9] Lord Goff has become known as a founding father of unjust enrichment in England and Wales – not only has *The Law of Restitution* become profoundly influential (and is currently on its ninth edition), but Lord Goff also influenced the judicial creation of the doctrine. In *BP Exploration v Hunt*[10] he used unjust enrichment in the context of frustrated contracts and later in *Lipkin Gorman v Karpnale* Lord Goff declared unjust enrichment as part of private law in its own right.[11]

This history tells us something about unjust enrichment's lack of application in the cohabitation context in England and Wales. *Pettitt v Pettitt*[12] was decided in 1969, and provided the impetus for private law solutions to cohabitation disputes across the Commonwealth. However, in jurisdictions where unjust enrichment had already enjoyed a great degree of legal analysis – the US and Canada in particular – judges quickly found the common intention basis of

[5] D.44.7.1.pr. See Alan Watson, *The Digest of Justinian, Volume 4* (University of Pennsylvania Press 2009).
[6] *Moses v McFarlane* (1760) 2 Burr 1005.
[7] Ibbetson (n 4) 264; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 45.
[8] Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell 1966).
[9] In particular, the First Restatement on Restitution: *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (American Law Institute Publishing 1937).
[10] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB).
[11] *Lipkin Gorman* (n 2).
[12] *Pettitt v Pettitt* [1970] AC 777 (HL).

cohabitation rights as too artificial and arbitrary, and proposed unjust enrichment as a more principled alternative.[13] England and Wales did not have the benefit of unjust enrichment thinking. The principle was well known: council in *Pettitt*, for example, argued that unjust enrichment may provide a basis for the claimant to obtain a remedy after divorce but Lord Reid thought that it was unhelpful because unjust enrichment had never been used in a case where one person improved the property of another and, regardless, it would only result in a monetary claim.[14] The principle had not yet been analysed as deeply as it would come to be, and again was only recognised as part of English law in 1991. By that time, Lord Bridge was handing down his judgment in *Lloyds Bank v Rosset*,[15] cementing the constructive trust as the relevant device for use in cohabitation disputes.

Despite this, however, and as noted above, unjust enrichment has enjoyed a great deal of success in other jurisdictions. In Chapter 3, the Canadian experiences of using unjust enrichment in the cohabitation context will be examined. However, one can immediately see the attraction. Unjust enrichment is based on the claimant enriching the defendant at the claimant's own expense, in a way which is 'unjust'. Disputes which involve one cohabitant contributing to the family home but being left with very little at the end of the relationship therefore prima facie appear to fit neatly into the unjust enrichment framework. Further, there is a certain degree of 'fit' with the current common intention device, as the current law focuses much of its time of contributions and detrimental reliance on the part of the claimant. These appear to map easily onto enrichment at the claimant's expense. Notable reform attempts, including the Law Commission's 2007 proposed scheme, follows this logic of considering benefits the defendant has received and disadvantage the claimant has experienced.[16] This is also true of legislation in other jurisdictions, most notably the Family Law (Scotland) Act 2006. In this way, these statutory schemes involve restitutionary principles.

However, unjust enrichment has retained a very strong commercial foundation, with the most high-profile use of the doctrine in England and Wales being to manage the mistaken payment of tax. The monetary stakes of these cases can run to hundreds of millions of pounds, and therefore decisions made by judges on the workings of unjust enrichment will have large

[13] See Chapter Three for the Canadian response.
[14] *Pettitt* (n 12) 795H.
[15] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL).
[16] See Chapter Three.

impacts on HM Revenue and Customs.[17] Within that framework, very little has been done to question the use of unjust enrichment in the domestic context. It exists within the logic of commerce. Consequently, many of the unjust enrichment cases used in this thesis will have been decided in contexts entirely alien to intimate relationships. Part of the challenge that will need to be confronted is precisely how unjust enrichment principles can be used in disputes concerning these relationships. This will be seen in Part Two when questioning the remedies appropriate for cohabitants claiming provision at the end of a relationship.

Even though unjust enrichment has been used primarily in the commercial context, academics have repeatedly commented on the suitability of the doctrine for cohabitation disputes. A brief summary will have to suffice here: a full review of this literature will be undertaken in Chapter Three. Gardner has noted that unjust enrichment may be referred to as a 'driver' for the common intention constructive trust, of particular use when the claimant has made contributions to the property at the acquisition stage.[18] Etherton has gone further, suggesting that unjust enrichment may also provide the theoretical basis for the trust at the quantification stage, due to the court's use of 'imputing' intentions in *Stack v Dowden*.[19] Further, Swadling has criticized *Stack v Dowden*[20] for the lack of any theoretical discussion within the judgment:

> Until a fundamental analysis of this subject is undertaken, we will never properly understand the common intention constructive trust, nor its relationship with the remedial constructive trust, the resulting trust, or even proprietary estoppel […] Moreover, we still need to know to what category of event this trust responds. Is it unjust enrichment, wrongdoing, or something in the miscellany?[21]

[17] William Day, for example, has argued that the recent narrowing of unjust enrichment comes from a judicial attempt to restrict cases of mistaken tax payments, in order to resist the retrospective effect of judge-made law: see William Day, 'Further Narrowing the Scope of Unjust Enrichment' [2019] CLJ 24 27. For a recent discussion of unjust enrichment's engagement with HMRC taxation, see Adrian Zuckerman, 'Test Claimants 2 in the Supreme Court: Serves Neither Justice nor the Administration of Justice [2022] LQR 1.
[18] Simon Gardner, 'Family Property Today' (2008) 124 LQR 422.
[19] Sir Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67(2) CLJ 265.
[20] *Stack* (n 1).
[21] William Swadling, 'The common intention constructive trust in the House of Lords: an opportunity missed' [2007] 123 LQR 511.

The idea that unjust enrichment could represent the theoretical foundation of the common intention constructive trust is therefore relatively old. However, if unjust enrichment is to be the basis for the law, certain elements will need to change. The aim of this thesis is to draw out those elements, and to question how the law could be developed using unjust enrichment principles.

II. KEY ELEMENTS OF UNJUST ENRICHMENT

In order to provide a foundation for the analysis in this thesis, it is necessary to provide a brief overview of the doctrinal requirements to sustain a successful unjust enrichment claim. The claimant must show that the defendant has been enriched at the claimant's expense, and that the facts show an unjust factor which makes the defendant's retention of this enrichment unjust. So long as there are no defences which the defendant can rely on, the claimant is entitled to restitution, which it will be argued in Part Two can take the form of either a proprietary interest under a trust or a personal monetary payment.

A) Enrichment

For an unjust enrichment claim, the defendant must have been enriched. Note that this does not necessarily mean that the defendant must have gained something – it may be that the claimant simply prevented the defendant from incurring an expense.[22] For example, the claimant may pay a debt (such as mortgage instalments) that the defendant owes to a third party. Clearly here the defendant has been enriched by the claimant, as the claimant has caused the defendant's wealth to increase. However, enrichment can cover a broad array of benefits and does not necessarily require an increase in the defendant's wealth. The notion of 'enrichment' therefore easily encompasses non-financial benefits. One of the key issues explored in Part Two is whether homemaking or the provision of childcare – 'pure services' with no valuable end products – may constitute an enrichment. Pure services have been considered enrichments in the case law,[23] but judges in this jurisdiction have never had to consider whether services provided in the context of a family can constitute an enrichment of the defendant. Even where there is an end product of the services provided, it is clear regardless that the service and not the end product constitutes the enrichment.[24]

[22] *Craven Ellis v Canons Ltd* [1934] 2 KB 403.
[23] Graham Virgo (n 7) 63; *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418; *Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 WLR 1580.
[24] *Cobbe v Yeoman's Row* [2008] UKHL 55, [2008] 1 WLR 1752 [41].

It is also controversial whether a mistaken improvement of property is an enrichment. This is clearly an important issue for the cohabitation context, where the contributions of the claimant to the family home may often involve improvements to the home. In *Greenwood v Bennett*,[25] Bennett, a garage manager, handed over a car to a third party, Searle, for repairs. Searle proceeded to crash the car and sell it to Harper who repaired the car. Searle was convicted of theft. Harper accepted that Bennett was the rightful owner of the car but claimed for payment for the repairs he carried out. The Court of Appeal held that where the improver (here Harper) is mistaken and genuinely believes the property is his own, he can claim back the cost of repairs from the true owner. Otherwise, Bennett would be unjustly enriched at Harper's expense. It would seem from this case that mistaken improvements to property are capable of being enrichments.

It will not always be the case, however, that cohabitants are mistaken as to ownership of the home. Further, even if the claimant is mistaken, case law suggests they may fail to show unjust enrichment. In *Blue Haven Enterprises v Tully*,[26] Blue Haven, due to a mistaken belief, developed land belonging to another as a coffee plantation. The true owner of the land therefore gained the benefit of Blue Haven's development. This case merits deep analysis due to the controversial judgment of the court: although the claim was made in unjust enrichment, the Privy Council suggested that the principles relied on were the same as proprietary estoppel.[27] The discussion therefore focused on representations and the presence of unconscionable behaviour, ultimately leading to the denial of Blue Haven's unjust enrichment claim. Therefore, although it is orthodox that mistaken improvements to chattels may sustain a claim in unjust enrichment, the same may not be true for land. Owing to the flawed application of the law in *Blue Haven*, and the importance of improvements made to another's land for cohabitation property disputes (such as where a cohabitant has spent money improving their partner's home), this issue will need to be analysed when enrichment is discussed in Part Two.

An enrichment is valued at the time it is received.[28] Enrichments are valued objectively, according to the price that a reasonable person in the defendant's position would have had to pay. Relevant characteristics of the defendant may be taken into account 'such as, in the context of borrowing, its credit rating, or whether it belongs to the public or the private sector'.[29] In

[25] *Greenwood v Bennett* [1973] QB 195 (CA).
[26] *Blue Haven Enterprises v Tully* [2006] UKPC 17.
[27] *Blue Haven* (n 26) [21].
[28] *Benedetti v Sawiris* [2010] EWCA Civ 1427, [2014] AC 938 [14].
[29] *Benedetti* (n 28) [101].

Sempra Metals the enrichment received by HMRC was prematurely paid tax.[30] This was an enrichment according to the House of Lords as HMRC had the ability to use the money early.[31] On valuing this enrichment, it was noted that the defendant, HMRC, could receive better interest rates than commercial companies could when borrowing. The enrichment was therefore of lower objective value than had a commercial company received the same.

The defendant is unlikely in the cohabitation context to have some characteristic which means the value of the claimant's contributions are worth less to him. However, the objective measure of valuation is not the end of the matter. It remains possible for the defendant to argue that they valued the enrichment less than the objective measure or, indeed, that they did not value the enrichment at all. This is known as subjective devaluation and is thought to protect the defendant's autonomy by refusing to force the defendant to pay for something which they did not value.[32] For instance, the mistaken installation of a new kitchen in the defendant's house may objectively be valuable, but the defendant may have been perfectly happy with their current kitchen and would never have wanted to pay for a new one. In this case, the defendant subjectively values the kitchen at a lower price than the market value. Of course, any subjective notion of value by the defendant must be proven as a genuine view, and the burden is on the defendant.[33] Subjective overvaluation – where the claimant seeks to prove that the defendant valued the enrichment *more* than the objective market value – is not allowed as it is not necessary to protect the defendant's freedom of choice.[34] So, had the defendant been desperate for a new kitchen, and had therefore been willing to pay double the price, the claimant cannot seek restitution for this subjective valuation of the defendant. The autonomy of the defendant is not at stake, as they are not losing out by paying the market value.

The possibility of the defendant subjectively devaluing the claimant's contributions to the family home is problematic if it opens the door to the defendant arguing that he did not value the claimant's homemaking, childcare or improvements to property (or valued them at less than the market value). It will not always be possible for the defendant to subjectively devalue an enrichment. In some circumstances, the defendant will have received an incontrovertible

[30] *Sempra Metals v Her Majesty's Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561.
[31] This has since been overruled: *Prudential Assurance Company v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39, [2018] 3 WLR 652. However, the analysis of the objective valuation of an enrichment in *Sempra Metals* remains authoritative.
[32] *Benedetti* (n 28) [26] [113] [187]-[188]. On autonomy, see below.
[33] *Benedetti* (n 28) [23].
[34] *Benedetti* (n 28) [29], [121].

benefit. This is a benefit which was so clearly valuable that the defendant cannot argue they valued at a lower amount. For example, where the defendant has received money, there can be no argument that the defendant has been enriched by the value of that money. Money is unequivocally enriching.

The same is true where the claimant has saved the defendant some necessary expenditure – necessary in law or in fact – as the defendant would have paid for the benefit regardless. In *Exall v Partridge,*[35] for example, the claimant paid the defendant's rent in order to free his (the claimant's) property which the landlord had taken possession of. It was held that the rent could be claimed back by the claimant. The defendant had been enriched because he would have otherwise had to pay his rent regardless: it was a legal requirement that he do so. The defendant therefore cannot claim that they did not value something which fulfils a legal duty they owe. However, it is controversial to what extent the receiving of property is an incontrovertible benefit: where the benefit has been realised in money it would seem that there can be no subjective devaluation,[36] but it is less clear whether a benefit realisable in money – property received but not yet sold – is incontrovertible. This seems unlikely.[37] Regardless, if property is readily returnable and yet the defendant refuses to return it, the Court of Appeal has recognised the property can be interpreted as valued by the defendant.[38] Further, it may be that an enrichment was requested by the defendant, in which case once again it is not open for the defendant to deny that the benefit was enriching. The full implications of subjective devaluation, and whether it could apply to the claimant's contributions to the family home, will be explored in Part Two.

B) At the Claimant's Expense

It is not enough that the claimant can prove that the defendant has in some way been enriched. There must be something more: the defendant must have been enriched *at the claimant's expense*. There must be some causative link between the defendant's gain and the claimant's loss. Note that this 'loss' does not necessarily refer to wealth. All that is required is that something has been 'subtracted' from the claimant. So, where the claimant fixes the defendant's car, this will be an enrichment at the expense of the claimant even if such a service

[35] *Exall v Partridge* 101 ER 1405 (KB).
[36] Virgo (n 7) 82-84.
[37] Virgo (n 7) 84.
[38] *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 WLR 2775.

did not cost them anything. There must be a 'sufficient causal connection, in the sense of a sufficient nexus or link'.[39]

This is rather vague. 'But for' causation is not enough.[40] In *Cobbe v Yeoman's Row*,[41] Mr Cobbe provided the service of obtaining planning permission for Yeoman's Row. This caused the market value of the property to increase. Yeoman's Row, 'but for' Mr Cobbe's actions, have been enriched by the increase in the market value of the property. However, only the service itself was an enrichment at Mr Cobbe's expense, *not* the increase in market value. Lord Scott uses the analogy of a cabinet which is believed to contain valuable treasures, but which has no key:

> A locksmith agrees to try to fashion a key. He does so successfully and the cabinet is unlocked. As had been hoped, it is found to contain valuable treasures. The locksmith had hoped to be awarded a share of their value but no agreement to that effect had been concluded […] surely the extent of the enrichment is no more than the value of the locksmith's services in fashioning the key. Everything else the owner of the cabinet already owned.[42]

The claimant can only obtain restitution for the amount which the defendant has been enriched at the claimant's expense. This is again made clear by the recent case of *Prudential Assurance*.[43] Here, the relevant enrichment was the receipt of overpaid tax by HMRC. The claimants were attempting to get compound interest on their remedy by way of *Sempra Metals*, where the House of Lords had held that an early payment of tax was an enrichment separate from the transfer of money itself as HMRC could use the money earlier than otherwise possible. However, the Supreme Court in *Prudential* refused to accept this. They held that whether the mistaken money is paid and repaid on the same day or paid and repaid a month later, the claimant has lost the same amount. The 'use value' of the money during the month's wait was therefore not at the expense of the claimant.[44] A simple example can serve to show this.

[39] *Bank of Cyprus v Menelaou* [2015] UKSC 66, [2016] AC 176 [27].
[40] *Investment Trust Companies v The Commissioners of Her Majesty's Revenue and Customs* [2017] UKSC 29, [2018] AC 275 [52].
[41] *Cobbe* (n 24).
[42] *Cobbe* (n 24) [41].
[43] *Prudential* (n 31).
[44] *Prudential* (n 31) [74].

Suppose that the claimant spends £10,000 on improving the defendant's property. The market value of this property rises by £20,000 as a result. Only the enrichment of the £10,000 is at the claimant's expense, as the rest of the enrichment was provided by the potential within the property itself.[45] C can therefore claim back £10,000, not £20,000. This is an important point for valuation of the claimant's improvements to property within the cohabitation context.

Another issue is the requirement for direct enrichment. What if the claimant mistakenly pays a third party, who then pays the defendant? Can the claimant get the money back from the defendant? In *Investment Trust Companies*,[46] customers (the claimants) had paid tax on services provided by the supplier management companies (the third party). The management companies then paid the tax to HMRC (the defendants). It then turned out that the tax had been mistakenly paid, and the customers wanted to get their money back from HMRC. The issue was that the enrichment of HMRC did not come directly from the customers. It was held, therefore, that the customers could not maintain an action in unjust enrichment against HMRC. Unless an exception applies, the claimant must have directly conferred an enrichment on the defendant.[47] It is not enough to say that the claimant has enriched the defendant directly as a matter of economic reality. Indirect enrichment is therefore not sufficient to ground a claim in unjust enrichment. This should not prove a problem for most cohabitants, as any enrichment is likely to be made directly to the defendant. The only indirect enrichment likely to be established on the facts is payment of another's debt – such as where the claimant pays off the defendant's mortgage – and this is permitted as an exception to the direct enrichment rule.[48]

Finally, there is controversy over whether one can claim for incidental benefits which the defendant has received. This means that where the claimant is acting in their own self-interest (and any benefits the defendant receives is only incidental to this self-interest) it is unlikely

[45] *Greenwood* (n 25); on which see Robert Stevens, 'Three Enrichment Issues' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006). See also *Cobbe* (n 24) [41]. It should be noted that this issue can be phrased in two different ways: either whether the enrichment itself is classed as the service or the increase in market value, or alternatively whether the increase in market value was at the claimant's expense. Regardless, the outcome is the same. The only practical difference is whether this discussion is had in a section on 'enrichment' or 'at the claimant's expense'. As the defendant is factually 'enriched' by an increase in market value, the discussion here is had as part of whether the enrichment was at the claimant's expense.

[46] *Investment Trust Companies v The Commissioners of Her Majesty's Revenue and Customs* (n 40).

[47] *ITC* (n 46) [46]-[51]. The relevant exceptions include agency, assignment of the right to restitution, cases in which the intervening transaction is a sham, cases in which the claimant can trace an interest into property in the hands of the defendant, payment of another's debt, and a where there is a series of related, coordinated transactions.

[48] *ITC* (n 46) [49].

that they will be able to claim for restitution for any benefit that another has received.[49] As argued by Lord Dunedin:

> One man heats his house, and his neighbour gets a great deal of benefit. It is absurd to suppose that the person who has heated his house can go to his neighbour and say – 'Give me so much for my coal bill, because you have been warmed by what I have done, and I did not intend to give you a present of it'.[50]

It is clear therefore that where the defendant has been enriched incidentally often the enrichment simply will not be at the claimant's expense. In *TFL Management*,[51] the claimant incurred costs in legal proceedings against a third party. As part of these proceedings, it was found that the third party owed a debt not to the claimant (as they were arguing) but to the defendants. The claimants then sued the defendants in unjust enrichment, as they had benefitted from the claimant's legal proceedings. The Supreme Court in *Investment Trust Companies* suggested that the case should have been dismissed, as the enrichment of the defendants was in no way at the claimant's expense.[52] In cohabitation cases, the claimant will often be enriching the defendant, but also themselves. For instance, where the claimant contributes towards the cost of building an extension, or pays certain bills, they may be acting partially in their own self-interest. The issue of incidental enrichments is therefore a key problem which will be discussed in Part Two.

C) Unjust Factor

Once it has been proven that the defendant has been enriched at the claimant's expense, it must finally be established that this enrichment was an unjust one – or, put differently, that the defendant cannot in good conscience retain the enrichment provided at the claimant's expense. This is done by showing an 'unjust factor'. The claimant must fit the facts into one of the categories of unjust factors in order to show that the enrichment was unjust. This thesis uses two principal claimant-oriented unjust factors: failure of basis and mistake.

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[49] Though there is academic controversy here. This will be explored fully in Part Two.
[50] *Edinburgh and District Tramways Co Ltd v Courtney* 1909 SC 99, 106.
[51] *TFL Management Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006.
[52] *Investment Trust Companies v The Commissioners of Her Majesty's Revenue and Customs* (n 40) [56]-[57].

1. *Failure of Basis*

This thesis primarily suggests using failure of basis as the operative unjust factor in cohabitation disputes.[53] Failure of basis usually occurs where there has been failure of some promised counter-performance by the defendant. Where the basis for the claimant's conferral of a benefit on the defendant was that the defendant would provide counter-performance, and where the defendant has not provided this, the claimant may obtain restitution in unjust enrichment. Failure of basis is therefore often used in cases involving unenforceable or void contracts, and a key doctrinal question is in what circumstances a claimant can sue for unjust enrichment instead of for breach of contract. However, a contract is not required for failure of basis, and indeed in cohabitation disputes it is unlikely that a contract will have been formed.[54] Therefore, this section will focus on failure of basis as a failure of a future event or state of affairs: in other words, where a benefit has been granted to the defendant at the claimant's expense on the basis that some event or status will come into being or will not end. As the claimant's intention is qualified by this basis, if the basis then fails the claimant may obtain restitution.

An example is *Chillingworth v Esche*.[55] Here, purchasers agreed to purchase property 'subject to contract'. All the necessary steps were taken, and the purchasers paid a deposit to the vendors. However, the purchasers then refused to sign the final contract. It was held that the purchasers could get their deposit back. The deposit was paid in anticipation of a contract. No contract was formed, and therefore the future state of affairs and the basis for the payment – that there would be a contract – never came into existence. The basis had failed, and restitution was permitted. Another example is *Barnes v Eastenders Cash and Carry*.[56] Here, companies were thought to be committing fraud and were therefore served with a restraint and receivership order. The receiver began managing the companies' property, expending considerable time and money at the receiver's expense, before the Court of Appeal then quashed the order, meaning the receiver should never have been appointed in the first place. The Supreme Court held that 'failure of basis […] does not necessarily require failure of a promised counter-performance;

[53] Though failure of basis is primarily used as the relevant unjust factor in this thesis, Chapter Five will also discuss the use of mistake, especially in relation to the common law marriage myth.
[54] Further, the validity of such contracts has been questioned. See *Sutton v Mishcon de Reya* [2003] EWHC 3166, [2003] 12 WLUK 595; Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) 5.8.
[55] *Chillingworth v Esche* [1924] 1 Ch 97.
[56] *Barnes v Eastenders Cash and Carry* [2014] UKSC 26, [2015] AC 1.

it may consist of the failure of a state of affairs on which the agreement was premised.'[57] The receiver had supplied services on the condition that he would be able to take payment from the companies' assets. This condition was fundamental in providing the basis for which the receiver provided his services. The receiver could therefore claim restitution in unjust enrichment for failure of basis.

The question is how useful failure of basis is for the cohabitation context. The basis may be marriage, such that if there is no marriage the basis fails, and the claimant is entitled to restitution. In *Re Ames Settlement*,[58] a marriage settlement was made. A gift, by way of trust fund, was to be given on the one-year anniversary of marriage. The marriage was later declared void ab initio by way of a decree of nullity. It was held that, as there has been no marriage, there had been a failure of basis. The trust was declared to be held on resulting trust for the settlor. This argument has had particular success in Scottish law. In *Shilliday v Smith*,[59] the pursuer (Isobel) was in a relationship with the defender (William). They became engaged and moved in together. The property was owned by William and was in a state of disrepair. Isobel paid a substantial amount of money towards the improvements to the property, thereby enriching William at her expense. After the relationship ended, the court held that the payments by Isobel had been made in consideration of marriage, and that the marriage had failed to happen: 'the critical factor in her ground of action is that she acted as she did in contemplation of the parties' marriage, which did not take place'.[60] The Sheriff held that Isobel would not have made the payments had the parties not been contemplating marriage. Therefore, Isobel could obtain restitution for the payments she made improving William's property.

Is it clear, therefore, that where the claimant has enriched the defendant at the claimant's expense on the basis that the parties are to one day marry, the claimant can obtain restitution by unjust enrichment if the basis fails and marriage never occurs. For our purposes, the question is whether this analysis can be applied even when there is no expectation or contemplation of marriage, so that the basis is the continuing cohabiting relationship of the parties. In this instance, had the claimant contributed because of the relationship, the claimant would seek to get restitution on the failure of that relationship. There is no English authority on the point, but there is Scots authority; namely, *Satchwell v McIntosh*.[61] On appeal from the Sheriff Court to

[57] *Barnes* (n 56) [106].
[58] *Re Ames Settlement* [1946] Ch 217; see also *P v P* [1916] 2 IR 400.
[59] *Shilliday v Smith* 1998 SC 725.
[60] *Shilliday* (n 59) 731.
[61] *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117.

the Sheriff Principle, Satchwell claimed restitution for moneys paid to McIntosh for the purposes of refurbishing their shared house, title of which was held in McIntosh's name. It was argued that the moneys were provided on the basis that the parties would continue to live together for the rest of their lives. This basis then failed when McIntosh began a relationship with somebody else and moved him into the shared home. The Sheriff Principal held that there was no need for a mutual understanding or intention to marry at any point: such a requirement would be far too close to a contractual model.[62] What was critical was the state of mind of the pursuer. The Sheriff Principal argued that 'the property was transferred on the condition that parties would continue to live together. If there required to be a causa as suggested by counsel for the defender it was that cohabitation would not stop'.[63] Satchwell was therefore entitled to restitution of the money paid.

The claimant may, therefore, be able to argue that enrichments conferred during the relationship were made because of the continuing relationship, and further that when the relationship ends the basis fails and those enrichments may be the subject of a restitutionary claim. It should be noted that not all enrichments conferred during a relationship would be open to an unjust enrichment claim. A great many enrichments may be seen as a gift between the parties. The purchase of furniture, for example, may not be seen as significant enough to be considered transferred on the basis of the relationship continuing. However, larger expenditure, such as paying for an extension to the family home or embarking on years of childcare, will have been contributed purely on the consideration that the relationship between the parties would continue and, crucially, will have been intended to benefit the relationship rather than the defendant personally. It is this sort of enrichment which will therefore be the natural subject for an unjust enrichment claim for failure of basis. All will depend on the facts. Failure of basis therefore exists as a strong potential unjust factor for use in cohabitation property disputes, so long as economic benefits have been provided on the supposition of continued cohabitation. This will be discussed in much more detail in Part Two.

2. *Mistake*

The secondary unjust factor considered in this thesis is mistake. This is relevant primarily due to the 'common law marriage myth', where about half of the British public believe that

[62] *Satchwell* (n 61) [10].
[63] *Satchwell* (n 61) [12].

cohabitation alone can produce rights similar or equal to those enjoyed by married couples.[64] Those that believe in this myth are therefore making a mistake of law. The question is, if a claimant contributes to the family home because of her belief in this myth, whether the unjust factor of mistake might mean that the enrichment of the defendant is considered unjust.

The mistake must be causative. It is therefore necessary that the claimant would not have contributed to the property 'but for' the mistake.[65] The case law has distinguished between an incorrect conscience belief, an incorrect tacit assumption and mere causative ignorance, with the latter proving insufficient.[66] The claimant must therefore be mistaken in their knowledge of the law – even if it only a passive assumption – for the unjust factor of mistake to work. Simply not knowing what the law is will not be sufficient. The case law has also considered that risk-taking by the claimant, where they are doubtful whether they will receive any financial remedy but go ahead and contribute to the home anyway, might prevent any unjust enrichment claim based on mistake.[67]

Due to these elements of the law, this thesis argues that failure of basis is a better unjust factor to rely on in the cohabitation context. Often claimants will not be labouring under any mistake as to their legal rights and, even if they are, it might be difficult to show that the mistake was causative. However, the unjust factor of mistake is interesting in its resonance with the common law marriage myth. Each will be examined further in Part Two.

D) Defences

If the claimant can show an enrichment of the defendant at the expense of the claimant and the presence of an unjust factor, the claimant has succeeded in proving unjust enrichment. On the face of it, the claimant will therefore obtain restitution to the value of the defendant's gain. However, the defendant may seek to raise a defence – either partial or total – to the claimant's action. This section will only deal with two defences most relevant to cohabitation property disputes: change of position and counter-restitution.

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[64] Muslihah Albakri, Suzanne Hill, Nancy Kelly and Nilufer Rahim, 'Relationships and gender identity: Public attitudes in within the context of legal reform' in John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: the 36th Report* (The National Centre for Social Research 2019).
[65] *Barclay's Bank v JW Simms* [1980] QB 677 (QB); *Deutsche Morgan Grenfell Group v Her Majesty's Commissioners of Inland Revenue* [2006] UKHL 49, [2007] 1 AC 558.
[66] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [109].
[67] *Deutsche Morgan Grenfell Group v Her Majesty's Commissioners of Inland Revenue* (n 65).

Change of position is relevant where the defendant no longer has the enrichment they originally received. Where the defendant can argue that they have changed their position in good faith and in reliance on the enrichment, they may defeat an enrichment claim to the extent they have changed their position (which may be in its entirety). Good faith here means that the defendant did not have knowledge of the facts leading to the unjust enrichment claim.[68] Further, the defendant must not have been taking a risk as to whether they were entitled to the enrichment. Change of position will also not be available where the defendant would have changed their position regardless, such as where a defendant has used the enrichment to pay their rent. In this scenario, the defendant has not relied on the security of their enrichment,[69] for they would have paid the rest regardless of their receipt of the enrichment. For the purposes of this thesis, one of the key questions is whether change of position should be available at all in the cohabitation context. Regardless, even if the change of position defence is available in this context the defendant will often be aware of the facts leading to the claim, meaning he will not be able to make use of the defence. These issues will be dealt with in Chapter Six.

Counter-restitution is a similar principle. Here, the defendant will have benefited the claimant just as the claimant has benefitted the defendant. This principle has played an important role in proprietary estoppel cases. For instance, in *Sledmore v Dalby* the claimant's detriment was outweighed by his enjoyment of living rent-free in the defendant's property.[70] This is one of the reasons Chapter One argued that proprietary estoppel was not appropriate for use as the primary doctrine for cohabitation disputes. Should unjust enrichment claims be defeated by the defendant arguing the claimant has, for example, lived rent-free in his house, the doctrine will be denied most of its effect. Part Two will therefore discuss how the concept could work in an unjust enrichment claim.

E) Remedies

There are several restitutionary remedies which may be given for unjust enrichment. Many of these are unlikely to be of relevance to cohabitation property disputes. Rescission of a contract – should the contract be void, for example – will not be relevant as the parties will not have

[68] *Lipkin Gorman* (n 2) 579.
[69] See for example *McDonald* (n 38).
[70] *Sledmore v Dalby* (1996) 72 P&CR 196 (CA).

formed a contract. Similarly, subrogation is unlikely to have much application in the domestic context.[71]

The remedies which cohabitants will likely seek are those for the return of money paid to the defendant (money had and received) or reasonable payment for services (quantum meruit). Traditionally, each of these is given as a personal remedy: a lump sum paid by the defendant to the claimant. However, it has been argued that claims for unjust enrichment can also support a proprietary remedy.[72] It is clear that on current legal authority there is no ability for unjust enrichment to provide a proprietary remedy.[73] This is a result of two concerns over proprietary restitution: first, that third parties will be caught out by an unexpected property interest which the courts have declared; and second, that readily allowing property interests as a result of unjust enrichment could adversely affect the careful balancing exercise of the Insolvency Act 1986, which dictates which creditors will be protected on the event of a defendant's insolvency and affords more protection to creditors with interests over the defendant's property.

These concerns have not prevented intense academic debate over the potential of proprietary restitution. Chambers, for example, has argued that the resulting trust responds to unjust enrichment.[74] This would mean that once a claim in unjust enrichment has been successful, the court may respond with proprietary restitution and declare a resulting trust has arisen for the benefit of the claimant. Chambers' argument is based on the theory that resulting trusts are triggered by a lack of intention to benefit the defendant, this lack of intention being shown by unjust enrichment. If resulting trusts do respond to unjust enrichment, they will apply to a much wider set of circumstances envisioned by the view of resulting trusts in *Gissing v Gissing*, where the resulting trust was assumed to apply merely as a response to direct contributions to the purchase price of property.[75]

Chambers argues that a resulting trust requires two facts to be shown. The first is that property has been transferred to another or paid for without consideration. The second is that the provider did not intend to benefit the recipient. This second fact can be presumed by the fact

[71] *Banque Financière De La Cité v Parc (Battersea)* [1999] AC 221 (HL); *Bank of Cyprus v Menelaou* (n 39); *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2018] AC 313.
[72] See, for example, Robert Chambers, *Resulting Trusts* (OUP 1997); Peter Birks, Unjust Enrichment (OUP 2005); and Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011).
[73] There is no case in which a proprietary remedy has been given for unjust enrichment. See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 689-691.
[74] Robert Chambers, *Resulting Trusts* (1997).
[75] *Gissing v Gissing* [1971] AC 886 (HL) 901.

that the recipient did not provide the whole of the consideration.[76] This explains the 'presumption of resulting trust' in circumstances where the claimant has paid for property belonging to the defendant where the presumption of advancement does not apply. Chambers' analysis and the nature of proprietary restitution more broadly will be explored in a Chapter Six, but a few key observations should be made about proprietary restitution in general.

First, whether proprietary restitution is allowed in English law is a particularly thorny issue. The need to fit the resulting trust with some underlying conceptual theory seems to stem from the orthodoxy that English law does not allow remedial trusts (trusts imposed by the discretion of the court).[77] Although Lord Browne-Wilkinson has argued that the remedial trust might be a good basis for proprietary restitution for unjust enrichment,[78] primarily as it can be tailored to the circumstances of the individual case and therefore innocent third parties can be protected, Etherton LJ has reminded us that 'the current general view is that English law does not at present recognise a remedial constructive trust of the kind described by Lord Browne-Wilkinson with its critical features of judicial discretion and retrospectivity'.[79] If remedial trusts were allowed, it would be easier to argue for proprietary restitution as a remedy for unjust enrichment on policy grounds, to 'ring-fence' property that the recipient was never intended to have and, therefore, that the creditors of the recipient were never intended to obtain. This is because the imposition of a trust would be a remedial choice rather than a theoretical battle. However, due to the low likelihood of remedial trusts being accepted in English law,[80] this thesis will prefer a solution based on Chambers' theory, as this theory makes the most sense out of considerable case law and literature which simply cannot fit together perfectly.

Second, if proprietary restitution is not possible, this conclusion does not make unjust enrichment irrelevant. As demonstrated in Chapter One, the common intention constructive trust's remedy is entirely without nuance. Either the claimant acquires an interest in the house, which is likely to be a substantial amount (with the starting presumption of 50% in joint legal title disputes) or they get nothing.[81] This can be seen by the case of *Amin v Amin*, where the

[76] Robert Chambers, *Resulting Trusts* (1997) 32.
[77] *FHR European Ventures v Cedar Capital* [2014] UKSC 45, [2015] AC 250 [47]: '[the] remedial constructive trust... is a concept which has authoritatively been said not to be part of English law'.
[78] *Westdeutsche Landesbank Girozintrale* (n 73).
[79] *Crossco No 4 Unlimited v Jolan Limited* [2011] EWCA Civ 1619, [2012] 1 PC&R 16 [84].
[80] See generally: Charlie Webb, 'The Myth of the Remedial Constructive Trust' (2016) 69(1) Current Legal Problems 353; Etherton (n 19).
[81] It should be noted that substantially unequal property sharing is possible under the common intention constructive trust: see *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 where the property ended up

claimant, despite having sole legal title to the property, ended up with no beneficial interest at all.[82] Unjust enrichment, however, allows a more nuanced appreciation of the facts by allowing restitution by appropriate monetary payments, therefore facilitating the court to be more responsive to facts rather than being wedded to the requirement of a common intention and the creation of beneficial interests. Dewar has noted that the focus on ownership 'may have become a bit of a strait-jacket' and suggests a more functional approach.[83] It may be that the claimant would prefer an award based on a lump sum payment, rather than having to wait for the property to be sold before her share can be realised and her money obtained. In addition, a proprietary remedy only works for those couples that own their homes: unjust enrichment is potentially useful for those cohabiting couples who rent or live apart together as it can provide a personal award.[84] Dewar goes on to argue that the vindication of a right to have basic needs met by resources out of the family home requires more than a simple rule about ownership.[85] The possibility of flexibility in unjust enrichment between a personal monetary award and proprietary restitution based on a resulting trust will be discussed further in Part Two.

III. UNITY OF A CLAIM – DOCTRINE OR PRINCIPLE?

Unjust enrichment thinking has progressed to the point where it is now relatively easy to state the key requirements needed for a successful claim. However, the theoretical structure of unjust enrichment is a matter for consistent debate within the academic literature. The proposals range from unjust enrichment acting as merely a moral principle which loosely involves various private law causes of action to a single unified cause of action in which claimants sue for unjust enrichment using the same requirements regardless of the context of the case. This chapter is not intended to provide an answer to this debate, but it is important to explain how this thesis understands and uses the term 'unjust enrichment'.

Perhaps the most well-known rejection of unjust enrichment as an independent cause of action comes from Hedley, who notes the three potential ways of using unjust enrichment:[86] first,

being shared 90:10. However, this outcome is rare, and it is explicitly difficult in joint name cases to disrupt the 50:50 starting point.

[82] *Amin v Amin* [2020] EWHC 2675 (Ch). This is a particularly stark example. See Sam Bannister, 'Over-Acquiring and Under-Quantifying: Continuing Issues with the Common Intention Constructive Trust' [2021] Conv 222.

[83] John Dewar, 'Land, Law, and the Family Home' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998).

[84] See Chapter Six.

[85] John Dewar (n 83) 354.

[86] Steve Hedley, '"Farewell to Unjustified Enrichment?" – A Common Law Response' (2016) 20(3) The Edinburgh Law Review 326.

unjust enrichment may act as a legal concept with no real special status in law, and instead exists as merely an abstract approach from which judges may draw from when developing the law. This may be known as the descriptive sense of unjust enrichment. Second, one may take the principled view in which unjust enrichment is a general principle that addresses problems, but necessarily differently for different problems – under this view, there is no single cause of action for unjust enrichment, and it instead involves different causes of action for different circumstances. Thirdly, the strictest viewpoint is the logical view where unjust enrichment can be stated with a high degree of rigour. Under this view, there is one, unified cause of action for unjust enrichment. This third viewpoint is the one most associated with Birks' categories of events.[87] The second and third viewpoints might be known as a substantive sense of unjust enrichment.

Hedley's argument that 'all sensible academics admit that intellectual order is good but is not the only good'[88] quickly leads him to doubt the logical viewpoint, as 'imposing unification on the law has a significant price – in fairness, in flexibility, in practicality, in fidelity to court rulings – and some think the price is too high'.[89] Those academics that think the price is too high for a single unified cause of action appear to be growing. Stevens has argued recently that a wrong turn has been taken by unjust enrichment law.[90] Stevens suggests that different kinds of unjust enrichment claims have very little in common with each other, meaning that there is no unifying rationale behind unjust enrichment as there is behind tort (a wrong has been actioned) or contract (agreements that create legal rights which ought to be enforced). Stevens laments the fact that, because unjust enrichment is treated as a unified claim, if one claim does not have feature X, it is assumed that no unjust enrichment claims can have X. This causes the law of the lowest common denominator. In addition, if one claim has feature Y, it is assumed that all unjust enrichment claims must do so. This is inappropriate where unjust enrichment can be deployed in a wide diversity of cases.

In response to Stevens, Burrows has defended the traditional unified view of unjust enrichment.[91] Burrows suggests that 'the single high level normative principle of unjust enrichment ties together what may be regarded as more specific causes of action which have

[87] Peter Birks, 'Misnomer' in William Cornish et al (eds), *Restitution: Past, Present and Future* (Hart 1998).
[88] Hedley (n 86) 328.
[89] Hedley (n 86) 328.
[90] Robert Stevens, 'The Unjust Enrichment Disaster' [2018] LQR 574.
[91] Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) CLJ 521.

significantly different normative explanations'.[92] This acceptance of different normative rationales for different factual circumstances is likely necessary in order to maintain an independent law of unjust enrichment. Burrows notes that arguing for a unified cause of action for unjust enrichment does not mean 'that one has to accept that the same answer will be given to each of those four elements whichever example of unjust enrichment one is talking about. Nor does it equate to saying that there is a single test for answering each of the four elements'.[93] Therefore, the 'wrong turn' taken by unjust enrichment law appears to be the idea that 'we are forced to draw general conclusions applicable to every unjust enrichment case' due to a single normative significance underlying every unjust enrichment claim.[94] The implication of this is that, as Smith argues,[95] we need to separate unjust enrichment into multiple causes of action. They exist for different normative reasons and therefore have different requirements attached to them.

The idea of differing unjust enrichment claims responding to various normative principles is relatively old. In this jurisdiction, the theory is best expounded by Barker, who uses unjust enrichment as a classificatory category and as a normative legal principle, which mediates at a higher level of abstraction the broad variety of claims within unjust enrichment.[96] Unjust enrichment is about when one person can sue another for gains the other has made – this is because there are enough family resemblances between these actions. Under this argument, we need to reject essentialism as unjust enrichment claims are simply too diverse to have the same ruleset. Barker therefore argues strongly for the heterogenous nature of unjust enrichment, saying that claims should not be seen as the same just to fit them into the category. Unjust enrichment, he argues, can be a mixed bag without being an incoherent bag. The normative plurality of unjust enrichment is also espoused by Dagan, who argues (in a US context) that unjust enrichment is based normatively on a trio of principles: autonomy, utility, and community.[97] Dagan's thesis will be returned to in the next section.

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[92] Burrows (n 91) 529-530.
[93] Burrows (n 91) 528.
[94] Pablo Letelier, 'A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims' (2020) 136(Jan) LQR 121, 136.
[95] Lionel Smith, 'Restitution: A New Start' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2019).
[96] Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in *Understanding Unjust Enrichment*, Jason W Neyers, Mitchell McInnes and Stephen GA Pitel (Eds) (Hart 2004).
[97] Hanoch Dagan, *The Law and Ethics of Restitution* (CUP 2004).

For the purposes of this thesis, unjust enrichment will be treated as an independent cause of action, separate from tort law or contract law. In this way, it sits on its own within the schema of private law. However, as this section has sought to argue, this does not mean that the requirements attaching to an unjust enrichment claim in the cohabitation context should necessarily be the same as those used in other contexts. Much of the work done in this thesis is in introducing unjust enrichment to the domestic context. This requires re-examining cases which have primarily involved disputes between commercial actors, and therefore which have been decided based on commercial logic and reasoning. It is important not to assume that the same reasoning can be relied upon in the cohabitation context. Throughout this thesis, it will be considered how unjust enrichment might work in the domestic context, and this consideration occasionally – and surprisingly rarely – involves the reexamination of settled unjust enrichment law which was originally created in the commercial context. Where that is necessary, the normative plurality of the law is relied upon to point out that a differing normative principle will produce a difference in how unjust enrichment operates as a cause of action. The normative principle relied on for the use of unjust enrichment in the cohabitation context is discussed in the next section.

IV. UNJUST ENRICHMENT IN THE COHABITATION CONTEXT – NORMATIVE CAUSE

Unjust enrichment is a strict liability action which imposes a positive obligation on the defendant to affect restitution. In some cases, the defendant will be akin to an innocent bystander or a finder,[98] having done nothing whatsoever in relation to the claimant. Take the case of a mistaken payment. If someone mistakenly pays £100 into another's bank account, unjust enrichment says that the recipient has an obligation to pay the mistaken payor £100 (assuming that the recipient cannot use a defence in their favour). In such a case, there is nothing that the defendant could have done to avoid liability. Laws inform us of how we are expected to behave and are backed by the State's coercive powers.[99] The normative justification underpinning the law is therefore very important. Moreover, these justifications of the law both inform us of its future direction and provide a framework for development – this is useful as a disciplining tool, to work out the boundaries of the doctrine thereby preventing

[98] Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason W Neyers, Mitchell McInnes and Stephen GA Pitel (Eds), *Understanding Unjust Enrichment* (2004 Hart) 130.
[99] Stephen Smith, 'Justifying the Law of Unjust Enrichment' (2001) 79 Texas LR 2177; Dagan (n 97) 6.

'palm-tree justice'.[100] Yet there has been considerable academic controversy over quite what the normative justification for unjust enrichment is. This section will attempt to make sense of this controversy and will define the normative rationale for unjust enrichment that this thesis will adopt when considering its application in the cohabitation context. The orthodox view of unjust enrichment is that it responds to corrective justice.[101] It is therefore this theory which will be looked at first. It will be shown that although corrective justice is helpful when analysing unjust enrichment, it cannot do all the work in providing a normative justification for the doctrine. There must be something else which, when combined with corrective justice, can justify imposing liability on the defendant in these circumstances. It will be proposed that this 'something else' is public policy, using Dagan's theory of legal realism in the law of restitution.[102] Therefore, this thesis takes the position that unjust enrichment responds to corrective justice, which is supplemented with and made meaningful by consideration of important social goals.

A) Corrective Justice

At its most fundamental, corrective justice involves liability rectifying an injustice inflicted on one person by another. It is therefore a correlative form of justice, with the claimant (the sufferer) and defendant (the doer) linked by a transactional injustice. Corrective justice is to be contrasted with distributive justice, where the law divides a benefit or burden in accordance with the relative merits of the parties. Distributive justice does not concern itself with correlation between the parties, and indeed more than two parties may have contributed and therefore hope to benefit from a distributive scheme. The court's jurisdiction under the Matrimonial Causes Act 1973 is an example of judicial distributive justice, as liability is not based on injustices occurring between the parties. Weinrib argues that distributive justice cannot provide the basis for unjust enrichment because it does not tell us why any individual defendant should be liable to the claimant.[103] Why does the State not reimburse the claimant, or take profits from the defendant for itself? According to Weinrib, the answer is because corrective justice shows a correlativity between claimant and the defendant which makes the defendant liable to the claimant.[104]

[100] Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 OJLS 457, 458.
[101] Explained by Ernest J Weinrib, *The Idea of Private Law* (OUP 2012).
[102] Dagan (n 97).
[103] Ernest J Weinrib, 'Restoring Restitution' (2005) 91 Va LR 861, 869.
[104] Ernest J Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 31.

Corrective justice is about wrongful gain and loss. According to Aristotle, both parties start at a point of equality, and the defendant then wrongfully makes a gain and causes the claimant a loss. Corrective justice restores the parties to the original equality. Much of the literature on corrective justice in the unjust enrichment context considers what is meant by *wrongful* gain and loss. A birthday gift would fit within the corrective justice framework, but the donee could clearly not be sued by the donor for the return of the gift. There must be something to make the transfer wrongful. Weinrib has argued that this means that there must be a right violated on the part of the claimant and a duty breached on the part of the defendant.[105] There must be a right that the claimant holds, and a correlative duty of the defendant not to interfere with that right. If the claimant's right is violated and the defendant's duty is breached by the same action, corrective justice says that the law must provide a remedy.[106] In some cases of unjust enrichment, the defendant might have put undue pressure onto the claimant (such as in cases of duress or undue influence, for instance). In such cases, we can find a duty that the defendant has breached. But think back to the example made in the introduction to this section. If someone mistakenly pays another £100, the recipient will have to pay back that £100 unless they can prove a defence in their favour. This liability is strict: it is imposed independent of any wrongdoing on the part of the recipient. Indeed, in this example there is no action at all, and certainly no wrongdoing, committed by the recipient of the money.[107] In cohabitation disputes, one can easily see that the form of corrective justice is present. The claimant loses something by contributing to the family home, and the defendant is benefitted. However, it appears that no duty has been breached by the defendant. The question then is why the defendant's gain is wrongful, and therefore why a claim for unjust enrichment could lie.

Several attempts have been made to fill the corrective justice gap and provide the 'wrongfulness' required. Weinrib himself argues that the duty being violated is the claimant's 'right to value': if the claimant has given non-gratuitously (meaning in the expectation of receiving something in return), and the defendant has accepted as non-gratuitously given, the defendant is under a duty to retransfer to the claimant. Though an ingenious way of allowing unjust enrichment to work with corrective justice, Weinrib's theory is hard to accept. The defendant will often not have accepted a benefit as non-gratuitously given. This is obvious where the defendant is ignorant to the existence of the benefit, such as in the aforementioned

[105] Weinrib (n 104).
[106] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 UTLJ 349.
[107] This lack of breach, and therefore wrongdoing, by the defendant has led Birks to define unjust enrichment as a 'not-wrong': Peter Birks, 'Misnomer' (n 87).

case where the defendant without knowledge has received money into their bank account. Further, within cohabitation disputes it is difficult to understand the concept of 'gratuitous' giving and receiving, as it supposes an individual, autonomous actor which, within the domestic context, might not be present (as will be discussed below).

Other commentators have noted that, rather than providing a substantive normative 'wrongfulness', corrective justice is about the form of justice. Barker, for example, argues that corrective justice is about the bilateral relationship between the parties and the attempt to move parties back to the positions they were in before the transfer, not about what makes these transfers wrongful.[108] Barker suggests that as we have no Aristotelian guidance on what a 'wrongful' transfer is, a wider interpretation than Weinrib's could be palatable. The protection of individuals from unjust transactions is, he argues, not necessarily incompatible with the pursuit of broader social goals.[109] This theory is taken further by Posner, who argues that nowhere does Aristotle suggest that the concept of 'wrongful' – as in wrongful gain and loss – excludes consideration of the social value of conduct.[110] In this sense, it is possible to reconcile Weinrib's corrective justice theory with the use of social values. The context for Posner's work is tort law: he suggests that, though corrective justice is the underlying basis for English tort law, this basis helps to cement an economic theory of torts, as an economically inefficient action may form the definition of 'wrongful'. Smith agrees with Barker and Posner that there may be an opening for public policy in providing the substantive wrongfulness in corrective justice – Smith argues that the relevant gain and loss required is *normative* rather than material, but notes that public policy could play a role in construing what is normatively problematic, and therefore shaping which transfers are classed as wrongful and in need of being reversed.[111]

This argument – that social policy is relevant in providing the normative theory justifying unjust enrichment – is one which has been taken up by Dagan under a theory known as 'value instrumentalism', a name adopted by Klimchuk.[112] It is argued here that value instrumentalism can help to provide the wrongfulness necessary for the corrective justice form, supplementing

[108] Barker (n 100) 469.
[109] Barker (n 100) 475.
[110] Richard Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 JLS 187 192.
[111] Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas LR 2115, 2144.
[112] Dennis Klimchuk, 'The Normative Foundations of Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 95-96.

corrective justice as the normative theory justifying the use of unjust enrichment in the cohabitation context.

B) Value Instrumentalism

In *The Idea of Private Law*,[113] Weinrib argues that private law should be an inherently intelligible phenomenon.[114] He refutes the idea that private law has anything to do with external influences and suggests that social goals are irrelevant.[115] According to Weinrib, corrective justice alone can justify private law. Contrastingly, Dagan argues for a legal realism account of the law, suggesting that unjust enrichment responds to certain social goals. Social facts and human values must always inform the direction of legal evolution because the law affects people's lives so drastically.[116] This is clearly at odds with Weinrib's 'inherently intelligible' view of private law, but Dagan's theory may help to discover the normative justification for unjust enrichment. This section argues that these social goals form the requirement of 'wrongfulness' in wrongful gain and loss to allow unjust enrichment to work with corrective justice.

An example of value instrumentalism may be helpful. We have seen above that corrective justice as understood by Weinrib struggles to justify liability in mistaken payment cases. Someone pays another £100 by mistake. Why must the recipient pay that money back when they may have taken no relevant action (and further may be ignorant of the payment)? Weinrib cannot find a duty that the recipient has breached. Dagan argues that the law imposes liability to further the social goal of individual autonomy. Autonomy can be a rather nebulous concept: as Fineman argues, its 'amorphous, overarching, and imprecise nature means that [it] can be used simultaneously by those holding disparate positions in regard to any proposal'.[117] For the moment, 'autonomy' will be used to simply mean 'the ability for a person to use their property as they wish'.[118] So, in our example the payor's autonomy has been affected – they have not been able to use their property as they intended. In order to protect the payor's autonomy, the property must therefore be transferred back.

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[113] Weinrib (n 101).
[114] Weinrib (n 101) 2-3.
[115] Weinrib (n 101) 4-5.
[116] Hanoch Dagan, 'Restitution's Realism' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 58.
[117] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) 26.
[118] Lionel Smith (n 111) 2117, 2141-2142.

Importantly, the recipient's autonomy is not affected, as they will be no worse off after restitution than they were before the money was mistakenly paid. The recipient is not losing anything, so the law has no problem making him liable.[119] The rule in favour of liability maximises the claimant's autonomy without unduly harming the defendant's because the defendant is no worse off.[120] This also helpfully explains the change of position defence, which allows the defendant to escape liability if he has, in good faith, spent the enrichment on something they would not otherwise have bought. Here, liability would impact the defendant's autonomy, as liability would make them worse off. The law therefore does not require restitution. Autonomy allows us the ability to say that the transfer of value between claimant and defendant is normatively 'wrongful' – because it is a transfer that unduly impacts upon the claimant's autonomy.

1. *Freedom of self-determination*

There are two relevant types of autonomy in the cohabitation context. The first can be called the freedom of self-determination. Nadler defines freedom of self-determination as 'on this view of freedom, to be free is to act from purposes that are actually self-chosen and to be able to view one's life as broadly expressive of one's own projects and goals, as the unfolding of one's self-determined ends'.[121] If the claimant contributes to the family home, she has made a decision to use her assets in a particular way, whether that involves money paid or services rendered. However, her autonomy, or freedom of self-determination, requires the claimant to be able to actualise her goal:

> [I]n the case of the partner in the quasi-spousal relationship who works and sacrifices for what she believes is a common enterprise but actually acquires no share of the family assets because property law gives rights of ownership to the title-holder alone […] the law lends its support to the subversion of the plaintiff's reasonable expectation. The court, as a public institution of justice, responds by preventing this effect of the law. It thus protects the

[119] Dagan (n 97) 40.
[120] Kit Barker, 'The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (2009 OUP) 168.
[121] Jennifer M Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28(2) OJLS 245, 262.

> plaintiff's right of self-determination where it is undermined in the circumstances by the laws of property or contract.[122]

Unless the claimant is intending to gift the defendant an economic benefit obtained via her provision of homemaking, childcare, improvements to the property and any financial contribution to the running of the household, the property law position of the defendant retaining that benefit frustrates the claimant's freedom of self-determination and her autonomy. An unjust enrichment claim is therefore permitted. The claimant's partner is the correct defendant for this action as we can see that he has made the gain at the claimant's expense in a way which, due to the claimant's lack of autonomy, was wrongful. Freedom of self-determination is an important part of the unjust factor in the cohabitation context and will be discussed more in Chapter Five.

2. *Relational autonomy*

The second relevant type of autonomy is what we could call 'relational autonomy'. Consider this argument: the claimant agreed to provide services including childcare and homemaking during the relationship, whilst the defendant agreed to work outside the home. Why should the claimant be considered to have a valid claim against the defendant because the defendant happens to have gained more under this agreement? The answer is that a commitment to autonomy requires more than upholding an informal agreement of responsibilities within a relationship. It also requires understanding that relationships involve an interdependence which has the potential of causing a great degree of economic and emotional vulnerability should the relationship end. It is, as MacKenzie and Stoljar note, important not to define autonomy in opposition to dependency and connection.[123] In this way, the law needs to protect cohabitants from the liberal pursuit of free exit from relationships, stemming from an ideology of individual autonomy. Friedman argues that 'because women were usually limited to dependence on men for financial support, whereas men had no comparable limitation, women doubtless suffered more than they benefited from the cultural idealization of autonomy.'[124] *Relational* autonomy

[122] Nadler (n 121) 267.
[123] Catriona MacKenzie and Natalie Stoljar, *Relational Autonomy* (OUP 2007) 10.
[124] Marilyn Friedman, 'Autonomy, Social Disruption and Women' in Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy* (OUP 2007) 45.

is an acceptance that people's interests are often intertwined, that we depend on each other, and that obligations may arise through relationships.[125]

Of course, this issue is heavily gendered, and the fact that women are still more likely to take on domestic work and are less likely to take on work outside the home means that it is women who must deal with the risks of free exit from informal relationships. Therefore, 'it follows that a commitment to protect the autonomous individual in social and political life requires scrutiny of the various social forces that affect the development of autonomy'.[126] Butler's argument on gender norms is informative:

> 'norms act on us, work upon us, and this kind of "being worked on" makes its way into our own action […] By mistake, we sometimes announce that we are the sovereign ground of our action, but this is only because we fail to account for the ways in which we are in the process of being made.'[127]

Rather than treating each party in a relationship as purely independent property owners dealing with each other as strangers in relation to the acquisition and ownership of property,[128] the law must recognise the normative expectations within society of the roles that men and women perform.[129] Social constraints and the moral compulsion to provide care means that behaviours within relationships may not truly be the consequence of free choice.[130]

The impact of relational autonomy for the purposes of this thesis is that the law must be able to protect cohabitants from the defendant's own use of autonomy to exit relationships when he chooses without retaining obligational ties to the claimant. Dagan argues that the normative rationale for using unjust enrichment in the cohabitation context is that 'unjust enrichment claims facilitate informal intimate relationships by protecting interpersonal relationships of

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[125] Jonathan Herring, 'Relational Autonomy and Family Law' in Julie Wallbank, Shazia Choundhry and Jonathan Herring, *Rights, Gender and Family Law* (Routledge 2009).
[126] Linda Barclay, 'Autonomy and the Social Self' in Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy* (OUP 2007).
[127] Judith Butler, 'Performativity, Precarity and Sexual Politics' (2009) 4(3) *Revista de antropología iberoamericana* i, xi.
[128] Simone Wong, 'Would you "Care" to Share Your Home?' (2007) 58(3) Northern Island Legal Quarterly 268.
[129] Anne Barlow, 'Configuration(s) of Unpaid Caregiving Within Current Legal Discourse in and Around the Family' (2007) 58(3) Northern Ireland Legal Quarterly 251.
[130] Brian Sloan, *Informal Carers and Private Law* (Hart 2013) 17.

reciprocity, trust, and reliance and shielding the parties to such relationships against the lingering risks of opportunism and abuse of trust'.[131] Dagan notes that these relationships often involve power relationships where the man is able to capture a disproportionately larger share of the benefits of the relationship while simultaneously bearing a disproportionately low share of the costs,[132] whilst noting that, as above, long term interpersonal relationships in liberal environments are particularly vulnerable to opportunistic behaviour because of the liberal commitment to free exit, which allows any cohabitant to leave their relationship at will.[133]

In order to properly protect the autonomy of the claimant, unjust enrichment must step in. This is necessary to ensure that the defendant does not gain from the claimant's contributions to the family in circumstances where he was never intended to: if the claimant is intending to contribute to the family, she is not intending to benefit the defendant personally, even after the relationship has ended. This is discussed at length in Part Two. However, unjust enrichment must also protect the relational autonomy of the claimant by ensuring that the joint venture of an interdependent informal relationship cannot give way to the defendant leaving the relationship without any obligational ties with a disproportionate share of the benefits from that relationship. As Douglas notes, actions driven by the caregiver, generally expected in relationships, may lead to adverse consequences for that person, and to gains on the part of the other person. The recipient of these gains or benefits cannot treat them as windfalls unconnected to the effort – and commitment – of the caregiver.[134] This fits the modern liberal individualist approach by allowing adult parties at the end of their relationship to draw a line underneath it while redressing economic imbalance that has arisen in consequence of it.

C) Autonomy and Social Policy in the Unjust Enrichment Caselaw

The discussion above is heavily theoretical. Importantly, the normative justifications for the doctrine should not be used to think of unjust enrichment as capable of discretionary, 'palm-tree' justice. These normative justifications are clothed by the substantive law, which regulates when an unjust enrichment claim may be available. Because judges often do not consider the normative justifications of doctrine, the discussion in this section has thus far focused on academic debates about the law. However, the case law does show an acceptance of social

[131] Dagan (n 97) 165.
[132] Dagan (n 97) 170.
[133] Dagan (n 97) 174.
[134] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2008) 31-32.

policy in unjust enrichment reasoning and (in particular) recognition of concerns about autonomy.

One example is undue influence. Here, a claimant can claim restitution if it can be shown that the defendant has unduly influenced them to enrich the defendant. The courts have been alive to the social problems that such a situation may present:

> [T]he high degree of trust and confidence and emotional interdependence which normally characterises a marriage relationship provides scope for abuse. One party may take advantage of the other's vulnerability. Unhappily, such abuse does occur. Further, it is all too easy for a husband, anxious or even desperate for bank finance, to misstate the position in some particular or to mislead the wife, wittingly or unwittingly, in some other way. The law would be seriously defective if it did not recognise these realities.[135]

The courts therefore have accepted that the goal of protection for people vulnerable due to their relationship must be upheld. Other areas of unjust enrichment seem to follow social aims too. In *Benedetti v Sawiris* when considering whether subjective devaluation should be permitted, the protection of autonomy was seen as a major influencing factor. Lord Clarke argues that a defendant should be able to prove that he valued the enrichment less than its market value, as 'that principle is widely accepted by academic commentators and is based on the fundamental need to protect a defendant's autonomy'.[136] It has been suggested that the change of position defence is also designed to protect the defendant's autonomy.[137] This suggests that respect for autonomy is a foundational principle tying together elements of the unjust enrichment doctrine.

Further, some unjust factors may be policy oriented. Indeed, Birks separated unjust factors into two categories: first, lack of intent to benefit the recipient and second, policy reasons as to why the enrichment must be given up.[138] Alternatively, Virgo separates the unjust factors into three: claimant-oriented factors, defendant-oriented factors, and policy-oriented factors.[139] The idea that unjust enrichment responds to social policy is therefore perfectly orthodox. One such 'policy-oriented' unjust factor may be necessity. In *The Great Northern Railway Company v*

[135] *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 [36].
[136] *Benedetti* (n 28) [18].
[137] *Benedetti* (n 28) [118].
[138] Peter Birks, *Unjust Enrichment* (n 72).
[139] Virgo (n 7) 124.

Swaffield,[140] the plaintiffs sent a horse to the defendant on the defendant's request. As there was nobody present to receive the horse, the plaintiffs stabled the horse at their own cost. It was held they could get restitution of this money from the defendants:

> I think we need do no more than ask ourselves, as a question of common sense and common understanding, had they any choice? They must either have allowed the horse to stand at the station—a place where it would have been extremely improper and dangerous to let it remain; or they must have put it in safe custody, which was what in fact they did in placing it in the care of the livery stable keeper.[141]

The court thought that the plaintiffs 'were bound, from ordinary feelings of humanity, to keep the horse safely and feed him'.[142] This is not a consideration of normative theories of justice. This is a consideration of social policy.

Unjust enrichment's grounding in social goals can be seen most clearly in the unjust factor of ultra vires collection of money by a public authority. In *Woolwich Equitable Building Society v IRC*,[143] the claimant, a building society, paid tax to the Revenue Commissioners. The regulations requiring this tax were then declared to be ultra vires and therefore void. The Commissioners paid back the money with interest which had been paid after the date of the judgment declaring the regulations void, but not before. The question for the court was therefore whether the Commissioners must pay back this larger amount of interest charged before the judgment. This question was considered by Lord Goff to be 'of importance for the future of the law of restitution, since the decision of your Lordships' House could have a profound effect upon the structure of this part of our law'.[144] It was noted that the revenue, armed with 'the coercive power of the state',[145] gained a huge interest free loan if they were not required to pay back any of the interest on sums before the judgement of invalidity was made. It was said that the Revenue's position, 'as a matter of common justice', was unsustainable.[146] It was argued that it would be wrong to penalise a good citizen, seeking to

[140] (1874) LR 9 Ex 132.
[141] *Great Northern Railway* (n 141) 135.
[142] *Great Northern Railway* (n 141) 136.
[143] *Woolwich Equitable Building Society v IRC* [1993] AC 70
[144] *Woolwich* (n 143) 163.
[145] *Woolwich* (n 143)171; There is an interesting use of the same phrase in Dagan's writings (n 97).
[146] *Woolwich* (n 143)171.

pay their taxes.[147] Further, the Bill of Rights 1688 states that taxes should not be levied without the authority of Parliament. Lord Goff combats the argument against judicial activism and crossing the boundary between the judges and the legislature:

> I feel bound however to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships' House would never have been decided the way they were.[148]

As Walpole argues, these arguments are made on constitutional policy grounds.[149] They seek to further certain social goals, which appeared here to be mediating justice between the parties. There is no breach of duty by the defendant here. Instead, in this case the normative wrong is being driven by constitutional policy.

Indeed, it should be noted that original statements of unjust enrichment contained not analyses of corrective justice, but of conscience. Lord Wright in 1943 argued that 'it is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep'.[150] As has been seen, the courts have not shied away from considering these issues of conscience. Policy considerations and social goals are ingrained in unjust enrichment.

V. CONCLUSIONS

This chapter introduced unjust enrichment and highlighted the controversial elements of the doctrine which will need to be considered in Part Two of this thesis in order to demonstrate how unjust enrichment might influence development of the law in the cohabitation context. In doing so, this chapter has defined the way that unjust enrichment is to be used throughout this thesis by focusing on the practical and theoretical elements of the doctrine.

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[147] *Woolwich* (n 143)172.
[148] *Woolwich* (n 143)173.
[149] Samuel Walpole, 'Justifying the Woolwich Principle: An Exploration of the Normative Boundaries of Unjust Enrichment and Corrective Justice' (2018) 26 RLR 42.
[150] *Fibrosa* (n 3) 61.

Unjust enrichment has experienced significant impediments to recognition in the cohabitation context in England and Wales, including later acceptance as part of private law than it enjoyed in similar jurisdictions and its close link with commercial logic. This means that development of cohabitation disputes along the lines of unjust enrichment will rely not only on established case law but also extrapolations from normative principle. It is for this reason that this chapter has elucidated the theoretical justification for considering the use of unjust enrichment in the cohabitation context. The 'wrongfulness' involved in transfers of value between cohabiting couples relies on the theoretical structure of not only corrective justice but also value instrumentalism. It was argued that respect for and protection of the parties' autonomy generates significant need for an unjust enrichment claim to provide restitution should the defendant end up retaining the wealth generated by both parties to the relationship. One party must not be permitted to leave this relationship without accepting the obligational ties which require restitution to prevent economic vulnerability.

Acceptance of this normative rationale requires further acceptance of normative plurality within the law of unjust enrichment. The theoretical justification for the doctrine changes depending on the unjust factor and the context. If we are to take this normative plurality seriously, the distinct rationale applying to the cohabitation context must create a differing law of unjust enrichment: in other words, the application of the law must fit the context. The way in which unjust enrichment could operate to develop the law currently applying to cohabitation disputes is considered in Part Two. However, it is first necessary to consider the current literature on use of unjust enrichment specifically applied in the cohabitation context, both in England and Wales but also in comparative jurisdictions. That is the role of Chapter Three.

CHAPTER THREE – UNJUST ENRICHMENT AND COHABITATION DISPUTES

This chapter lays the groundwork for the doctrinal analysis in Part Two of this thesis by showing that although the doctrine of unjust enrichment has rarely been considered relevant in the cohabitation context by the judiciary, there is a great degree of academic discussion of the doctrine's use in this context. This chapter surveys the literature on unjust enrichment's application in disputes that arise on cohabitation breakdown. This chapter attempts to confront the current consideration of unjust enrichment in this context, both in England and Wales and in other jurisdictions, and across judicial decisions, academic commentary and reform attempts.

In considering the current relationship between unjust enrichment and cohabitation, this chapter acts as a link between the first two chapters in Part One – where the current law and the doctrine of unjust enrichment were discussed – and Part Two, where legal issues with the current law are considered from the perspective of unjust enrichment. This chapter demonstrates that the similarities between the doctrines, in particular the use of contributions and concern for party intention, indicate why unjust enrichment has long been considered by academics for use in these disputes.

This chapter proceeds as follows. First, the similarities (and differences) between the common intention constructive trust and unjust enrichment are considered. An appreciation of these similarities will allow for an understanding of what the transition from property law to restitution would in practice mean. Second, the current literature on unjust enrichment in the cohabitation context in England and Wales will be explored. This section will focus on judgments which mention the usefulness (or otherwise) of unjust enrichment, academic commentary and the Law Commission's reform proposals. Third and finally, this chapter considers use of unjust(ified) enrichment in Canada and Scotland. It is suggested that, despite differences in the understanding of the doctrine, England and Wales could learn from the approach in these jurisdictions.

I. COMPARING UNJUST ENRICHMENT AND THE COMMON INTENTION CONSTRUCTIVE TRUST

As will be seen, explicit mentions of unjust enrichment are rare in the cohabitation property dispute case law. However, it should be noted that the law does contain concepts, such as contribution to the family home and the search for party intention, which would feel more at home within unjust enrichment than as part of a constructive trust. After all, a constructive trust based on the common intention of the parties is unique,[1] with intention usually being relevant only for express trusts.[2] It is true of course that detrimental reliance is required in addition to supply the 'unconscionability' at the heart of the doctrine,[3] but that does not change the fact that the doctrine is fundamentally about informal agreements about ownership.

As the common intention constructive trust is supposedly based on consent[4] and on agreement between the parties, contributions initially appear to be irrelevant. Of course, the reality is that parties will not have agreed. It is very unusual that there is an express agreement to share the property.[5] Instead, the court must look at contributions to divine the common intention of the parties. Contributions to the family home are often unlikely to show what the parties' intentions truly are, as was argued by Lord Neuberger in *Stack v Dowden*.[6] Does the fact that the claimant has taken care of the couple's children indicate that she intended to have an interest in the house

[1] AJ Cloherty and DM Fox, 'Proving a Trust of a Shared Home' (2007) 6(3) CLJ 517, 517; Martin Dixon, 'Choppy Waters (Property Rights of Unmarried Couples)' [2011] Conv 87, questioning whether the law of trusts applied in this area is 'conventional' at all. John Mee, 'Ambulation, Severance and the Common Intention Constructive Trust' (2012) 128(Oct) LQR 500 discusses the issue of severance, where the parties may start as joint tenants but end up tenants in common.

[2] Indeed, there are no other examples of constructive trusts being formed by intention.

[3] *Dobson v Griffey* [2018] EWCA 1117 (Ch) [10]. Note, however, the recent decision of *Hudson v Hathaway* [2022] EWHC 631 (QB) in which the requirement of detrimental reliance was doubted. However, the core concept of unconscionability remained.

[4] *Dobson* (n 3) [10]. Note the criticisms of this in Chapter One, however, in particular the search for the parties' intentions.

[5] John Mee, 'Joint Ownership, Subjective Intention and the Common Intention Constructive Trust' [2007] Conv 14, 16; *Midland Bank v Cooke* (1995) 27 HLR 733 (CA) 746; *Pettitt v Pettitt* [1970] AC 777 (HL) 820.

[6] *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432 [132]-[133]. Lord Neuberger's dissent has been supported in *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36 (CA (Sing)), partially because it is consistent with Chamber's resulting trust analysis responding to absence of intention to benefit. However, it must also be noted that the Singaporean cultural context is different, and the landmark cases on the common intention constructive trust in Singapore have been in the context of children arguing over assets acquired by their parents, as opposed to unmarried cohabitants ending their relationship. See Man Yip, 'Comparing Family Property Disputes in England and Singaporean Law: "Context is Everything"' (2021) 41(3) Legal Studies 474.

(and that the defendant also intended this)? Clearly not:[7] by considering such behaviour as relevant, the law presupposes mercenary motivations. This linking of contributions and intentions about ownership also allows the judge to ignore domestic services, which are seen as part of the 'private' sphere of the family, provided owing to the love and care of the claimant, and therefore not as relevant to the beneficial shareholdings of the property.[8] Without considering the parties' intentions about ownership, however, we can see that these contributions are valuable in their own right, in the same way that financial contributions to bills or to mortgage instalments are.[9]

Contributions are also highly relevant in an unjust enrichment claim. Where property or wealth must be returned to the claimant via restitution, it becomes vital to discover what the defendant received in the first place. Indeed, in the 1990s cohabitation cases seemed to use a narrow form of restitution:[10] in cases such as *Springette v Defoe*[11] the claimant received strictly what she had contributed to the acquisition of the property, and nothing more. If the claimant was lucky, as the claimants in *Huntingford v Hobbs*[12] or *Le Foe v Le Foe*[13] seem to have been,[14] they might also have received restitution for mortgage payments or indirect payments to household expenses as well. The claimant was given back what they contributed on a strict, mathematical approach.[15] Unfortunately, the courts failed to realise the power of this idea and did not allow restitution for wider contributions such as childcare or other domestic services (which, as will be argued in Part Two, have economic value which can form the basis for a restitutionary claim). Realising this error, the court took a course correction: not towards more restitution, but instead towards more intention.[16] Courts began (in theory at least) recognising wider

[7] Simon Gardner, 'Quantum in *Gissing v Gissing* Constructive Trusts' [2004] LQR 541, 546-548; Martin Dixon, 'The Never-Ending Story – Co-Ownership after Stack v Dowden' (2017) 2 Conv 456, 458; John Mee, 'Jones v Kernott: Inferring and Imputing in Essex' [2012] Conv 167, 170; Rebecca Lee, '*Stack* v Dowden: A Sequel' (2008) 124 LQR 209, 212.
[8] *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 FLR 1598; *Dobson* (n 3); Simone Wong 'Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?' (1998) 18 LS 369.
[9] See Chapter Four, where this issue will be discussing in the context of commodification.
[10] Martin Dixon, 'A Case Too Far?' [1997] Conv 66, 69-70, suggesting that the common intention constructive trust is 'piggy-backing' on the back of the resulting trust.
[11] *Springette v Defoe* (1992) 24 HLR 552 (CA).
[12] *Huntingford v Hobbs* [1993] 1 FLR 736 (CA).
[13] *Le Foe v Le Foe* [2001] 2 FLR 970.
[14] In *Le Foe v Le Foe* [2001] EWCA Civ 1870, the Court of Appeal says that the first instance decision was 'generous' to the wife.
[15] *Midland Bank v Cooke* (n 5) 743; Mark Pawlowski, 'Common Intention: Assessing Beneficial Entitlement' (2004) 10(6) T&T 13, 13.
[16] *Midland Bank v Cooke* (n 5); *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211; *Stack* (n 6).

relationship matters, and attempting to divine the common intention of the parties by considering the whole course of dealings between the them.[17] As has been argued in Chapter One, this consideration of the whole course of dealings has not been the saviour that many wished: financial contributions are still prioritised, and the notion of 'natural woman's work' continues to persist.[18] Indeed in some cases, such as *Graham-York v York*,[19] the court almost returns to the resulting trust position of the 1990s, putting a narrow form of restitution front and centre.[20] It is a shame that the court failed to see that a wider restitution-based doctrine, allowing restitution for domestic services such as childcare, could herald a number of advantages.

Regardless, in continuing to use the idea of contributions, the court utilises principles which are very familiar to unjust enrichment. In almost all cases, a contribution to the family home will constitute an enrichment. Contributions to the purchase price, mortgage instalments, household bills, improvements to the property and provision of domestic services are all enrichments. In addition, the current law couples this contribution requirement with a 'loss' requirement. This is that the claimant must have relied to her detriment on the common intention of the parties.[21] This again is familiar to unjust enrichment, where the enrichment must be at the expense of the claimant.

Another similarity is that the intention of the parties remains relevant in both unjust enrichment and the common intention constructive trust. The criticisms that are made in this thesis towards intention as the basis of the law is that a *common* intention is required, in an area where agreement is highly unlikely. Unjust enrichment, however, separates the parties' intention. As has been discussed when analysing the protection of autonomy in unjust enrichment claims,[22] the claimant's intention is vitally important, looking not to agreement, but instead to understanding the motivations of the claimant in contributing to the family home. This will be discussed at length in Part Two, where it is submitted that effectively protecting the claimant's autonomy when dealing with her assets requires the claimant's intentions to be prioritised. It

[17] *Stack* (n 6); *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[18] Ellen Gordon-Bouvier, 'Crossing the boundaries of the home: a chronotopical analysis of the legal status of women's domestic work' (2019) 15(4) Int JLC 479; Simone Wong, 'Would you "Care" to Share Your Home?' (2007) 58(3) Northern Island Legal Quarterly 268; *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL) 131. See Chapter One.
[19] *Graham-York v York* [2015] EWCA Civ 72.
[20] S Greer and M Pawlowski, 'Imputation, fairness and the family home — Graham-York v York' [2015] 79 Conv 512, 520.
[21] *Grant v Edwards* [1986] Ch 638 (CA); *Eves v Eves* [1975] 1 WLR 1338 (CA).
[22] See Chapter Two.

will be argued that this is a more appropriate basis for the complex claims made at the end of a cohabiting relationship.

After an examination of the comparison between unjust enrichment and the common intention constructive trust, the real ancestry of unjust enrichment in this context can be seen from the use of contributions when considering whether the claimant has established a constructive trust. In this way, a reorientation towards unjust enrichment would not be as radical as first appears. There would be frequent overlaps with the current law, and this means that the sort of evidence produced by each party would be very similar should unjust enrichment act as the theoretical basis of the relevant obligations. The framework of the law would continue, focusing on contributions and party intention. However, rather than dealing with a fictitious agreement between the parties, unjust enrichment would consider the claimant's intentions when dealing with her assets, allowing a more realistic construction of the claimant and the interdependency of the parties' relationship.

II. UNJUST ENRICHMENT AND COHABITATION IN ENGLAND AND WALES

When considering any extension of unjust enrichment principles into the cohabitation context, it is important to consider what has come before. In England and Wales, judges and academics have occasionally mentioned the potential relevance of unjust enrichment. Furthermore, the influence of unjust enrichment inspired principles can be seen in reform suggestions made by, for example, the Law Commission which, by their focus on economic advantage and disadvantage, have a striking similarity to unjust enrichment. Thus, the development of law according to unjust enrichment can be justified as a principled, pragmatic and realisable innovation.

A) Judicial Dicta on Unjust Enrichment in Cohabitation Cases

Unjust enrichment has been mentioned very occasionally when discussing possible approaches to property disputes on cohabitation breakdown. This section will survey what little discussion of unjust enrichment there is to demonstrate the reaction which courts have had to unjust enrichment's use.

Pettitt v Pettitt[23] appears to be the first explicit mention of unjust enrichment in relation to cohabitation. In this case, counsel for each of the parties referred to unjust enrichment during

[23] *Pettitt* (n 5).

argument. However, Lord Reid doubted the doctrine's helpfulness, for two reasons.[24] First, he could not find any case where the doctrine had been used where one party has mistakenly improved the property of another. It should be noted that in 1969 when *Pettitt* was heard, there was no general doctrine of unjust enrichment, and it was seemingly limited to mistaken monetary payments (and therefore could not apply to improvements to property).[25] The nature of improvements in unjust enrichment law is complex and will be dealt with in Part Two. However, if analysed according to current unjust enrichment orthodoxy there should be no problem for unjust enrichment in dealing with improvements to property.

Second, Lord Reid suggested in any case that the remedy for unjust enrichment would be a monetary payment instead of a beneficial interest in the property (which the imposition of a trust would provide), and 'generally' the claimant would prefer the latter.[26] This argument will be considered in Chapter Six, where it will be suggested that unjust enrichment could allow a resulting trust to be imposed, and therefore that it is not restricted to personal payments only. Differing situations will require different remedial responses. Further, it is not true that a claimant will generally prefer a beneficial interest. A personal remedy may in certain circumstances be more helpful than adjustments of beneficial interests. Overall, Lord Reid appeared to have a 'somewhat limited' understanding of the unjust enrichment doctrine at the time,[27] which is unsurprising considering when *Pettitt* was decided. Counsel for the claimant also argued against an unjust enrichment approach, suggesting that unjust enrichment should not be used due to the countervailing benefits which the claimant received, including free accommodation.[28] This argument does not acknowledge that such benefits would need to be counter-unjust enrichments, explored in Chapter Six. It does not appear that free accommodation is necessarily at the expense of the defendant, and further it is unlikely to be unjust (acting instead as a gift). As Jones – who together with Lord Goff introduced unjust enrichment in *The Law of Restitution* – argues with reference to the judgment in *Pettitt*, 'some, but not all, of the difficulties which have been mentioned could have been avoided if the courts had been prepared to recognise, and a convenient procedure had been available to enforce, a *quantum meruit* claim.'[29] Unjust enrichment is well placed to deal with quantum meruit claims – claims that the defendant has been enriched by the provision of services – and, as will be

[24] *Pettitt* (n 5) 795.
[25] *Pettitt* (n 5) 788.
[26] *Pettitt* (n 5) 795.
[27] Gareth Jones, '*Pettitt v Pettitt*: A Post-Script' [1969] CLJ 196.
[28] *Pettitt v Pettitt* (n 5) 786.
[29] Jones (n 28) 197.

seen below, Canadian courts have used *Pettitt* to inform their own unjust enrichment-based law.[30]

Lord Reid's comments in *Pettitt* should be contrasted with Lord Walker's comments in the much later case of *Stack v Dowden*.[31] Here, his Lordship discussed the theoretical underpinnings of the law and noted that Scotland and some Commonwealth jurisdictions have used unjust enrichment principles. However, he resisted discussing the prospect of unjust enrichment in this area as it 'would be unwise for the House to make such a significant change of course in advance of the Law Commission's proposals'.[32] In addition, he noted, neither counsel argued it on the facts of the case before the House. He therefore concluded that 'on the assumption that there is not to be some dramatic extension of the law of unjust enrichment, it is reasonably clear that the correct approach to this area lies not in contract law but in looking for a beneficial interest under a trust of some sort'.[33] Lord Walker may have been willing to consider unjust enrichment's use in this area had the counsel in this case argued it or had the Law Commission not been considering proposals for reform at the time. A similar hint had been made earlier by Nourse LJ in *Stokes v Anderson*, where it was suggested that 'it is possible that the House of Lords will one day decide to solve the problems presented by these cases […] by following the recent trend in other Commonwealth jurisdictions towards more generalised principles of unconscionability and unjust enrichment'.[34]

The court has on only one occasion dealt with an unjust enrichment claim in the cohabitation context. Perhaps that is why the claim is dealt with briefly and in unsatisfactory detail (in merely three paragraphs). In *Walsh v Singh*,[35] the claimant, Miss Walsh, argued that she had a 50% share of the interest in a property owned solely by her partner and defendant, Mr Singh. Walsh undertook renovations and decorations, offered assistance in obtaining planning permission and acquiring nearby properties, and ran an equestrian business from the property. However, all of this was financed by Singh; Walsh paid for nothing.

As well as a common intention constructive trust and proprietary estoppel claim, Miss Walsh also claimed for 'quantum meruit based on unjust enrichment'.[36] Part of the reason this claim

[30] See for example *Rathwell v Rathwell* [1978] 2 SCR 436; *Becker v Pettkus* [1980] 2 SCR 834 (SCC); *Kerr v Baranow* 2011 SCC 10.
[31] *Stack* (n 6).
[32] *Stack* (n 6) [23].
[33] *Stack* (n 6) [29].
[34] *Stokes v Anderson* [1990] 12 WLUK 290 (CA) 399G.
[35] *Walsh v Singh* [2009] EWHC 3219 (Ch).
[36] *Walsh* (n 35) [65].

was insufficiently explored may have been the form in which it was made: it is vital that the unjust factor is made clear so as to properly facilitate analysis of the claim. Without the unjust factor, one is merely arguing that the defendant has been enriched at the claimant's expense – but this is equally true of a birthday present. The judge rejected the unjust enrichment claim on the ground that Miss Walsh made her contributions voluntarily, with the expectation of a long-term relationship and eventually marriage, but not in expectation of reward.[37] This is another example of the 'love and affection' narrative that detrimentally affects female claimants in the cohabitation context (and indeed a Canadian court may have decided that Miss Walsh did indeed act in expectation of reward[38]). Expectation of reward is only necessary if the unjust factor is failure of basis, and even then, only where the relevant basis is that the defendant will provide some counter-performance under a prior agreement. The judge did not consider, as this thesis will go on to argue is important, that voluntary contributions might still be conditional or qualified in some way. On the argument made in this thesis, should contributions have been made towards the relationship itself and not to the defendant, restitution should follow once the relationship has ended, regardless of whether the contributions were voluntary. This is because the relevant basis is a subsisting state of affairs rather than expectation of counter-performance. Regardless, there are other unjust factors which may have been present in *Walsh*. The judge considered briefly whether Walsh may have been acting under a mistake. Counsel for the claimant had argued that Walsh only paid money to Singh due the mistaken belief that she would have some title in the property. This argument was made in the hopes of a 'tracing remedy',[39] but the point stands equally for a potential unjust enrichment claim. The judge argued however that Walsh voluntarily gave money to Singh to allow him to obtain tax advantages, and that to allow the 'tracing remedy' would be to reverse these advantages, contrary to the intention of the parties.[40] However, this does not mean that there was no mistake. Walsh could have been acting to provide tax advantages to Singh on the assumption that her provision of the money would lead to a beneficial interest. The goal of the transaction is not relevant: what is relevant is whether Walsh was acting due to a mistake. This was never properly considered.

[37] *Walsh* (n 35) [65].
[38] *Peter v Beblow* [1993] 1 SCR 980 [94]: where a person provides 'spousal services' to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary.
[39] Language used in the judgment: *Walsh v Singh* (n 35) [26].
[40] *Walsh v Singh* (n 35) [26].

Interestingly, a Scottish court may have allowed an unjustified enrichment claim here.[41] The fact that Miss Walsh was acting in expectation of a long-term relationship and marriage means that failure of basis may have been present, with the relationship itself acting as the relevant basis. When the relationship fails, so does the basis, and an unjust enrichment claim materialises. This is an avenue which was not mentioned by the judge.

The problems mentioned above are enough to reject the judge's reasoning that unjust enrichment is 'ill-equipped' to deal with cohabitation claims such as those made by Miss Walsh. However, a few other points must be mentioned. The judge said that the quantification of the enrichment made by Walsh was impossible to discover due to the inadequacy of evidence.[42] This is a fair point (and one which crops up often in these cases due to the notoriously complex fact-patterns in which relevant details may have happened long ago), but the judge does then make some findings, including that Walsh had been benefitted by Singh more than she had benefitted him. This discussion on the value of Miss Walsh's contributions is problematic – it is noted for instance that Walsh's work for the equestrian business owned by Singh was not a valuable benefit as the business lost money, but the profitability of the business is surely not the point: Walsh's contributions were undoubtably significant as she essentially ran the business for Singh, with multiple clients assuming that she owned the business. The fact that the business itself lost money does not mean that Walsh's work was not valuable. It is interesting that Walsh's other contributions, including decorating and renovation, were considered to be motivated purely on the basis of creating a life together with Singh (a common way of pushing women's contributions into the 'private' sphere to be ignored[43]), but Singh's expenditure is framed thus: 'Miss Walsh has in financial terms cost him more than she has been worth'.[44]

It is not argued that Walsh should necessarily have succeeded in an unjust enrichment claim. It is likely, as the judge said, that she received far more in benefits than she provided, which means the defendant might have had a claim for counter-restitution. However, the judge in coming to this decision failed to properly consider and apply the unjust enrichment doctrine. For example, only *defective* transfers of value paid either way should be considered i.e., those

[41] *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117. See below for an explanation of this case.
[42] *Walsh v Singh* (n 35) [66].
[43] Gordon-Bouvier (n 18); Leo Flynn and Anna Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance (1995) 3(1) Feminist Legal Studies 105; Alison Diduck, 'Autonomy and Family Justice' [2016] CFLQ 133.
[44] *Walsh* (n 35) [66].

with an unjust factor present. Payments made for gifts or loans or any other legal basis are not relevant for this discussion. It is therefore not appropriate for the judge to have decided that unjust enrichment cannot work in this area:

> If dashed expectations of a long-term domestic relationship open the door to unjust enrichment claims, a wide range of claims which the concept of unjust enrichment was never meant, and is ill equipped, to deal with will come marching through.[45]

If one is to swap the words 'unjust enrichment' with the words 'constructive trust', this statement remains true. Whether these doctrines were created to deal with the problems in front of us is irrelevant. What is relevant is whether they *can* work to deal with cohabitation disputes. Sloan, calling the decision 'unfortunate', has made the point that 'it is questionable whether the constructive trust or proprietary estoppel are any more equipped to deal with "domestic" cases than are the principles of unjust enrichment'.[46] As has been explained above, the judge's conclusion that unjust enrichment cannot work in this context should be rejected.

B) Academic Commentary Exploring Unjust Enrichment in the Cohabitation Context

The academic literature exploring unjust enrichment's use in the cohabitation context is again limited. The approaches taken by academics range from attempting to apply unjust enrichment as a *doctrine* and cause of action (unjust enrichment in the substantive sense[47]) to applying some sort of abstract, quasi-unjust enrichment *principle* (unjust enrichment in the descriptive sense). This thesis applies unjust enrichment doctrine in the substantive sense and therefore, as will be seen, is distinct from the majority of previous discussions of unjust enrichment which use the descriptive sense. In addition, there have been some academics who have considered unjust enrichment in other similar contexts to cohabitation disputes.

To begin, then, only one academic has attempted to apply unjust enrichment in the substantive sense. Gardner argues that unjust enrichment may act as a 'driver' (meaning theoretical ground) for the current law.[48] There is, therefore, a subtle difference between Gardner's argument and

[45] *Walsh* (n 35) [67].
[46] Brian Sloan, *Informal Carers and Private Law* (Hart 2013) 129.
[47] See Graham Virgo, *The Principles of the Law of Restitution* (OUP 2006) 8-11.
[48] Simon Gardner, 'Family Property Today' (2008) 124 LQR 422.

the one advanced in this thesis: while Gardner attempts to justify the current law by reference to unjust enrichment, this thesis argues that understanding the obligations created at the end of a cohabiting relationship as based on unjust enrichment might lead to development of the law in a way advantageous to litigants. Put differently, this thesis argues (unlike Gardner) that the law cannot as it stands be considered based on unjust enrichment, but instead that development according to the doctrine of unjust enrichment could improve the law. However, Gardner's analysis remains an important summary of how unjust enrichment can be used, accepting that these kinds of cases 'might well disclose a case of unjust enrichment'.[49] He notes that contributing to a mortgage, working for the defendant or unpaid work in the home can all produce an enrichment for the defendant at the expense of the claimant. Further, he notes that 'absence of thought' – acting without any particular motivations – could work as an unjust factor, given that the emotional relationship between the parties suggests that often parties will not act with any clear intention.

Other academics have suggested the use of unjust enrichment in the descriptive sense. These academics are not using the doctrinal law of unjust enrichment, but instead using the concept of unjust enrichment to describe the law. A good example is Douglas et al. In using the term 'unjust enrichment', the authors make clear that they are not talking about a substantive sense of unjust enrichment, but instead 'are interested in the concept as a means of getting to the nub of what it is that is regarded as unfair in the current law'.[50] This then is a use of unjust enrichment *principles*, but not of the doctrine itself. They suggest that the injustice at the heart of this area is not based on the special status of the parties, or on the claimant having to 'earn' a share of the house, but instead on 'the idea that one party "gets something for nothing" or enjoys a windfall at the expense of another'.[51] This could help to explain the focus on contributions in the case law, and would fix the *Burns* problem, which takes the form of 'a contribution or sacrifice that goes unrecognised'.[52] In *Burns* itself,[53] a woman was refused a beneficial interest in her ex-partner's house despite using her earnings to meet household bills and providing domestic services such as maintaining the home and raising their children. Douglas et al's approach is to be supported, as it understands the key issue in the area: that one

[49] Gardner (n 48) 437.
[50] Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' [2009] MLR 25, 31.
[51] Douglas et al (n 50) 31.
[52] Douglas et al (n 50).
[53] *Burns v Burns* [1984] Ch 317 (CA).

person is receiving a continuing advantage after the relationship, whilst the other is being subject to relationship-based disadvantage.

Etherton also uses unjust enrichment in the descriptive sense. He suggests that unjust enrichment is already at play in this area,[54] arguing that *Stack v Dowden* is authority for the proposition that the courts are providing a remedial constructive trust to claimants to reverse an unjust enrichment. This suggestion rests on the point that the House of Lords used a discretionary 'whole course of dealings' model,[55] which allowed imputation of intention driven by considerations of fairness to determine property rights.[56] Etherton argues that 'it is quite impossible to say at any particular point of time before judgment […] that a certain, distinct and quantifiable property interest has arisen',[57] and therefore that the constructive trust created must be remedial rather than institutional.

On this, Etherton may have a valid point. The constructive trust imposed in cohabitation property disputes seems remedial in all but name. However, Etherton goes further and suggests that this remedial trust responds to unjust enrichment. On this element he is less clear. It is true, as he suggests, that an unjust enrichment analysis would help to explain the focus on contributions, as this focus does not fit with the current 'whole course of dealings' model which is supposed to take into account more than merely contributions to the home. The issue with suggesting that the current law is already a form of unjust enrichment is that it implies that unjust enrichment itself is discretionary, capable of being satisfied by reference to the parties' 'whole course of dealings'. It is not: as Chapter Two has revealed unjust enrichment requires an enrichment of the defendant at the expense of the claimant in circumstances that the law considers unjust. Etherton is therefore not using unjust enrichment in a substantive, doctrinal sense.

Turning to a conceptual use of unjust enrichment, Harding paints unjust enrichment as a 'liberal' perspective (focussing on individual and moral autonomy) in comparison with *Stack*'s weakly 'communitarian' perspective (focussing on the nature of the parties' relationship).[58] Harding goes on to analyse the objection to *Stack* from this liberal, unjust enrichment perspective, which insists on liberating the moral autonomy of the party who has contributed

[54] Sir Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67(2) CLJ 265.
[55] *Stack* (n 6) [61].
[56] *Stack* (n 6) [60].
[57] Etherton (n 54) 279.
[58] Matthew Harding, 'Defending Stack v Dowden' (2009) 4 Conv 309.

to their own expense.[59] He further suggests that the protection of individual autonomy comes from the doctrine's basis in corrective justice.[60] As will be recalled from Chapter Two, the fact that unjust enrichment focusses on the protection of the parties' autonomy does not mean that it does not take into account the parties' relationship. *Relational* autonomy allows us to acknowledge the relationship between the claimant and defendant, ensuring that unjust enrichment use in this area in justified by concerns about how the autonomy of the parties has been affected. This requires a recognition of gendered expectations within the family and a consideration of any remaining interdependency between the parties. Therefore, although Harding is right that unjust enrichment protects autonomy, this does not mean that it does so without consideration of the relationship between the parties. Autonomy is only protected effectively when considering the context of the case.

We now move outside of the cohabitation context, to explore the approach academics have taken to the use of unjust enrichment in the domestic sphere more generally. Sloan has suggested that unjust enrichment could be of use to carers.[61] He discusses similar problems to those which will be faced by this thesis in bringing this doctrine into the domestic sphere. In particular, he notes issues relating to 'pure' services as an enrichment, subjective devaluation by the defendant of the claimant's contributions, and the search for an unjust factor. These are all areas of unjust enrichment law which are as much a problem for cohabitation contexts as they are for the carer context. Sloan's analysis of unjust enrichment from the point of view of carers will be useful for this thesis going forward.

Nield has looked at cases where testamentary promises to reward caregivers later fail.[62] She suggests unjust enrichment as one possible solution to deal with such issues, noting that it has 'immediate resonance',[63] and gives a salient view of the problems with adopting such an approach. Nield cites the main difficulty of using unjust enrichment in such domestic contexts as 'the uncertainty surrounding this emerging area of law'.[64] She further notes that this area shares similarities with cohabitation disputes – particularly that unpaid caregivers hope for some recognition – but that:

[59] Harding (n 58) 323.
[60] Harding (n 58) 310.
[61] Sloan (n 46) 121-135.
[62] Sarah Nield, 'Testamentary Promises: A Test Bed for Legal Frameworks of Unpaid Caregiving' (2007) 58 Northern Ireland Legal Quarterly 287.
[63] Nield (n 62) 294.
[64] Nield (n 62) 295.

> Acquisition of interests in family property is dominated by the imposition of a constructive, or occasionally resulting, trust or by resort to statutory solutions whilst claims for pre-contractual expenses have inclined towards contractual or restitutionary principles. There has been little cross-pollination of solutions.[65]

Again, Nield's insights into this area will help in constructing an unjust enrichment doctrine to deal with domestic issues.

Finally, and on a different note, Degeling and Roque have discussed the possibility of an unjust enrichment claim for domestic services by examining the feminist potentials of the doctrine. As they note, unjust enrichment has been somewhat ignored by the feminist literature. Degeling and Roque are positive about the utilisation of unjust enrichment, arguing that 'the gendered norms that identify, construct and value such services in other areas of private law, such as torts, are not present in unjust enrichment in the same way'.[66] However, they warn about the impact of gendered expectations on valuation, as feminist scholarship has demonstrated a significant undervaluation of domestic labour or contributions in areas such as torts and equity,[67] and note that these gendered norms are also present in conversations about autonomy and consent. These concerns will need to be addressed in this thesis, particularly when discussing how unjust enrichment will value domestic services in Chapters Four and Six.

While a number of academics have mentioned unjust enrichment in relation to the cohabitation context (or at least the domestic sphere), there has therefore been no detailed, sustained analysis of whether unjust enrichment may provide a new perspective on some of the problems in the common intention constructive trust. As Nield suggests, perhaps the reason why the literature has not picked this argument up is that unjust enrichment is a youthful doctrine which is yet to clearly outline its boundaries. In addition, unjust enrichment as a doctrine has been forced to deal with cases mainly relating to mistaken tax since its inception.[68] However, the sparse

[65] Nield (n 62) 288.
[66] Simone Degeling and Mehera San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 Sydney L Rev 69, 70.
[67] Deleging and Roque (n 66) 89.
[68] In William Day, 'Further Narrowing the Scope of Unjust Enrichment' [2019] CLJ 24, 27, Day argues that courts when considering unjust enrichment may be reacting to a need to keep mistaken tax cases in proper bounds. If true, we cannot take what judges pronounce on these issues to be determinative of the way courts would react to an unjust enrichment scheme in the domestic sphere.

literature on the subject does provide some key messages. First, the principle of unjust enrichment is one which resonates with unpaid caregiving and cohabitant disputes as it appears (at least prima facie) to deal with the issue of the parties leaving a relationship with disproportionate economic advantages and disadvantages. Second, in practice a claimant should be able to successfully claim using unjust enrichment against a former cohabitant. This comes from both Gardner and Sloan's analysis of the subject, though each point out potential concerns which must be considered. Degeling and Rogue back this up by suggesting that unjust enrichment will be able to value domestic services in a way in which other areas of law have not. As both judicial dicta and academic commentary shows, there is a foundation on which to base these arguments.

C) The Law Commission Report and the Utilisation of Restitutionary Principles

The Law Commission, following a consultation, published a report in 2007 which recommended reform of the law applying to cohabiting couples.[69] This scheme involved reversing retained benefits and economic disadvantage in order to share economic disparities upon relationship breakdown between the couple, with the aim of easing financial vulnerability often experienced at the end of cohabiting relationships. It is worth noting that the Law Commission did not consider whether reform was warranted, but instead merely considered how such reform should be done. This was a source of discontent for some.[70] Regardless, the scheme was never legislated for by the UK Parliament after the Government refused to go forward with it. This was because the Government felt that the findings by research into the similar Family Law (Scotland) Act 2006 regime did 'not provide us with a sufficient basis for a change in the law'.[71] The proposed scheme involved a weak discretion, rather than a strong discretion like that under the Matrimonial Causes Act 1973;[72] the Law Commission thought it inappropriate to simply extend this jurisdiction given that cohabiting couples have not chosen to get married.[73] Further, political concerns about the undermining of the institution of marriage

[69] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).
[70] David Hughes, Martin Davis and Louise Jacklin, '"Come Live with me and Be my Love" – A Consideration of the 2007 Law Commission Proposals on Cohabitation Breakdown' (2008) Conv 197.
[71] Statement by the Parliamentary Under-Secretary of State for Justice HC Deb 6 September 2011, Vol 532, Col 16WS.
[72] Law Commission (n 69) 4.16.
[73] Law Commission (n 69) 4.2

were likely to be stronger should the law relating to marriage be extended wholesale to cohabiting couples.[74]

The Law Commission's scheme in many ways echoes unjust enrichment, given its focus on contributions and retained benefits. Of course, it is not suggested that the similarity between the Law Commission's scheme and unjust enrichment was in any way intentional, and indeed the restitutionary nature of the scheme was likely decided upon partially to ensure the scheme was politically acceptable. However, it is important to see that one of the most important reform proposals within the past two decades is one in which restitutionary principles are at the fore. It is true that, in some ways, the Law Commission's scheme it is much wider than unjust enrichment. For instance, it allows the applicant to successfully claim for economic loss, which unjust enrichment simply cannot do. In other ways, however, unjust enrichment will allow a claim where the Law Commission's scheme would not. The relative merits of the Law Commission's approach compared with that of unjust enrichment will be examined after the Law Commission's scheme is described in more detail.

Under the scheme, the applicant must prove that they have suffered an economic disadvantage or that the respondent has retained a benefit as a result of a qualifying contribution made by the applicant. A 'qualifying contribution' is any contribution towards the parties' shared lives or the welfare of members of their families. Qualifying contributions may include care for children, care for other members of the family, financial support for the family and the giving up of secure accommodation.[75] In calculating the economic disadvantage or retained benefit of the applicant or respondent respectively, the court must consider two further principles. First, there is a list of discretionary factors which the court must consider: this includes the welfare of any children of both parties (of primary importance), the financial needs and obligations of both parties and the conduct of each party (restrictively defined).[76] Second, there is an 'economic equality ceiling' where the court must not put the applicant in a better position than the respondent when compensating economic disadvantage.[77]

To be eligible for the scheme, the cohabiting couple must either have a child together, or alternatively must have been living together for a minimum time duration. The Law

[74] Hughes et al (n 70) 208; Stuart Bridge, 'Cohabitation: Why Legislative Reform is Necessary' [2007] 37 Family Law 911, 912.
[75] Law Commission (n 69) 4.44.
[76] Law Commission (n 69) 4.38.
[77] Law Commission (n 69) 4.72.

Commission left the decision on the minimum period to Parliament but suggested that it should be between two and five years.

Although generally well-received as a scheme for cohabitation reform, commentators pointed out several flaws in the Law Commission's proposals. The eligibility criteria were accepted as 'politically astute',[78] though would not allow the law to protect all those who are economically vulnerable due to their relationship.[79] In particular, the position of those in short relationships but who had provided large financial contributions was mentioned. It is not at all clear whether such relationships would be adequately dealt with under the general law of property.[80] Finally, Wong and Probert have each noted that, if the justification for the scheme rests on retained benefits and economic disadvantage, then there is no need for cohabitation to be a prerequisite for the scheme at all.[81] Those that are living apart together (LATs) are excluded entirely from the scheme, despite the fact that they may also experience relationship generated disadvantage.[82]

However, the greatest problems relate to the notion of 'retained benefits' and 'economic disadvantage'. The Law Commission's scheme only reverses benefits which have been retained by the respondent. Therefore, contributions toward daily expenses which do not help pay off the mortgage, or building work that does not cause an increase in value cannot be successfully claimed under the retained benefits principle.[83] The theory of retained benefits therefore measures the end product. This means that domestic services cannot be claimed under retained benefits. This has led Probert to argue that the Law Commission's scheme is no more generous than the current law.[84] These contributions could all, however, be the basis for a successful unjust enrichment claim. This is because unjust enrichment measures the

[78] Rebecca Probert, 'A Review of "Cohabitation: The Financial Consequences of Relationship Breakdown," Law Com. No. 307 (HMSO 2007)' (2007) 41(3) Family Law Quarterly 521, 527.
[79] Gillian Douglas, Julia Pearce and Hilary Woodward, 'The Law Commission's Cohabitation Proposals: Applying them in Practice' [2008] Fam Law 351, 353.
[80] Douglas et al (n 79) 353; Stuart Bridge, 'Financial Relief for Cohabitants: Eligibility, Opt-Out and Provision on Death' [2007] Fam Law 1076, 1077.
[81] Probert (n 78) 527; Simone Wong, 'Cohabitation and the Law Commission's Report' (2006) 14 Feminist Legal Studies 145, 150.
[82] For information on LATs, see Chapter Six and generally: John Haskey, 'Living Arrangements in Contemporary Britain: Having a Partner Who Usually Lives Elsewhere and Living Apart Together (LAT)' (2005) 122 Population Trends 35; Simon Duncan, Julia Carter, Miranda Phillips, Sasha Roseneil & Mariya Stoilova 'Legal rights for people who "Live Apart Together"?' (2012) 34(4) Journal of Social Welfare and Family Law 443; Cynthia Grant Bowman, 'How Should the Law Treat Couples Who Live Apart Together?' (2017) 29(4) CFLQ 335.
[83] Law Commission (n 69) 4.45.
[84] Probert (n 78) 529.

performance value rather than the end product.[85] Building work, even if it does not cause an increase in value of the property, is still valuable to the defendant as long as the defendant has agreed to it being carried out. The same is true of paying household expenditure or childcare. Each enrich the defendant.

In theory, the failure to allow domestic services to count as retained benefits is justified by the fact that the applicant may also claim for any economic disadvantage suffered due to the relationship, which may allow the applicant to share disadvantages associated with loss of earnings or pensions with the respondent, as long as these disadvantages have been suffered due to a qualifying contribution towards the relationship. Unfortunately, the notion of economic disadvantage does not save those let down by the restrictive interpretation of retained benefits. If the applicant has not left employment in order to care for the couple's children, then they may have no claim at all for those domestic services, having suffered no disadvantage.[86] This again puts the applicant in no better position than they would have been under the current law. However, whether the claimant gave up work to provide childcare or not is irrelevant to unjust enrichment. This is because disadvantage under unjust enrichment does not depend on economic disadvantage: provision of childcare, for instance, remains at the expense of the claimant even if the 'subtraction' from the claimant was only time spent.

Further, economic disadvantage is not easy to quantify. Although in theory the possibility of sharing losses caused by the relationship is a powerful one, Douglas et al note that in practice the application could be problematic:

> Questions arise as to how one would calculate how long it might take [the applicant] to catch up on her earnings – if catching up were even possible after 16 years – or what the shortfall on her possible earnings would be. Would evidence have to be based upon the situation in [the applicant's] particular bank, or across the banking industry, or in relation to women in general? How would the court put a value on the fact that [the applicant] chose not to take up earning opportunities?[87]

[85] A point made powerfully by Stevens: Robert Stevens, 'The Unjust Enrichment Disaster' [2018] LQR 574. See *Cobbe v Yeoman's Row* [2008] UKHL 55, [2008] 1 WLR 1752; *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418; *Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 WLR 1580.
[86] Probert (n 78) 528; Samantha Singer, 'What Provision for Unmarried Couples Should the Law Make when their Relationships Break Down?' [2009] 39 Family Law 234, 237.
[87] Douglas et al (n 79) 355.

The practical application of the scheme is therefore not at all certain, making it difficult for solicitors to provide advice and – crucially – negotiate settlements on the basis of this scheme.[88] In addition, there is a duty on the applicant to mitigate their loss, and they are expected to produce evidence for their attempts to get back to work and maintain their expertise. Much would depend on how this is interpreted by the courts: it has the potential to be too onerous, leading to the watering down of claims.[89]

The Law Commission's scheme is partially restitutionary (in seeking to reverse benefits received by the respondent), and partly compensatory (in seeking to share losses received by the applicant between the parties). Unjust enrichment cannot deal with compensation (as the doctrine is about stripping the defendant of enrichments) but, by taking a wider restitutionary stance than the Law Commission, may be able to encompass some of the fact-patterns that would have to rely on the uncertain economic disadvantage principles under the Law Commission's proposals.

Further, under unjust enrichment it does not matter whether there are children, or whether the couple have lived together for a certain period of time. Neither does it require ownership of the family home, and therefore may apply to those who rent just as it does to homeowners. It therefore includes those excluded by the current law and the Law Commission's reform proposals. It should be noted that this is similar to the Scottish regime, which also does not require any minimum duration for the relationship before the couple can apply for financial provision.[90]

Both the Law Commission and unjust enrichment would deny the applicant a remedy where the respondent did not want the applicant's contribution[91] – the Law Commission has suggested that usually contributions should come from joint decisions. Where there is proof that a contribution has been made in the face of the other parties' express disagreement, this will be a factor to be considered as part of the court's discretion.[92] A similar point is made by subjective devaluation in unjust enrichment, where the defendant will not be forced to pay for

[88] Douglas et al (n 79) 356; Matthew Humphries, 'The Law Commission Consultation on Cohabitation' [2006] 36 Family Law 860, 862.
[89] Probert (n 78) 532-533.
[90] Luke Tattersall, 'Living in Sin: A Reform Proposal for Financial Relief following Cohabitation Breakdown' (2015) 17 Eur JL Reform 568; *Gow v Grant* [2012] UKSC 29, 2012 SLT 829 [52].
[91] Law Commission (n 69) 4.51.
[92] Law Commission (n 69) 4.51.

contributions which he made clear he did not want. This principle exists within strict limits, explored in Chapter Four. Further, unconditional gifts provided will not be considered contributions under the Law Commission scheme or unjust enrichments under the unjust enrichment doctrine. Gifts conditional on the continuation of the relationship would be relevant for both schemes.

The Law Commission's proposals, as they would have operated through specific legislation, provide a level of comprehensiveness which goes beyond that of a common law doctrine. In particular, the discretion which the scheme affords the court in both calculating the award and in deciding a remedy is unknown to not just unjust enrichment but to the common law – meaning judge-made law – in general.[93] Moreover, no claim under unjust enrichment could be made for lost future earning capacity, pensions which would otherwise have accrued and the failure to make other savings or investments.[94] This level of detail and precision is something which simply cannot be contemplated in any private law doctrine.

Two final points must also be made. The first is that there is one advantage which the common law has over the Law Commission's scheme: unjust enrichment does not require legislation. It does require a judicial willingness to engage with unjust enrichment principles, but the fact that no Parliamentary time is needed is a significant boon for unjust enrichment as a legal development. Second, it is accepted readily that a legislative scheme offering discretionary remedies for financial consequences at the end of cohabitation relationships is required, as it is only by extending rights on relationship breakdown to cohabitants that the law would be able to sufficiently deal with the complex interdependence occurring within these relationships. However, such a legislative scheme has been argued for time and time again. As the Government's rejection of the Law Commission's proposals makes clear, Parliamentary time is unlikely to be made for this issue any time soon. This thesis therefore attempts to develop the law without Parliament, by using purely private law doctrines.

It should be noted that other bills, in lieu of the Law Commission's proposals being accepted, have been brought forward – for example Lord Mark's Cohabitation Rights Bill[95] – but again there is unlikely to be any progress. Interestingly, Lord Mark's Bill is modelled on the Law Commission scheme, again showing basic acceptance of core restitutionary principles. Lord

[93] Law Commission (n 69) 4.79.
[94] Law Commission (n 69) 4.60.
[95] Cohabitation Rights Bill <https://services.parliament.uk/bills/2019-21/cohabitationrightsbill.html> (accessed 24th March 2020).

Lester's Bill in 2007-2008 also failed to make its way through Parliament, and again involved some restitutionary principles.[96] This Bill used discretionary factors in order for the court to decide on whether an order should be made, making it a much more open ended and less technical scheme than that suggested by the Law Commission or Lord Marks. However, Lord Lester's Bill still involved consideration of contributions made and economic advantage and disadvantage experienced by each party.

It is important to see that part of the Law Commission's proposals can be realised, in many ways, without legislation by using the doctrine of unjust enrichment. This shows that unjust enrichment can carry forward legal developments which have been suggested in this jurisdiction over a decade ago, in a way that the common intention constructive trust could not, and legislation will not. Development of the law towards an unjust enrichment doctrine would require a bold, creative judiciary. However, the kind of change that the utilisation of unjust enrichment could cause is not against principle: this kind of consideration of economic advantage and disadvantage has been called for by the Law Commission itself. It is also the underlying principle of the doctrine used in Scotland and Canada, to which we now turn.

III. COMPARATIVE CONTEXTS

This section will examine the use of unjust enrichment and restitution principles in the cohabitation context in two other jurisdictions. These are Scotland and Canada, and both have been chosen for their reliance on unjust enrichment when considering claims for financial remedies on relationship breakdown of cohabiting couples. The extent to which the Scottish and Canadian unjust enrichment doctrines resembles that of England and Wales varies, and both jurisdictions have enacted statutes applying to the area, meaning that an unjust enrichment claim is now less important in both jurisdictions. Regardless, the way in which unjust enrichment is used in these jurisdictions will be very useful for future analysis on how England and Wales could use the doctrine, and lessons learnt from the analysis of the law in these comparative contexts will be utilised throughout Part Two of this thesis. We begin with Scotland, and then consider Canada.

A) Scotland

In Scotland, cohabitants may make a claim against their former partner in two ways: either for 'unjustified enrichment' or under the Family Law (Scotland) Act 2006. The former is

[96] Cohabitation Bill 2008 <http://www.publications.parliament.uk/pa/ld200809/ldbills/008/09008.1-5.html#j02> (accessed 3rd July 2020).

functionally very similar to the English unjust enrichment doctrine, whereas the latter is a statutory scheme set up to allow cohabitants to make a claim where the defendant has derived an economic advantage from contributions made by the applicant or where the applicant has received an economic disadvantage consequent on these contributions. Examining how unjustified enrichment works in Scots law as a claim for financial provision on cohabitation breakdown will be useful when considering how an English unjust enrichment scheme could impact development of the English law. This section will therefore first discuss unjustified enrichment before examining the Family Law (Scotland) Act 2006. It will be seen that Scotland adheres very closely to the economic advantage/disadvantage model, allowing restitution to prevent economic vulnerability, both in unjustified enrichment and later in the statutory claim.

1. *Unjustified enrichment*

Scottish unjustified enrichment works very similarly to English unjust enrichment:

> A person may be said to have received unjustified enrichment at another's expense when he has obtained a benefit from his actings or expenditure, without there being a legal ground which would justify him in retaining that benefit, and it is in accordance with equity that he should account for that enrichment.[97]

The reference to equity is due to the fact that in Scottish law that unjustified enrichment is an equitable principle.[98] Scotland uses the civilian model, requiring proof that there was no legal ground or basis for the transfer (rather than requiring proof of an unjust factor as in England and Wales).[99] Despite this, courts often discuss what the 'unjust factor' is, as in Scots law differing unjust factors – mistake and failure of consideration, for example – invoke different causes of action.[100] It is therefore often clear what the unjust factor is.[101] Other than these differences, the requirements for unjustified enrichment match English law.

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[97] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* [1996] SC 331, 348-349.
[98] See also *Courtney's Executors v Campbell* [2016] CSOH 136, 2017 SCLR 387 [17].
[99] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90, 93G, 94E-F. See also *Connelly v Simpson* 1993 SC 391 408A-B where claims under unjustified enrichment were confirmed to be subsidiary to contractual claims.
[100] So, money paid on a mistake is a *condictio indebtii* and restitution for failure of basis is *condictio causa data causa non secuta*.
[101] For example, see *Shilliday v Smith* 1998 SC 725 and *Satchwell* (n 41) where a 'failure of basis' factor seems to have been in contemplation. This was discussed in Chapter Two. In *Morgan Guaranty Trust*

In the cohabitation context, the unjustified enrichment claim may succeed due to the claimant's belief in the future continuation of the relationship. Early cases required there to be a mutual agreement or understanding between the parties that a contribution was provided on the basis of the continuing relationship,[102] but this stipulation was soon dropped. In *Satchwell v McIntosh*,[103] the pursuer paid money to the defender for the refurbishment of the house they were living in, which was owned by the defender. The pursuer had also paid some of the purchase money. The court here made it explicit that there was no need for an agreement or common understanding. Unjustified enrichment looks at the state of mind of the pursuer only.[104] The money was paid based on the condition that the parties continued to live together. Therefore, once the relationship ended and the condition failed, the defender had to provide restitution. It should be noted that the requirement that the contributions must have been made in consideration of a continuing cohabitation may not always be easy to show. In *Harley v Robertson*, for example, the Sheriff opined that 'the pursuer is clearly a woman who is insecure, is unable to sustain relationships, is perhaps somewhat naive and is certainly impetuous',[105] and therefore the relevant payments were not made in expectation of continued cohabitation. In *Newton v Newton*, the Sheriff held that contributions made pursuant to an honest mistaken belief that the house was the pursuer's property could lead to a restitutionary claim,[106] meaning that there is an indication here that a mistaken belief in ownership of the property could be grounds for an unjust enrichment claim.

A controversial point about unjustified enrichment's use in the cohabitation context that appears to have now been clarified is the principle of subsidiarity. Where there is a contractual[107] or statutory[108] remedy available, no claim in unjustified enrichment may be made. However, in *Courtney's Executors v Campbell* the Outer House went further.[109] Here the claimant had not brought the statutory claim within the time limit, and therefore tried to claim unjustified enrichment for the payments towards the purchase price of the property (put in the defender's sole name) and renovations to the property. It was held that, if a claim under

Company of New York v Lothian Regional Council 1994 SC 151, the nature of 'mistake' was discussed, and the bar to claiming for mistakes of law was rejected.

[102] *Grieve v Morrison* 1993 SLT 852.

[103] *Satchwell* (n 41).

[104] *Satchwell* (n 41) [10].

[105] *Harley v Robertson* [2011] 12 WLUK 328.

[106] *Newton v Newton* 1925 SC 715.

[107] *Connelly v Simpson* (n 99).

[108] *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245.

[109] *Courtney's Executors v Campbell* (n 98).

the statute has not been pursued and there are no special or strong circumstances justifying an alternate claim in unjustified enrichment, the alternative claim is not available. This decision was criticised by numerous commentators due to the injustice it may cause.[110] It will therefore likely be celebrated amongst commentators that the Inner House of the Court of Session has suggested that the failure to exercise the right under the statute does not bar the use of any common law remedy otherwise available.[111] This means that unjustified enrichment may now be available for claimants who have failed to claim under the Act.

Perhaps due partially to a lack of analysis of controversial and structural issues,[112] unjustified enrichment law was not well received by practitioners in Scotland, who criticised the law as 'hellishly difficult',[113] being complex to apply and difficult to prove.[114] In particular, there were concerns with the conceptual language used when making a claim, with remedies being separated into recompense, restitution and repetition and the causes of action still being made in Latin.[115] Black and Carr have argued that the instability in the law is linked to the use of equitable terminology, suggesting a discretion afforded to the judge.[116] Further, some commentators noted that unjustified enrichment could not properly take account of non-financial contributions,[117] though it will be argued in Chapter Four that domestic services such as childcare should be considered enrichments much the same as financial contributions. Unjustified enrichment also lacks the remediable flexibility that is desired,[118] allowing only

[110] Alison Edmondson, "Timed out? Alternative financial claims by cohabitants" (2016) 61(11) JLSS 17-19, available at: http://www.journalonline.co.uk/Magazine/61-11/1022479.aspx#.XEGtgrp2uM8; Hector MacQueen, "Unjustified Enrichment and Family Law" (2010) Edinburgh Law School Working Papers, no 2010/01 4.
[111] *Pert v McCaffrey* [2020] CSIH 5. See Mat Campbell, 'Unjustified Enrichment and Statute: Pert v McCaffrey' (2020) 24 Edin LR 400.
[112] *Morgan Guaranty Trust Company of New York* (n 101) 155D.
[113] Fran Wasoff, Jo Miles and Enid Mordaunt, 'Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006' (2010) (https://www.crfr.ac.uk/assets/Cohabitation-final-report.pdf) 101.
[114] Wasoff (n 113) 61.
[115] Peter Birks 'Six questions in search of a subject - unjust enrichment in a crisis of identity' 1985 JR 227, 238-241; WDH Stellar, '*Shilliday v Smith*: Unjust Enrichment though the Looking Glass?' (2001) 5(1) ELR 80.
[116] Gillian Black and Daniel J Carr, 'Cohabitant's Rights in Conflict: the Family Law (Scotland) Act 2006 vs Unjustified Enrichment in Courtney's Executors v Campbell' (2017) 21(2) Edin LR 293.
[117] Frankie McCarthy, 'Cohabitation: lessons from north of the border?' [2011] 23(3) CFLQ 277, 279; Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19(3) Edin LR 311, 313. See *Jamieson v Rodhouse* 2009 Fam LR 34, where it was held that no value could be placed on domestic services.
[118] Garland (n 117) 313.

personal capital payment remedies. No property transfer orders or periodical payments are possible. Therefore, the primary remedy open to cohabitants is under the statutory scheme.

2. *The Family Law (Scotland) Act 2006*

The Family Law (Scotland) Act 2006 was introduced to provide greater certainty, fairness and clarity.[119] It allows a claim against an ex-partner after a cohabiting relationship has ended. The key provision is section 28: this allows the court to make an order for payment of a sum of money to the applicant. In deciding whether to make such an order, the court must consider whether the defender has derived economic advantage from contributions made by the applicant and whether the applicant has suffered an economic disadvantage. Countervailing benefits – where the applicant has derived an advantage and the defender a disadvantage – must also be taken into account.

This statutory scheme has been subject to many complaints, and the Scottish Law Commission is currently reviewing the law, with a full report due soon. A key difficulty appears to be the complexity of the scheme, which is indicated by the lack of any guiding principle to help the discretion of the court. This is heavily criticised by McCarthy, who suggests that cases have varyingly applied approaches based on property sharing, compensation and restitution.[120] The complexity of the legislation also seems to have been an important point made in Wasoff, Miles and Mordaunt's research into practitioners' views on the operation of the Act.[121] Most practitioners highlighted problems with interpretation, proof and quantification of economic advantage and disadvantage, and issues with the width of the Sheriff's discretion. This uncertainty has also been criticised by Sheriffs themselves.[122] Even after the Supreme Court clarified matters in *Gow v Grant*[123] Sheriffs were unhappy with the provisions, suggesting that application of the applicable principles have been very difficult in practice and that there is no proper guidance when attempting to quantify the award.[124]

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[119] Tom Guthrie and Hilary Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland) Act 2006' (2007) 11(2) Edin LR 208, 211. See: *Policy Memorandum* (available at *http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-pm.pdf*).
[120] McCarthy (n 117).
[121] Wasoff et al (n 113). See also Jo Miles, Fran Wasoff and Enid Mordaunt, 'Cohabitation law in Scotland: the implications for reform in England & Wales', (2011) 23(3) CFLQ 302 for a summary of findings.
[122] *Lindsay v Murphy* 2010 Fam Law 156 [62]; *Mitchell v Gibson* 2011 Fam LR 53 [10].
[123] *Gow v Grant* (n 90).
[124] *Whigham v Owen* [2013] CSOH 29, 2013 SLT 483 [9]; *Smith-Milne v Langler* 2013 Fam LR 58 [12].

The Scottish legislation is not relevant for the claims made in this thesis, except for understanding that Scots law has legislated based on the restitutionary principle of returning economic advantages and thereby balancing economic consequences of cohabitation. On a broader level, Scottish law is useful for the argument advanced in this thesis in three ways. First, if Scottish law can focus explicitly on the economic consequences of cohabitation breakdown in both statute and unjustified enrichment law, English law need not continue to apply a model based on agreement and mutual intentions (with all the structural issues discussed in Chapter One). Second, statutory reform is not necessary in order for the law to consider the economic consequences of cohabitation, as Scottish unjustified enrichment law shows. Third, the details of Scottish law's application of both unjustified enrichment and the statute to the cohabitation context will be invaluable for England and Wales when querying how judges could practically develop the law should they acknowledge an unjust enrichment basis. This thesis will therefore continue to make use of Scots law where relevant.

B) Canada

Alongside Scotland, Canada also uses unjust enrichment to deal with cohabitation disputes. As will be seen, Canada's unjust enrichment doctrine is not quite the same as the doctrine in England and Wales. However, the Canadian version of the doctrine provides insights into how the English doctrine could operate in the cohabitation context. To prove unjust enrichment in Canada, the claimant must show that 'the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment'.[125] The most visible difference is that Canadian unjust enrichment law does not require the plaintiff prove the presence of an unjust factor.[126]

It must also be remembered that in many Canadian provinces, the common law is not the only recourse for remedies on cohabitation relationship breakdown as statutory reform provides alternative remedies.[127] These statutory provisions make clear that in many ways the law applying to cohabitation disputes in Canada is far more advanced than in England, even without

[125] *Kerr* (n 30) [3].
[126] See John D McCamus, 'Unjust Enrichment, Existing Categories and Kerr v. Baranow: A Reply to Professor McInnes' (2012) 52 Can Bus LJ 390; John D McCamus, 'Forty Years of Restitution: A Retrospective' (2011) 50 Can Bus LJ 474. Mitchell McInnes, 'Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada' 2011 127(Jul) LQR 339; Mitchell McInnes, 'A Return to First Principles in Unjust Enrichment: Kerr v. Baranow' (2011) 51 Can Bus LJ 275.
[127] See generally Robert Leckey, 'Cohabitation, Law Reform and the Litigants' (2017) 31(2) International Journal of Law, Policy and the Family 131; British Columbia Family Law Act; Alberta Family Property Act 2000 Chapter F-4.7; and the Adult Interdependent Relationships Act 2002.

considering the common law claim for unjust enrichment. Still, in the absence of legislation in England, the common law must deal with cohabitation disputes, and so the statutory remedies in Canada must be put out of our minds for now.

This section will proceed as follows. First, the development of the Canadian unjust enrichment doctrine, as it applies to cohabitation, will be explained. This will provide us with the basic rules that the jurisdiction follows in cohabitant property claims. Second, subsequent developments will be analysed to provide a fuller picture of how unjust enrichment law works in this area: in particular, we will look at how the 'joint family venture' works. Third, this section will close with a consideration of what England and Wales can learn from Canada's cohabitation law.

1. *Development of the law*

Canadian law in this context looked – for a short period of time – very similar to the law in England and Wales. Thus, in *Murdoch v Murdoch*,[128] the majority of the Supreme Court of Canada held that Mrs Murdoch could not obtain a share of her husband's property on the basis that there was no evidence of a common intention to share the property. There had been no financial contribution by Mrs Murdoch to the acquisition of the property, and the work done was seen as typical for a wife in Mrs Murdoch's position. However, although the majority stuck to traditional principles – reminiscent of what would become known in England as the common intention constructive trust – Laskin J dissented and argued that Mrs Murdoch could succeed based on unjust enrichment. He held that Mrs Murdoch's domestic contributions, and her contributions to Mr Murdoch's ranch, were 'extraordinary',[129] and that Mrs Murdoch should therefore get something even though Mr Murdoch had no intention of giving her any property. In doing so, Laskin J was beginning a legal development which would lead to the rejection of English common intention principles and the utilisation of unjust enrichment instead. It is therefore important to remember his reasons for choosing this path:

> No doubt, legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way; and if the exercise of a traditional jurisdiction by the courts can conduce to equitable

[128] *Murdoch v Murdoch* [1974] 1 WWR 361 (SCC).
[129] *Murdoch* (n 128) [39].

> sharing, it should not be withheld merely because difficulties in particular cases and the making of distinctions may result in a slower and perhaps more painful evolution of principle.[130]

The same may be said for English cohabitation reform. It is precisely this sentiment which underlies this thesis' central argument on the use of unjust enrichment for cohabitation disputes. Unjust enrichment continued to gain traction in Canadian family law, and in *Rathwell v Rathwell*[131] three of nine judges used the doctrine to grant the wife one half share of the relevant property, rejecting the common intention principle as agreements between cohabitants on how property is held are rare and cannot often be evidenced properly.[132] However, as the five other judges refused to accept the principles of unjust enrichment here,[133] support for the doctrine still had no majority.

The change came in *Becker v Pettkus,*[134] where the majority accepted unjust enrichment reasoning for the first time. Crucially, the judges held that it was clear on the evidence that there was no common intention,[135] as Mr Pettkus had always refused to be drawn on the subject of commitment and did not seem to intend a permanent relationship or marriage. Therefore, the majority relied on unjust enrichment reasoning, which they accepted could lead to a constructive trust. Ms Becker had clearly enriched Mr Pettkus, as Ms Becker had worked unpaid for 18 years.[136] In addition, there was no juristic reason for the enrichment. Indeed, Dickson J (with whom the majority agreed) argued that there was an unjust factor present – free acceptance:

> [W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where

[130] *Murdoch* (n 128) [64].
[131] *Rathwell* (n 30).
[132] *Rathwell* (n 30) [29].
[133] *Rathwell* (n 30) [86].
[134] *Becker* (n 30).
[135] *Becker* (n 30) [27].
[136] *Becker* (n 30) [41].

> he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[137]

In Canadian law, free acceptance appears to have been the rationale behind providing a remedy for unjust enrichment in this area, despite the language used of 'no juristic reason' for the enrichment.[138] It should be noted that it is unlikely the free acceptance could work in this area in England and Wales, and it is not relied on in this thesis. This is partially because the status of free acceptance as an unjust factor in English law is doubtful. The key issue, as Mee notes,[139] is that the claimant may not have provided the enrichment non-gratuitously, and the defendant is unlikely to have accepted the enrichment knowing that it was provided non-gratuitously.[140] Such is the extent of the issue with free acceptance that McInnes has argued that *Pettkus v Becker* could not be reconciled with orthodox unjust enrichment principles.[141] Further, it is not clear why the reasonable expectations of the claimant is relevant to the claim in unjust enrichment, and neither is it explained why Mrs Becker expected to obtain a share in the property – the remedy which she ended up with.[142] However, free acceptance will be explored when discussing the concept of enrichment and subjective devaluation in Chapter Four, and the passage quoted above will be relied on when setting out how unjust enrichment could develop the court's approach to party intention in Chapter Five.

Once enrichment, expense and no juristic reason have been shown, the question of remedy arises. In *Pettkus v Becker*, the majority held that there must be a causal connection between the contribution and the acquisition of the disputed assets in order to apply a constructive trust.[143] This was considered uncomplicated on the facts as Ms Becker's contribution enabled the purchase of property, whether from allowing Mr Pettkus to save up money by paying household expenses or from her labour. Rather than apply a value received approach (where Ms Becker's remedy equals the value of the enrichment she bestowed upon Mr Pettkus) the

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[137] *Becker* (n 30) [41].
[138] *Becker* (n 30); *Sorochan v Sorochan* [1986] 2 SCR 38 (SCC).
[139] John Mee, *The Property Rights of Cohabitees* (Hart 1999) 201-206.
[140] Though on the perception of the claimant providing contributions 'gratuitously', see Chapter Four.
[141] Mitchell McInnes, 'Reflections on the Canadian Law of Unjust Enrichment' (1999) 78 Canadian Bar Review 416, 429.
[142] John D McCamus, 'Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?' in Stephen Pitel, Mitchell McInnes and Jason Neyers (eds), *Understanding Unjust Enrichment* (Hart 2004) 364.
[143] *Becker* (n 30) [49].

court instead provided Ms Becker with an equal share in the property – a value surviving approach. This was because each party started with nothing and pulled equal weight during the relationship. Although appropriate for the context, this partnership or value surviving approach seems to be at odds with the ordinary unjust enrichment principle of providing restitution based on individual enrichments. On this approach, unjust enrichment arises 'not because the defendant has received more in money or money's worth than he or she has given, but because he or she is denying to the plaintiff a reasonable share of the wealth accumulated in the course of the relationship'.[144] This is an interesting utilisation of unjust enrichment in a context which relies not on a single event in which a benefit is unilaterally provided, but instead on an ongoing relationship of many years, in which benefits are mutually conferred between the parties.[145]

The further cases of *Sorochan v Sorochan* and *Peter v Beblow* developed the basic rules set out in *Becker v Pettkus*. In *Sorochan v Sorochan*, it was made clear that domestic contributions were valuable and capable of supporting a claim in unjust enrichment.[146] It was held that full time devotion of one's labour without recompense is a deprivation.[147] For a constructive trust, it was not required that the plaintiff aided acquisition of the property: a broader rule that the contribution must have helped acquisition, preservation, maintenance or improvement of the property was instead used.[148] It was clear that the plaintiff's contributions had prevented the property from deteriorating, and therefore a constructive trust was applied. *Peter v Beblow* confirmed the analysis of domestic contributions, as there is no obligation or duty to provide domestic work meaning that the relationship itself could not act as a juristic reason for the enrichment.[149] In addition, *Peter* made clear that a constructive trust may only be applied when a monetary award is considered inadequate.[150] Often in family cases, monetary awards have been held to be appropriate,[151] particularly if there are no third-party concerns or problems with enforcement of the award.[152] If a constructive trust is to be imposed, *Peter v Beblow* again

[144] Patrick Parkinson, 'Beyond Pettkus v. Becker: Quantifying Relief for Unjust Enrichment' (1993) 43 U Toronto LJ 217, 223.
[145] Parkinson (n 144) 221-222.
[146] *Sorochan* (n 138).
[147] *Sorochan* (n 138) [19].
[148] *Sorochan* (n 138) [31].
[149] *Peter* (n 38) [6], [19].
[150] *Peter* (n 38).
[151] For example, see: *Pickelein v Gillmore* [1997] 5 WWR 595 (CA); *Shannon v Gidden* 1999 BCCA 539; *Bell v Bailey* (2001) 203 DLR (4th) 589 (CA); *MacFarlane v Smith* 2003 NBCA 6; *Panara v Di Ascenzo* 2005 ABCA 47.
[152] *Shannon* (n 151).

suggested that the value surviving approach should be used, as opposed to a value received approach, where the claimant receives precisely what she contributed.

2. *The joint family venture*

In *Kerr v Baranow*,[153] the Supreme Court of Canada invented a new concept: the joint family venture. This concept was used to reject a value received approach, as it was seen to be highly artificial and difficult in practice to do the detailed accounting required for a quantum meruit remedy. Thus:

> [W]here there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.[154]

Therefore, the concept of the joint family venture is designed as part of the law of unjust enrichment. For a relationship to be considered a joint family venture, factors such as mutual effort, economic integration, actual intent and the priority of the family should be considered. Where a joint family venture is found, the claimant can get a proportion of the value surviving from the relationship, even if the claimant's contributions cannot be linked to the property. It is therefore a powerful concept for the claimant. The idea of a joint family venture had some history in Canadian law: the idea of 'pooling' or of recognition of 'joint teamwork or effort' is found in several earlier cases.[155] This has led Karahotzitis and Larock to argue that *Kerr* was a restatement and modernisation of the law of unjust enrichment, but that it did not change the law.[156]

What makes a relationship a joint family venture? Leckey has conducted an empirical study of judgments applying the joint family venture law, and made findings on what makes

[153] *Kerr* (n 30) [60].
[154] *Kerr* (n 30) [60].
[155] *Kerr* (n 30) [63]-[64]; George Karahotzitis and Melanie A Larock, 'Recent Jurisprudence Post-*Kerr v Baranow*: 10-Year Limitation Period for Unjust Enrichment Claims in Family Law' *(Thomson, Rogers)*.
[156] Karahotzitis and Larock (n 155) 1.

relationships more or less likely to be seen as a joint family venture.[157] The relationship is more likely to be seen as a joint family venture if: the parties are older; the relationship was longer; minor children of the couple existed; both parties made financial contributions to the household expenses; and either the couples co-owned the home or shared a bank account or jointly operated a business. Career sacrifices and relocation were also likely to cause a positive finding. Interestingly, many of these factors are similar to the *Stack v Dowden* paragraph [69] factors used when quantifying beneficial interests. However, a key difference here is that the court focuses on the relationship itself, rather than intentions. This is because the Canadian Supreme Court believes the search for common intention is highly artificial, and merely exists as a route for the court to give the claimant a share of the property which it thinks fit.[158] In addition, Canadian courts can utilise all the assets of the parties[159] as a result of an acceptance that contributions will often have little to do with the property.[160]

Many academics have criticised the joint family venture for moving too far away from traditional unjust enrichment principles. Smith argues, for example, that the joint family venture is now a free-standing doctrine, a common law version of family law legislation.[161] He suggests therefore that unjust enrichment has become the fifth wheel on the coach. Smith is careful not to criticise the idea of a joint family venture in and of itself, disassociated from unjust enrichment. However, the concept of joint family venture appears to have explanatory force in telling us why the enrichment of the defendant is unjust and in working out how the defendant's enrichment is to be quantified. In this way, the joint family venture concept might be justified as part of unjust enrichment.[162]

3. *What can we learn?*

The foregoing has shown that Canadian law is significantly different from English law in two respects: first, it has rejected the English concept of the common intention constructive trust and second, it has rejected key areas of the English doctrine of unjust enrichment. In particular, Canada uses a 'juristic reasons' approach in place of the 'unjust factors' in English law. Further,

[157] Robert Leckey, 'Cohabitation, Female Sacrifice and Judge-Made Law' (2019) 41(1) Journal of Social Welfare and Family Law 72.
[158] *Kerr* (n 30) [26].
[159] Michael Lower, 'The Constructive Trust: From Common Intention to Relationship? Kerr v Baranow' [2011] Conv 515, 519.
[160] *Kerr* (n 30) [25].
[161] Lionel Smith, 'The State of the Law of Unjust Enrichment in Common Law Canada' (2015) 57 Can Bus LJ 39, 50.
[162] McCamus, 'Unjust Enrichment, Existing Categories and Kerr v. Baranow: A Reply to Professor McInnes' (n 126) 403.

Canadian courts have held that the constructive trust can respond to the unjust enrichment of the defendant. Despite these differences, Canada provides important lessons when considering how unjust enrichment can apply to the cohabitation context.[163]

First, the concept of the joint family venture is interesting and of potential use in England. Great care is needed here: we certainly cannot lift the concept wholesale from the Canadian jurisprudence. It must be clear as to precisely which part of the unjust enrichment doctrine the joint family venture concept applies. If used to quantify the enrichment of the defendant, the concept could be quite effective. However, it must be done in such a way as to not disrupt current unjust enrichment orthodoxy. The concept must be kept within proper bounds.

Second, when applying Canadian learning on unjust enrichment, we should remember that in many ways English unjust enrichment is a more developed doctrine.[164] For example, it is not clear whether Canadian law requires that the enrichment of the defendant comes directly from the claimant as is required in English law, with contradictory statements of principle being made.[165] This must be considered when applying Canadian learning.

Third and finally, it must be remembered that Canada has applied an unjust enrichment approach to cohabitation disputes and, broadly, it has worked. Indeed, Leckey has found that there has been no significant change in those litigating when comparing unjust enrichment claims to those made under new statutory regimes dealing with cohabitation property disputes.[166] As Leckey argues:

> Many observers sympathetic to the economic difficulties engendered by unmarried cohabitation will welcome the Court's judgment in Kerr as a laudable testimony to the capacity of the general private law—at least the common law—to adapt to changing conditions in the hands of willing judges.[167]

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[163] Several English academics have considered the Canadian unjust enrichment doctrine in the English context. See for example Mark Pawlowski, 'Beneficial Ownership - Estoppel, Unjust Enrichment or Unconscionability - A Comparative Study' (1995) 10 Denning LJ 125; Wong (n 8).
[164] McInnes, 'Reflections on the Canadian Law of Unjust Enrichment' (n 141) 416.
[165] *Moore v Sweet* 2018 SCC 52; 21 ITELR 811 (Sup Ct (Can)) and *Steel Industrial Supplies Inc v Elliot* 2019 ONSC 3904 appear to suppose that direct enrichment is not necessary, whereas in *MVL Leasing Ltd v CCI Group Inc* 2018 ONSC 1800, 18 CELR (4th) 155 it was held that a restitutionary enrichment 'must flow directly to the party against whom the claim is made' [54].
[166] Leckey (n 127).
[167] Robert Leckey, 'Unjust Enrichment and *de facto* Spouses' (2012) 114(3) *Revue du notariat* 475, 482.

There are issues with principle, but on a careful approach to the doctrine these can be ironed out, particularly in England and Wales where restitution scholarship is extensive, and the courts have already established the basic unjust enrichment principles. English courts are therefore likely to be more resistant to arguments for broader discretionary justice than the Canadian courts have been.[168] We can use the Canadian experience to jettison any reference to reasonable expectations and public policy, ensuring that unjust enrichment remains a doctrine that provides backwards-looking restitution for unjust enrichments at the expense of the claimant, whilst also ensuring sufficient practical utility to the needs of cohabitants.

IV. CONCLUSIONS

The discussion in this chapter demonstrates a substantial link already exists between cohabitation disputes and unjust enrichment. This link has long been a part of academic commentary in the area, with many academics casting an eye to Canadian law in consideration of whether the judicial creativity displayed there might allow the law in England and Wales to move on in a way that better combats the detriments caused by the common intention constructive trust. The law of unjust enrichment therefore has significant ancestry in this area. Although judges have only occasionally mentioned the doctrine, it has enjoyed longevity within academic discourse. There is clearly need for detailed consideration of how an acceptance of unjust enrichment principles might impact the law, particularly in light of failed reform attempts which have elements which strongly reflect restitutionary principles.

It was noted in the first section that unjust enrichment shares several similarities to the common intention constructive trust. Both doctrines focus primarily on contributions made by the claimant and on the intentions under which these contributions are made. It is unsurprising, therefore, that other jurisdictions have developed the common intention trusts along unjust enrichment principles. As has been seen, both Scotland and Canada have utilised unjust enrichment in order to develop the law applying to cohabitation disputes, and this has provided an alternative way of examining many of the issues which are found in the law of England and Wales.

Canadian law has been seen as particularly useful when considering how unjust enrichment could operate in the cohabitation context. Canadian courts have developed the law in a way

[168] *Kerr* (n 30) [23].

which allows domestic contributions to be valued and, importantly, courts have held unjust enrichment as flexible enough to provide either a personal payment or a proprietary interest under a constructive trust as a remedy. Perhaps most interestingly for English and Welsh law, the Canadian Supreme Court has developed the concept of 'joint family venture', which recognises the interdependent nature of cohabiting relationships and therefore permits restitution where the defendant has retained a disproportionate share of jointly created assets. It is this more broad-brush approach to restitution which will be useful for this thesis, rejecting a more detailed accounting-based exercise which unjust enrichment is known for in the commercial context.

CHAPTER FOUR – THE ENRICHMENT OF THE DEFENDANT

This is the first chapter of Part Two of this thesis. Part One explored the current state of the law. It looked at the critiques of the common intention constructive trust and related doctrines which operate at the end of an unmarried cohabiting relationship. It then explained the doctrine of unjust enrichment, and finally considered the current interaction between unjust enrichment and the cohabitation context in this jurisdiction and in comparable common law jurisdictions. Part Two looks to future development of the law, building on the discussions in Part One to examine how the law would look if it developed alongside judicial acknowledgement of unjust enrichment as the event at the heart of the obligations created at the end of cohabitation disputes. This Part therefore looks at the doctrinal implications of unjust enrichment on disputes that occur at the end of a cohabiting relationship, organised according to the requirements for a successful unjust enrichment claim. This Chapter questions the concept of 'enrichment at the claimant's expense'. The next Chapter looks at which unjust factor might be relevant to cohabitation disputes. The final Chapter considers a possible unjust enrichment claim as a whole and analyses the effect of a move away from property law logic.

The aim of this chapter is to consider what the concept of 'enrichment' can bring to cohabitation disputes in England and Wales. One of the key advantages of an unjust enrichment analysis of these disputes is a recognition of contributions to the home, including domestic contributions, as economically valuable. This may help to combat the narratives which have arisen under the current law, where domestic contributions cannot evidence a common intention to share property at the acquisition stage. Generally, discussion in this chapter revolves around improvements to property and 'domestic work' such as childcare and homemaking. It is this latter type of contribution which will be focused on, as these services are continually supplied disproportionately by women and so the treatment of these services represents a highly gendered issue in the law.

First, this chapter will analyse the nature of 'enrichment', considering case law on the topic to outline how the concept works in practice to examine and value benefits received by the

defendant, particularly so-called 'pure services' and subjective devaluation. Second, the economic concept of commodification will be discussed to show how unjust enrichment can value domestic contributions as *financial* behaviours, and therefore reveal the economic impact that these contributions have. Third, various types of contributions to the home will be considered to understand whether they may constitute enrichments of the defendant. Contributions which currently struggle to be considered relevant at the acquisition stage (and indeed often at the quantification stage) will be focused on: these are improvements to property and domestic work. Both, it will be argued, can be considered enrichments, but both have special issues around the defendant's possible attempted devaluation of these behaviours. Fourth, this chapter will briefly turn to consider whether the defendant's enrichment is at the expense of the claimant. One difficulty here is whether restitution can be obtained should the claimant have benefitted themselves or been acting in their own self-interest, making the benefit to the defendant merely incidental. It is argued that restitution should be obtainable regardless, as the concept of incidental benefits is not well established in case law and should not apply to the cohabitation context.

I. THE NATURE OF ENRICHMENT

Enrichment is the first of the three requirements for a successful unjust enrichment claim. It is a vital part of unjust enrichment, as the doctrine is designed to reverse an unjust gain that the defendant has received. It is therefore important to have clear rules marking out these gains. The question asked can be split into two: first, has the defendant been enriched? Second, by how much has the defendant been enriched? This means that the court must decide not only whether a particular benefit constitutes an enrichment to the defendant but must also quantify this benefit. This chapter considers the first question only – the second question will be answered in Chapter Six. This section will introduce the concept of enrichment and explain how it works within the doctrine of unjust enrichment.

The notion of 'enrichment' is very similar to the idea of 'contribution' within the common intention constructive trust. The trust, of course, does not require any contributions to the family home, allowing proof of a common intention about ownership of the property from express discussions alone. However, evidence of such discussions is usually non-existent (or at least slim), and the claimant must therefore prove that her contributions to the property show the requisite common intention. The evidence brought by a claimant seeking to show a common intention constructive trust is therefore comparable to the evidence brought by a claimant making an unjust enrichment claim.

Under the common intention constructive trust, contributions are relevant only insofar as they allow the court to infer a common intention about ownership. Therefore, relevant contributions at the acquisition stage (where the claimant does not have legal title) are restricted to contributions to the purchase price or mortgage instalments.[1] This is because these are the only contributions which are considered to indicate the parties' shared understandings about ownership of the family home. The concept of enrichment is therefore wider than contributions, as unjust enrichment does not require enrichments to be connected to the home per se – it is about enrichment of the defendant *himself*. The additional burden of proving that contributions to the family are indicative of intentions around ownership is not present. This is a consequence of a distinction between ownership logic under the common intention constructive trust and a broader claim over unjust economic benefit under unjust enrichment.

This distinction means that behaviours which may not be considered relevant contributions for proof of a common intention at the acquisition stage may still show an enrichment of the defendant. This is likely to be the case for indirect financial contributions and domestic contributions. As explained in Chapter One, the case law on the common intention constructive trust indicates that courts are still cautious (at best) about declaring a trust has arisen on the strength of domestic contributions alone. This has resulted in a gulf widening between financial contributions to acquisition of the property and all other contributions to the family home, often evidenced by judicial narratives which position the motivation for domestic contributions as based on love and affection for the family rather than an intention for ownership of the home.[2] The economic impact of these domestic contributions is therefore overlooked within the case law.

A) Defining an Enrichment

It is important to consider what 'enrichment' means. The most obvious enrichment of the defendant is where the claimant transfers money – here the defendant has seen an increase in wealth (and therefore has literally, colloquially, been 'enriched'). However, it is well established that the defendant's enrichment can also take the form of the claimant saving the defendant an expense. A relevant example may be where the claimant has paid mortgage instalments or utility bills which the defendant would otherwise have had to pay for. The

[1] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL), discussed in Chapter One.
[2] See for example *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 FLR 1598 and *Dobson v Griffey* [2018] EWCA 1117 (Ch).

defendant's wealth has increased just as if the claimant had paid money directly into the defendant's bank account.

One key issue is the fact that domestic work often does not produce an end product. In other words, it is a 'pure service', where the benefit is the service itself rather than what the service produces. Can these services – such as childcare and homemaking – constitute enrichments? Beatson has argued that such services cannot be considered enrichments because they do not have an exchange value or utility value.[3] However, the weight of academic opinion and judicial authority suggests that pure services can constitute enrichments. All the major textbook writers agree with this position. Virgo notes that recipients of pure services will say that they were enriched by what they have received, regardless of whether they were left with anything of value.[4] Furthermore, there is often an objective market value for pure services, and domestic services are marketable services which are often paid for. It is therefore impossible to see the receipt of these services as anything other than a valuable benefit.[5] Burrows notes that a result of Beatson's argument would be that services such as haircuts, car washing, and a rock concert would not be considered valuable benefits – a conclusion Burrows calls 'startling'.[6] Birks uses a different argument, noting that where a service saves necessary expenditure – such as where the claimant's provision of childcare saves the defendant from having to pay a child-carer – that necessary expenditure saved is the end product.[7]

In *Goff and Jones*, it is said that it is 'well established' that pure services can constitute an enrichment.[8] For example, in *Rowe v Vale of White Horse DC*,[9] the provision of sewerage services was held to be an enrichment to homeowners, despite creating no end product. In *Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd*[10] the provision of policing at football matches was considered an enrichment, despite once again being a pure service with no end product. It should be noted that in neither of these cases was the fact that

[3] Jack Beatson, *The Use and Abuse of Unjust Enrichment* (OUP 1991) 21-45.
[4] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 63.
[5] John C Casad, 'Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?' (1978) 77(1) Michigan Law Review 47, 52.
[6] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 47.
[7] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 62-63.
[8] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) 5-36.
[9] *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418.
[10] *Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 WLR 1580.

the enrichment was a pure service seen to be a controversial or difficult issue to deal with. Pure services are therefore able to ground a claim in unjust enrichment.

B) Valuing an Enrichment

Once the court has held that the defendant has received an enrichment, this enrichment must be valued. The starting point is the objective market value. The court must look to the price a reasonable person in the defendant's position would have had to pay for the services.[11] The court should not take the defendant's personality into account, but can take note of conditions which increase or decrease the value of a reasonable person in the same position:

> To give one example, a film star may not have to pay the ordinary price for a designer dress, as the fashion house may allow her a discount to reflect the fact that her wearing the dress will enhance its brand image. Her being a film star is thus an objective aspect of her position which affects the cost to her (or anyone else in her position) of obtaining such a dress, and therefore affects the value of the receipt of such a dress to a person in her position.[12]

However, idiosyncratic opinions or personal preferences are not relevant at this stage. Such opinions may, however, be relevant should the defendant be able to prove subjective devaluation. A defendant has the option to prove he valued the relevant services or goods at less than the market value. This allows the defendant's autonomy to be respected.[13] To use an example from Chapter Two, suppose that the claimant mistakenly installed a new kitchen in the defendant's house. This will constitute a clear enrichment of the defendant at the expense of the claimant, and the mistake provides an unjust factor. However, the defendant should not be expected to pay for this – it may be that he is saving his money for something else or is otherwise happy with the kitchen he already has. People should be permitted to prioritise expenditure of their wealth, and therefore can argue that objective enrichments they have received are not subjectively valuable to them.

[11] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [17].
[12] *Benedetti* (n 11) [101].
[13] *Benedetti* (n 11) [18].

One the claimant has shown an objective enrichment, the defendant has the burden of proof to show that he can subjectively devalue the enrichment.[14] There must be some objective manifestation of these subjective views,[15] but in order to protect the defendant's autonomy the defendant's figure for the benefit should be accepted where it has been proven to be a genuine view.[16] Subjective revaluation (or overvaluation) – where the claimant seeks to show that the defendant subjectively valued the enrichment *more* than its objective market value – is not permissible. This is because it is not a necessary concept to protect the defendant's autonomy.[17]

Beyond this brief introduction to the valuation of enrichments, little more will be said here: whilst this chapter considers whether activities within the family home can be considered enrichments, it is Chapter Six which deals with the valuation of these enrichments and the ultimate remedy which may be afforded to the claimant. Reference to the objective market value, and to the monetary gain of the defendant, uses the logic of commerce. When discussing domestic work in the home, this puts an economic value on this work which is absent in the common intention constructive trust and represents a development in the way the law could view these contributions. The use of market norms to value domestic work in the home is controversial. The next section will therefore examine the economic theory of commodification and its status when applied to domestic work such as childcare and homemaking.

II. COMMODIFICATION

As noted, the concept of 'enrichment' in unjust enrichment imposes market norms and values onto behaviour. Between commercial actors, this is perfectly appropriate. However, when applied to domestic contributions, unjust enrichment commodifies work such as homemaking, renovating a property and childcare which are often not seen as economically impactful and, further, are not often referred to as 'work'. It is therefore important to understand the consequences of this commodification.[18]

According to Radin, commodification, broadly construed, involves market rhetoric (the practice of thinking about interactions as if they were sale interactions) and market methodology (the use of monetary cost-benefit analysis to judge these interactions).[19] Unjust

[14] *Benedetti* (n 11) [21].
[15] *Benedetti* (n 11) [23].
[16] *Benedetti* (n 11) [26].
[17] *Benedetti* (n 11) [29].
[18] See generally Sam Bannister, 'Domestic Contributions as Unjust Enrichments: Commodifying Love?' [2021] CFLQ 275.
[19] Margaret Jane Radin, 'Market-Inalienability' (1987) 100 Harv L Rev 1849.

enrichment, by using the market to question both whether the defendant has been enriched at all and by how much, commodifies domestic work. The key benefit of this is that the economic impact of domestic contributions is revealed: this contradicts the narratives within the common intention constructive trust case law which conceive of domestic contributions as just something the non-working partner would normally do, provided in light of the love and affection of the claimant.[20]

These narratives are partially sustained due to the question asked in these disputes: have the parties a common intention to share the property? Financial considerations make it much easier for the court to infer a common intention.[21] Once domestic work is understood as having an economic impact, these narratives may be harder to sustain. Commodification removes the strict boundary between financial contributions on one hand and domestic contributions on the other. This strict boundary is primarily set up at the acquisition stage – as discussed in Chapter One – where only financial contributions to the acquisition of the home will be relevant when seeking to show a common intention between the parties.[22] Understanding the economic side of activities within the home (such as caring) may allow courts to reconsider allowing claims for recompense at the end of a cohabiting relationship resting on these activities alone.

The commodification of domestic contributions also sets up the 'unjust' nature of cohabitation disputes, described more fully in Chapter Five. Once domestic contributions are seen as financial contributions it can be understood that the claimant providing these contributions is adding to the joint wealth of the parties. Wealth jointly created by the parties should not self-evidentially remain with the defendant alone at the end of the relationship. The claimant should have autonomy and freedom of self-determination over her assets, including the wealth she creates by the provision of economically impactful services. As Williams notes, once family work is acknowledged as 'work', a new rationale emerges for income sharing on relationship breakdown: an asset produced by two people should be jointly owned by them.[23] Commodification therefore begins a transition from a focus on consensual property dealings between the parties to unjust economic benefit.

[20] See Chapter One, and generally *Rosset* (n 1); *James v Thomas* (n 2); and *Dobson v Griffey* (n 2).
[21] James Lee, '"And the Waters Begin to Subside": Imputing Intention Under Jones v Kernott' [2012] Conv 421, 427, noting that quantification of an asset is easier when considering the respective financial contributions of the parties.
[22] See *Rosset* (n 1).
[23] Joan C Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (OUP 2000).

The true cost of unpaid work in the home is difficult to measure. There are, however, statistics available which show a very high economic impact. The Office for National Statistics (ONS) have noted that women on average contribute 60% more unpaid work than men, with an average of 26 hours per week. Interestingly, the ONS offers an unpaid work calculator allowing users to estimate the value – calculated per hour on market rates – of their unpaid work in the home. Plugging in the ONS' statistics of average unpaid work per week,[24] the calculator shows the average woman is undertaking about £8500 worth of unpaid work within the home each year. This is obviously a very rough estimate. However, it shows that these responsibilities generate a significant financial impact. The Young Women's Trust has calculated that the value of unpaid work undertaken by women 18-30 alone reaches £140 billion.[25] It is undoubtable that unpaid work in the home contributes a considerable amount in economic terms to both the family and to the State.

A) Commodification Anxiety

Courts have been very reluctant to commodify domestic contributions previously, and this makes it difficult for some cohabitants, usually women, to obtain a share in the family home. A refusal to commodify has been termed 'commodification anxiety' in the literature.[26] Commodification anxiety can be understood as a fear of allowing market norms to enter the home, and often stems from a worry that the essence of care may be corrupted by strategic behaviour.[27] The home has been largely societally shielded from the market, and even limited use of market norms to describe behaviours such as childcare may cause concern.

This shielding of the home from the market stems from a conception of the home as special. As Radin notes, 'the home is a moral nexus between liberty, privacy and freedom of association'.[28] Wiegers argues that the shift in industrialised production from the home to the market created the ideology of motherhood, and therefore the ideology of childcare as a service rendered out of love rather than monetary award:

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[24] This includes seven hours of cooking, four hours of childcare, four hours of housework and two hours of laundry. Transport is not included in this analysis as, while driving others may constitute an enrichment, commuting to work would not. The ONS draws no distinction between the two.

[25] Young Women's Trust, *Valuing Young Women's Unpaid Work* (https://www.youngwomenstrust.org/wp-content/uploads/2020/11/Valuing-young-womens-unpaid-work.pdf accessed 19/11/2021).

[26] Williams (n 23); Joan C Williams and Viviana A Zelizer, 'To Commodify or Not to Commodify: That Is Not the Question' in Martha M Ertman & Joan C Williams, *Rethinking Commodification* (New York University Press 2005).

[27] Williams (n 23).

[28] Margaret Jane Radin, 'Property and Personhood' (1982) 43(5) Stanford Law Review 957, 991.

> In terms of the care of children, resistance to commodification has historically been associated with the dominance of an ideology of separate spheres, which dates from the emergence of industrial capitalism in Western cultures. Arising from a shift in production from the household to the market in the middle classes in England, the ideology of motherhood […] dictated that mothers undertake the care of children as a service rendered out of love rather than for monetary reward.[29]

This shift also resulted in a White, biological and heterosexual family structure – the nuclear family unit. Childcare specifically is one of the most time intensive and economically impactful behaviours within the home. As Hays argues, contemporary cultural connotations of motherhood come from the idea of intensive mothering, where a huge amount of time, energy and money is expected to be spent by mothers on a child.[30] For some, intensive mothering is seen as a given, not an ideology. It is a matter of what is natural and necessary. However, Hays argues that this form of mothering is neither self-evidentially natural nor necessary – it is a social construction. In other times and places, simpler, less time- and energy-consuming methods have been considered appropriate. The idea that child-rearing requires professional-level skills, and such intensive care is a recent phenomenon. These beliefs add up to a method of mothering which is described as 'child-centered, expert-guided, emotionally absorbing, labour-intensive, and financially expensive'.[31] As Hays notes, this leads to two contradictions: first, mothers with young children now often work outside the home, yet there still exists much pressure on mothers to dedicate so much time to child rearing. Second, in a society where self-interest gain seems to lead behaviour, we require a logic of unselfish nurture to guide mothers.

Of course, that is not to say that women have been untouched by the market forces of capitalism. Indeed, it is the very hiding of women's work within the family, designated a private sphere, which allows the reproduction of the worker without providing value for this work.[32] The structural devaluation of domestic responsibilities is therefore likely to have been exacerbated by the chasing of surplus-value by the capitalist.

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[29] Wanda Wiegers, 'Commodification and the Allocation of Care and Responsibility for Children' (2017) 67(2) University of Toronto Law Journal 206.
[30] Sharon Hays, *The Cultural Contradictions of Motherhood* (Yale University Press 1998).
[31] Hays (n 30).
[32] Silvia Federici, *Caliban and the Witch* (2nd edn, Autonomedia 2014).

Commodification anxiety, when related to domestic work, appears to be unique within the home. It is well established and accepted that care *outside* the home is commodified – nurses, social workers and childminders all provide care in return for payment. Further, it is societally accepted that foster carers may be paid for their work, in acknowledgement that looking after the children in their care means that they will be unable to earn a wage outside the home. The fear is that money will change the essence of care provided by parents, however. Market rhetoric involves a lack of loyalty, which is considered the opposite of motherly care. The market assumes self-interested behaviour, and the worry is that the motivations of caregivers might change. As Stone notes, 'markets, we fear, suppress our best natures and evoke our worst'.[33]

Against this background, the narratives within the common intention constructive trust case law seem to sit alongside societal concern about the commodification of domestic work and the perceived consequence of self-interested behaviour within relationships. Anderson notes that the market is only one way of valuation – other modes of valuation include love, admiration, honour and appreciation.[34] Anderson argues further that treating something properly valued by love and affection as instead valued by market norms represents degradation of that thing. Anderson's definition of care, that 'parental love can be understood as a passionate, unconditional commitment to nurture one's child, providing it with the care, affection, and guidance it needs to develop its capacities to maturity',[35] chimes with Hays' conception of 'intensive mothering' discussed above.

B) Advantages of Commodification

The concerns noted above are valid and indicate a societal desire to keep work within the home separate from the market logic which rules most other dealings in society. However, as Stilbaugh argues, 'as long as women's economic power remains a central concern of feminist discourse, this aversion to market analysis is detrimental to feminist reform'.[36] Radin notes that non-commodification of women's capabilities under current circumstances represents not a brave new world of human flourishing, but rather perpetrates old orders where only men can identify as market-traders and thus enter the economic mainstream.[37] In other words, pragmatic

[33] Deborah Stone, 'For Love nor Money: The Commodification of Care' in Martha M Ertman and Joan C Williams (Eds), *Rethinking Commodification* (New York University Press 2005) 275.
[34] Elizabeth Anderson, 'Is Women's Labor a Commodity?' (1990) 19 Phil & Pub Aff 71.
[35] Anderson (n 34) 75.
[36] Katharine Silbaugh, 'Commodification of Women's Household Labor' 9 Yale JL & Feminism 81.
[37] Radin (n 19).

justice involves picking the best options available to us. We may therefore have to tolerate some harms in doing so.

The academic literature on commodification is often very keen to argue that commodifying domestic work does not mean that it should be considered part of the market in all circumstances. Ertman warns against essentialist notions of commodification enthusiasm or anxiety – the use value of commodification depends on the context in which it is being used.[38] It is completely possible to have a market understanding of the economic impact of behaviours within the home without conceiving these behaviours as no different from other market activities. Neither an economic nor emotional understanding of non-market activities is intrinsic to the activities themselves.

There are many examples of commodification where we have not lost sight of the wider context. Life insurance, for example, puts a price on life. Tort damages may put a price on bodily harm.[39] Further, people adopt economic practices – forms of payment, routines for shared work, joint participation in shopping and so on – to conform to their understandings of the relationship at hand.[40] This is accepted by the common intention constructive trust case law, which uses primarily financial dealings to understand what the parties intended regarding the family home.

Radin argues that we may need a concept of *incomplete* commodification. This involves accepting that behaviour can be commodified for some purposes but not for others. This may mean using commodification to understand the economic impact of domestic contributions whilst accepting that there are some attributes of the services which are not commodifiable. This helps to align the concern with applying market logic to domestic contributions with the need to achieve practical justice by understanding the financial aspect of this work. Radin uses the example of the home: although the physical bricks-and-mortar of the home is commodified, the emotional attachment which those who occupy the home have is not commodified. Fox O'Mahony conceptualises this by noting that though the *house* is commodified, the *home* is not. Even this level of incomplete commodification may cause problems, however, if the emotional attachment to one's home is ignored by the law – we can see this in numerous areas of Land Law where the creditor's proprietary and financial interests are prioritised over the

[38] Martha Ertman, 'What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification' (2003–4) 82 NCL Rev 1.
[39] Silbaugh (n 36).
[40] Williams and Zelizer (n 26).

occupiers' emotional attachment to their home.[41] Refusing to commodify certain behaviours therefore risks making these behaviours irrelevant to courts.

Finally, on a very practical note, private law doctrines will never be able to accept broad brush judicial discretion to distribute assets at the end of a cohabiting relationship. Such possibility will require legislative intervention. Financial contributions, involving market analysis, is therefore an easy way for the law to value contributions to the home and provide relief for cohabitants who might otherwise be economically vulnerable. It has been seen how, under the common intention constructive trust, the lack of commodification of domestic contributions has caused problems for those claimants, usually women, who cannot show financial contributions to acquisition of property. Unjust enrichment works purely by transferring back unjust economic benefits which the defendant cannot in good conscience keep. It is therefore vital to have an understanding of domestic contributions which involves the production of a measurable economic impact for unjust enrichment to bite. Commodification helps to create that understanding.

III. TYPES OF ENRICHMENT

If the claimant is to make a successful unjust enrichment claim, the contributions she has made to the family home must be understandable as 'enrichments'. A key advantage of the use of unjust enrichment is the treatment of behaviours which cannot on their own sustain a claim under the common intention constructive trust. The focus of the following discussion is therefore on these behaviours, spending the most time on improvements to property and domestic services (such as childcare and homemaking). However, in the interests of completeness, contributions which currently appear to allow the claimant to successfully obtain an interest under the common intention constructive trust will be briefly mentioned. These are the payment of money, the transfer of land to the defendant and the discharge of the defendant's obligations (such as payment of mortgage instalments). By not relating these contributions to intentions about ownership, and instead considering only the enrichment of the defendant, it appears that unjust enrichment avoids treating financial contributions to the acquisition of home as more important than domestic contributions.

[41] In particular, claims under section 15 of the Trusts of Land and Appointment of Trustees Act 1996. See Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007)

A) Contributions Already Successful – Money, Land and Debts

1. *Money*

If the claimant has paid money to the defendant, this is unequivocally an enrichment. As explained above, the defendant may not argue that they did not value the enrichment – using subjective devaluation – for money is always a benefit. Cohabitation disputes may often involve transfer of money between the parties, in order to pay the mortgage or the bills, for example. Should money have been paid to help the defendant discharge his own liability, under a mortgage for example, or to increase his own savings, this is clearly a benefit to the defendant. One example of this in case law is *Graham-York v York*,[42] where the claimant would hand the defendant the money she was paid whenever he asked for it. The defendant would also sometimes collect her salary on her behalf. This is a clear case of enrichment.

2. *Land and goods*

It may be that cohabitants have brought certain land or goods to the relationship. Ordinarily enrichment is measured using objective financial value,[43] and is measured at the time of receipt.[44] The objective value is 'the price which a reasonable person in the defendant's position would have had to pay for the [benefit]'.[45] If goods have been transferred to the defendant, then this is clearly an enrichment, unless the defendant can subjectively devalue the goods. It is open to the defendant to prove that they did not value the enrichment at the objective market value, and further that they valued it less than the market value or indeed not at all. The rationale behind this rule is that the defendant should not be forced to pay for a benefit which they did not value, which is made clear in Pollock CB's famous dicta: '[if the claimant] cleans another's shoes, what can the other do but put them on?'[46] So, if the claimant brings a sofa into the defendant's home, it is up to the defendant to prove that he did not value it at all – for example, because the defendant already owned a perfectly good sofa – or that he valued it at less than

[42] *Graham-York v York* [2015] EWCA Civ 72, [2015] HLR 26.
[43] As has been made clear in *Peter v Beblow* [1993] 1 SCR 980, 990, where McLachlin J said that the law takes a 'straightforward economic approach to the assessment of value'.
[44] *Benedetti* (n 11) [18], though subsequent factors are clearly relevant – for example, the fact the benefit has been sold after receipt but before trial may matter if the defendant seeks to argue they did not value the benefit. This is because the benefit has been converted to money, which is always beneficial. Alternatively, the claimant may have been paid for services they provided, removing the enrichment of the defendant.
[45] *Benedetti* (n 11) [17].
[46] *Taylor v Laird* (1856) 25 LJ Ex 329 332.

the market value. Should the claimant put her house – formerly owned in her sole name – into the joint names of the parties then again, this must also be an enrichment.

3. *Discharge of obligations*

If the claimant discharges an obligation of the defendant, this is a clear enrichment. In the cohabitation context, this is likely most relevant where the claimant pays off the defendant's mortgage, or alternatively where the claimant takes up more than her share of the responsibility of a joint mortgage. The claimant may also discharge the defendant's obligations when paying utility or other household bills.

The question of whether the law allows a third party to pay off another's debt without authorisation is controversial. However, it was made clear in *Electricity Supply Nominees* that where there *is* authorisation or request that the claimant pay off the defendant's debt, the debt will be validly extinguished:

> If a person makes a voluntary payment intending to discharge another's debt, he will only discharge the debt if he acts with that person's authority or the latter subsequently ratifies the payment. Consequently if the payor makes the payment without authority and does not obtain subsequent ratification he normally has no redress against the debtor.[47]

So, if the claimant has directly paid off the mortgage by transferring money to the mortgage provider, this should constitute an enrichment as long as the defendant has agreed to the claimant doing so, or subsequently accepts that payment as paying off the mortgage. The point is that the claimant cannot discharge the defendant's liability without his consent. Fortunately, in the cohabitation context the defendant will almost certainly have authorised the payment of the claimant to discharge the mortgage. This is not a situation where it is likely that the claimant will pay off the mortgage without informing the defendant. So long as the defendant has authorised the payment, the discharge of the mortgage obligation is clearly an enrichment, as the mortgage is legally necessary expenditure. Where the claimant has given the defendant money for the mortgage to be paid off, this will constitute an enrichment regardless as discussed above.

[47] *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd* (1992) 63 P&CR 143 168.

Subjective devaluation is possible in the narrow situation that the defendant could have set-off the debt against a counterclaim the defendant had against the creditor. For instance, in *Boulton v Jones*[48] the defendant ordered and received some pipes from the claimant. However, the defendant had made the contract with the claimant's predecessor in title, meaning there was no contract existing between the claimant and defendant. The defendant refused to pay. It was held that there was no restitutionary remedy, as the claimant's predecessor had owed the defendant money. The defendant was receiving the pipes on the basis he could set it off against the debt owed by the claimant's predecessor. The defendant therefore could argue he was not being enriched when given the pipes by the claimant. In the cohabitation context, it is very unlikely that the defendant is going to have some counterclaim against the mortgagee bank, and therefore this is unlikely to be relevant for our purposes.

B) Improvements to Property

Cohabitation cases often involve the claimant improving the family home. If the house belongs to the defendant, the claimant may have enriched him. This section will examine when improvements to the home will constitute an enrichment of the defendant. In many cases the defendant's enrichment is obvious. For instance, where the claimant has built a house on the defendant's property due to obligations under a void contract, there should be an unjust enrichment claim available for failure of basis. This, however, is unlikely in the cohabitation context. Here, there will be no contractual basis to the claim. Further, it may well be that the defendant, once an objective benefit has been shown, can subjectively devalue this benefit.

Case authority on improvements to property has been mixed. Mistaken improvements, in particular, are considered to have different rules attaching to them. This is relevant as the unjust factor of mistake will be discussed in Chapter Five. To properly analyse the law, this section will look at case law on the treatment of improvements to property before going on to consider the factual circumstances of cohabitation cases.

1. *The law on improvements to land*

The leading authority on the treatment of mistaken improvements to land in unjust enrichment law is *Blue Haven v Tully*.[49] Tully contracted to sell land to Robinson, who intended to develop it as a coffee plantation. Unfortunately, a discrepancy in the contract of sale led to a dispute between the two. Robinson started legal proceedings to stop Tully selling the land to anyone

[48] *Boulton v Jones* (1857) 2 H and N 564, 157 ER 232.
[49] *Blue Haven Enterprises v Tully* [2006] UKPC 17.

else. Robinson was successful and an injunction was granted. However, Tully had already sold the land to Dr White, who was acting via Blue Haven Enterprises. White had no knowledge of Tully's earlier dispute with Robinson. He cleared the land and developed infrastructure for a coffee plantation. Robinson later discovered after visiting the land that someone was developing it. He told White's farm manager, Mr Dillon, that this was illegal since Robinson was the rightful owner and wrote a note including his contact details which the court found Dillon had given to White. Blue Haven, when Robinson was finally registered as owner, claimed proprietary estoppel and unjust enrichment against Robinson.

The decision of the Privy Council is controversial,[50] primarily because the Board failed to identify the differences between a proprietary estoppel claim and an unjust enrichment claim. Lord Scott explicitly stated that the principles of the two doctrines were the same,[51] therefore seemingly suggesting that an unjust enrichment claim should be treated differently when the enrichment is based on a mistaken improvement of land. It was clear that there was enrichment in this case,[52] for Robinson had received exactly the development he had wanted, and therefore had been saved the expense of developing the land himself, but the Privy Council said that some unconscionability on the part of Robinson was required for Blue Haven's claim to be successful. It was ultimately held that, as Robinson had done his best to draw White's attention to the mistake[53] (and further had made no representation to White[54]), he was not at fault and therefore Blue Haven's claim failed.

The lack of clarity over the relationship between unjust enrichment and proprietary estoppel makes this case disappointing authority for an important question of unjust enrichment law: when can a mistaken improver claim restitution from the landowner? In the cohabitation context, claimants might want to make a claim for both unjust enrichment and proprietary estoppel, so it is important to differentiate between these doctrines. Although the Privy Council noted that enrichment was clearly shown, they did not follow through the normal requirements of unjust enrichment – to find an unjust factor – and instead considered whether that enrichment

[50] See Tang Hang Wu, 'An Unjust Enrichment Claim for the Mistaken Improver of Land' [2011] Conv 8; Peter Watts, 'Unrequested Improvements to Land' [2006] LQR 553; Man Yip, 'Suing the Third Party for Improvements to Land: *Costello v Macdonald* [2011] EWCA Civ 930, [2011] 3 WLR 1341' (2011) 11(2) OUCLJ 217; Kelvin Low, 'Unjust enrichment and proprietary estoppel: two sides of the same coin?' [2007] LMCLQ 14; David Salmons, 'Claims for non-monetary benefits: unjust enrichment or estoppel' [2008] Conv 173.
[51] *Blue Haven* (n 48) [21].
[52] *Blue Haven* (n 48) [19].
[53] *Blue Haven* (n 48) [26].
[54] *Blue Haven* (n 48) [28].

placed Robinson under an equitable obligation to compensate Blue Haven.[55] The measure of relief considered was the claimant's costs expended in improving the land. Such a question indicates that the Privy Council were seemingly not dealing with an unjust enrichment claim at all, for unjust enrichment is neither an equitable doctrine nor capable of providing compensation.[56]

Perhaps the most puzzling aspect of this is that there was an obvious unjust factor in *Blue Haven*.[57] At least until the note from Robinson was given to White, Blue Haven was mistaken when they were building on the land. They thought they owned the land when in truth they did not. It was not explained in *Blue Haven* why this was not enough, and therefore further why improvements to property are treated differently to the provision of services or payment of money, where mistake clearly is enough to ground a claim in unjust enrichment. The Board relied on an analysis of the problem in Goff and Jones, where it was argued that in mistaken improvement to land cases that some form of unconscionability is required.[58] The editors of the latest edition of the book have a different opinion:

> [I]t was suggested in an earlier edition that greater difficulties arise in connection with claims for the value of mistaken improvements to land, and that a restitutionary remedy will only be available under, or at least consistently with, the law of proprietary estoppel—with the result that something more than a merely causative mistake is needed, amounting to unconscionable conduct on the part of the defendant. Once these cases are set in the context of the wider law of mistake, however, this argument seems doubtful.[59]

As will be discussed in Chapter Five, the common law marriage myth means that the unjust factor of mistake may be relevant for an unjust enrichment claim between cohabitants. This means that it is vital to be able to accurately identify the requirements for a successful unjust enrichment claim where there has been a mistaken improvement of property. Unfortunately, *Blue Haven* has now been relied on by subsequent cases. In *JS Bloor v Pavillion Developments*

[55] *Blue Haven* (n 48) [20].
[56] Salmons (n 49) 176.
[57] Low (n 49) 17.
[58] Goff and Jones, *The Law of Restitution* (7th edn, Sweet & Maxwell 2009) 6-002.
[59] Mitchell et al (n 8) 9-04.

Ltd,[60] Bloor had subdivided their land and sold part to the defendant, Pavillion, who intended to construct a care home. In the contract of sale, Bloor undertook to build an access road (the 'yellow road') within six months of Pavillion's commencing building the care home. Upon completion of the yellow road, Pavillion was contracted to build an 'orange road'. Bloor built both roads by mistake. Bloor claimed in unjust enrichment from Pavillion the cost of building this orange road, as they had discharged Pavillion's contractual obligation. The judge relied on *Blue Haven* for the proposition that it was necessary to demonstrate 'that the landowner had done something or just stood by in circumstances where his action or inaction would make it unconscionable for him to refuse to reimburse the improver'.[61] There was no unconscionable behaviour, and therefore the claim failed. This is not the analysis expected in an unjust enrichment claim, as Bloor had again saved Pavillion necessary expense by building the road that Pavillion was contractually obligated to provide, at their own expense, based on a mistake. It again was not made clear why the case was different to, for example, the payment of money, where a mistaken enrichment clearly allows a successful unjust enrichment claim.

It is understandable why unjust enrichment claims are often made alongside proprietary estoppel. Proprietary estoppel usually involves the defendant benefitting in some way from work done by the claimant, and therefore the facts of proprietary estoppel will often also ground a claim in unjust enrichment. Further, if there is no representation by the defendant – as there was not in *Blue Haven* – unjust enrichment is a much easier doctrine to successfully claim.[62] However, the conflation of proprietary estoppel and unjust enrichment principles have left several concerns surrounding improvers of property unaddressed. For instance, Salmons has argued that perhaps the Board's decision in *Blue Haven* was merely based on the fact that we cannot allow claimants to get money for mistaken improvements unabated, as the defendant may not want to pay for them.[63] We should not force defendants to pay for improvements they did not request. However, orthodox unjust enrichment law has no problem in dealing with this issue, given that the defendant may subjectively devalue any enrichment that he did not want, to prove that they valued the enrichment at less than the market value or indeed not at all. In *Blue Haven*, the enrichment involved the payment of factually necessary expenditure,[64] for

[60] *JS Bloor Ltd v Pavillion Developments Ltd* [2008] EWHC 724 (TCC), [2008] 2 EGLR 85.
[61] *Bloor* (n 59) [11].
[62] Watts (n 49) 556.
[63] Salmons (n 49) 179.
[64] This was explicitly mentioned as a way to defeat subjective devaluation by Lord Clarke in *Benedetti* (n 11) [25] and appears to be based on the fact that the defendant had no choice but to pay the money, which means that there is no need to protect their autonomy. A good example is *Exall v Partridge*

Robinson intended to develop the land as a coffee plantation, and this is what Blue Haven had done.[65] Robinson therefore could not have been heard to say he did not value the improvement, and his enrichment can be described as an incontrovertible benefit. It is unfortunate that the Board ignored these arguments due to their decision to treat unjust enrichment the same as proprietary estoppel. Part of the problem, however, may well have been the arguments of counsel, who suggested that proprietary estoppel and unjust enrichment involved the same principles and who, somewhat surprisingly, did not argue for subjective devaluation of Blue Haven's work.[66] The claim made in *Blue Haven* was either a proprietary estoppel claim using the language of unjust enrichment, or an unjust enrichment claim using the principles of proprietary estoppel. Either option is problematic.

It should be noted that the position in Scottish law is different. In *Newton v Newton*,[67] for example, a husband improved property belonging to his wife because he believed he owned it. It was explained in *Shilliday* that the husband in *Newton* succeeded as 'the critical factor in the pursuer's ground of action was his mistake about the title: he recovered because his wife was benefitting from sums which he would not have spent if he had been aware of the true position'.[68]

This all leaves the English law of unjust enrichment in a deeply unsatisfactory state when it comes to improvement to land as an enrichment, and it is not at all clear how a claimant cohabitant would need to frame a claim for unjust enrichment based on a mistaken improvement of the defendant's property. Given the academic controversy over *Blue Haven*, as noted above, it seems inconceivable that should the Supreme Court be confronted with these kinds of facts again they would continue to apply a proprietary estoppel framework to an unjust enrichment claim. We must now consider what this means for the cohabitation context and compare it to the current law operating in that context.

(1799) 8 TR 308, 101 ER 1405. In this case the claimant's carriage was on the defendant's landlord's land. The defendant had not paid the rent, leading to the landlord taking possession of all chattels on the land. To avoid his carriage being taken by the landlord, the claimant paid the defendant's rent. The defendant cannot rely on subjective devaluation here, as he would have regardless had to pay the rent.

[65] Tang Hang Wu (n 49) 49.

[66] Watts (n 49) 556.

[67] *Newton v Newton* 1925 SC 715.

[68] *Shilliday v Smith* 1998 SC 725, 731.

2. *Improvements to the home in cohabitation cases*

Cohabitation property disputes often involve the claimant improving the relevant land. The seminal case of *Pettitt v Pettitt*[69] involved improvements made to the shared home (owned solely by the wife) by the husband, and it was held that such improvements cannot ground a claim for a proprietary interest.[70] The improvements relevant in *Pettitt* – including the building of a wardrobe, a brick wall and an ornamental well – were considered just something which husbands do. It should be noted that in a few older cases, improvements to property do seem to have been considered relevant: in *Bernard v Josephs,* for example, an extension of a house was considered, albeit obiter, to potentially alter the beneficial interests of the house in exceptional circumstances.[71] Further in *Burns v Burns* capital improvements to the house at the claimant's expense were held to potentially give rise to a finding of common intention.[72] However, in *Lloyds Bank v Rosset*[73] Lord Bridge made clear that only an express agreement or direct financial contributions to acquisition of the property allow a cohabitant to show a common intention and thereby acquire an interest in the home. One argument is that improvements to the home reflect an intention to enjoy the occupation of the home, and not therefore to have an interest in the home.[74] Alternatively, the answer may lie in *Pettitt*: the court does not wish to value ordinary acts by parties in a family context.[75] Further, improvements are simply not referable to the purchase of the land. This position has held fast,[76] despite some attempts to suggest it is too harsh.[77] It is therefore the court's focus on intentions about ownership that allows courts to deny the claimant an interest when improvements to the home have been made. Interestingly, in *Pettitt* Lord Reid suggested that unjust enrichment was unhelpful to the claimant husband as it had never been applied to a case where one person improves the property of another.[78]

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[69] *Pettitt v Pettitt* [1970] AC 777 (HL).
[70] *Pettitt* (n 68) 796E, 807B, 826.
[71] *Barnard v Josephs* [1982] 1 Ch 391.
[72] *Burns v Burns* [1984] Ch 317.
[73] *Rosset* (n 1) 132-133. Note that the judiciary has often tried to break free of *Rosset*, but never convincingly. See B Sloan, 'Keeping up with the Jones case: establishing constructive trusts in "sole legal owner" scenarios' (2015) 35 Legal Studies 226, and the recent case of *Amin v Amin* [2020] EWHC 2675 (Ch).
[74] *Rosset* (n 1) 128.
[75] This argument can be seen not just in *Pettitt* (n 68), but also in earlier case law: see for example *Button v Button* [1968] 1 WLR 457 (CA).
[76] For example, see *James v Thomas* (n 2); *Dobson v Griffey* (n 2); *Pillmoor v Miah* [2019] EWHC 3696 (Ch), [2020] BPIR 417.
[77] *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432 [12].
[78] *Pettitt* (n 68) 795H.

This is no longer true. Improvements to the shared home can constitute an enrichment. Case law establishes that if the claimant improves a car, this will count as an enrichment.[79] Therefore, if the claimant builds an extension to the home of the defendant, the defendant must be enriched. We can see this from cases in Scottish law: in *Shilliday*,[80] the claimant paid a substantial amount towards the improvement of the property, as the house was in a state of disrepair. The Sheriff allowed restitution for failure of basis: the claimant had spent money on the property on the basis that the parties would soon be married. The value of this improvement will need to be quantified, and the quantification of these claims is discussed in Chapter Six, but it is open to the defendant to subjectively devalue any improvement the claimant has made. In many cases, however, this avenue will simply be closed to the defendant. So, where the work was a factual necessity, such as where repairs are made to the house by the claimant, the defendant cannot say that he did not value them, as he would have otherwise had to pay someone else to do the job. This has pedigree in English law – see *Jansen v Jansen*[81] – and rests in unjust enrichment law in the concept of anticipation of necessary expenditure. For instance, in *Re Berkeley Applegate (Investment Consultants) Ltd*[82] services provided by a liquidator in administering trust properties was held to be a benefit to the beneficiaries because if the liquidator had not done the work the court would have appointed a receiver who would have then needed payment. We can see the same argument in *Blue Haven v Tully*, as the claimant had provided exactly the improvements to the property that the defendant had been intending to build.

Another example may be where the defendant has requested the claimant carry out the work. Again, here the defendant has clearly shown themselves as valuing the improvement.[83] On the other hand, should the claimant carry out the work without the defendant's knowledge, the defendant cannot be expected to pay for the work. This aligns with what has been said in cohabitation cases: for example in *Pettitt v Pettitt* Lord Reid suggest that the claimant will fail if improvements have been made while the defendant is absent, without their consent or knowledge.[84] Further, in *Dobson v Griffey* one of the reasons that the judge denied the claim was that the defendant did not want the claimant to do renovation work, as he did not think she

[79] *Greenwood v Bennet* [1973] QB 195 (CA).
[80] *Shilliday* (n 67).
[81] *Jansen v Jansen* [1965] P 478 (CA). This case was about spouses rather than cohabitants, but the same principles apply.
[82] *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] 7 WLUK 57.
[83] *Benedetti* (n 11) [25].
[84] *Pettitt* (n 68) 795.

was very good at it.[85] The Law Commission, when setting out their proposals for a legislative scheme, suggested that qualifying contributions would come from joint decisions between the parties, and that contributions made in light of the other parties' express disagreement would be a factor to take into account as part of the court's exercise of its discretion.[86] Unjust enrichment simply repeats this requirement: where the defendant did not want the improvement, they will not have to pay for it.

C) Domestic Services

Domestic services are, under the current law, the least likely type of contribution to be considered relevant to sustain a claim for a beneficial interest in the family home. It is therefore vital that development of the law according to unjust enrichment principles must provide a route for these contributions to be considered relevant. There are two issues to be dealt with here: first, whether these services can objectively be considered benefits at all, and second, whether the defendant is able to subjectively devalue domestic contributions.

The common intention constructive trust fails to deal with claims based on domestic services. In sole name cases – where the property is held in the name of the defendant only – domestic services are not relevant when seeking to show a common intention that the claimant is to have an interest in the property.[87] This can be seen from Lord Bridge's judgment in *Lloyd's Bank v Rosset*.[88] As was argued in Chapter One, the cases on cohabitation indicate that unpaid caregiving and homemaking are treated as an incidental part of cohabitation, operating within a different space than renovation or breadwinning.[89] In cases such as *Thomson v Humphrey*,[90] *James v Thomas*[91] and *Dobson v Griffey*,[92] domestic services failed to produce any interest in the property. The reasoning is that such conduct does not show an intention to have an interest in the property. Instead, this sort of conduct is 'understandable in the context of their relationship'.[93] This is a left-over idea from the *Pettitt v Pettitt* argument that improvements

[85] *Dobson v Griffey* (n 2) [76].
[86] Law Commission, *The Financial Consequences of Cohabitation* (Law Com No 307, 2007) paras 4.50-4.51.
[87] Though domestic services may at least be relevant when considering detrimental reliance, which remains a key part of acquisition of an interest.
[88] *Rosset* (n 1) 133.
[89] Ellen Gordon-Bouvier, 'Crossing the boundaries of the home: a chronotopical analysis of the legal status of women's domestic work' (2019) 15(4) Int JLC 479.
[90] *Thomson v Humphrey* [2009] EWHC 3576 (Ch), [2010] 2 FLR 107.
[91] *James v Thomas* (n 2).
[92] *Dobson v Griffey* (n 2).
[93] *Dobson v Griffey* (n 2) [85].

are just something which husbands do.[94] In *Button v Button*, for example, it was held that improvements to the home could only show the claimant has acquired an interest in the home if they were of a nature usually done by a craftsman or contractor.[95] Stereotypically feminine work such as unpaid caregiving is pushed into the private sphere and is not given significance by the court.[96] One of the most infamous cases of cohabitation breakdown – *Burns v Burns*[97] – involved a woman providing childcare for twenty years while her partner worked, and ending up with nothing at all at the end of the relationship. As childcare was not seen as a financial contribution (despite allowing her partner to remain in work and increase his own economic power), the Court of Appeal felt that they simply could not find that a trust had arisen. One of the main strengths of an unjust enrichment claim in cohabitation property disputes is that it will be able to deal with claims for unpaid caregiving, as 'the gendered norms that identify, construct and value such services in other areas of private law, such as torts, are not present in unjust enrichment in the same way'.[98] Further, it has been argued by Wong that 'by taking into account domestic contributions, it has been suggested that the unjust enrichment approach is a more realistic acknowledgement of familial relationships as a common enterprise'.[99]

1. *Benefit*

The provision of domestic services – whether childcare or more general homemaking tasks – constitute an enrichment of the defendant. As Wiergers notes, 'where domestic labour is provided "for free," the costs of caring will be borne largely by mothers. Men benefit economically insofar as their labour as breadwinners is paid for and under their control'.[100] The breadwinner will be able to go to work outside the home and earn a salary only because he has delegated the domestic tasks to the homemaker.[101] The counterfactual scenario is therefore either that the defendant would have had to work fewer hours (or give up work entirely) in

[94] *Pettitt* (n 68) 796E, 807B, 826.
[95] *Button* (n 74).
[96] Gordon-Bouvier (n 88); Leo Flynn and Anna Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance (1995) 3(1) Feminist Legal Studies 105; Alison Diduck, 'Autonomy and Family Justice' [2016] CFLQ 133; Simone Wong, 'Would you "Care" to Share Your Home?' (2007) 58(3) Northern Island Legal Quarterly 268; Fran Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) Harvard Law Review 1497; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004).
[97] *Burns* (n 71).
[98] Simone Degeling and Mehera San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 Sydney L Rev 69, 70.
[99] Simone Wong, 'When Trust(s) is not Enough: An Argument for the Use of Unjust Enrichment for Home-Sharers' [1999] Feminist Legal Studies 47 58.
[100] Wiegers (n 29) 213.
[101] Williams (n 23).

order to complete these domestic tasks, or would otherwise have needed to pay for a childminder or cleaner. The claimant has therefore provided a service which has increased the defendant's wealth in two ways: first, he has been able to earn a salary and second, he has not had to pay for a childminder or cleaner. The claimant has therefore provided an economically valuable service which has a similar market cost.[102] There is no doubt that the defendant has been enriched by the claimant's provision of these services.

This represents a commodification of these services, as discussed above. It is only possible to view domestic services as enriching the defendant if they are understood as economically valuable. This economic valuation is created by imposing market norms, as the counterfactual used is the engagement of commercial suppliers of childcare and homemaking. Utilising Radin's conception of incomplete commodification, we can appreciate that there are aspects of these services which it is impossible to commodify. The mother's emotional attachment to the child or to her home, for example, is not replicated in the same way in the market. In that way, there is no perfect market for the work that the homemaker does in the home. However, to consequently conclude that there is no possibility of using market norms to value domestic services is counterproductive to the proper appreciation of unpaid work within the home. Although some aspects of this work cannot be commodified, it is nonetheless true that market logic can be used to understand the provision of childcare and homemaking as a commercial service. In this way, domestic services can be commodified, and their economic value understood while continuing to acknowledge the non-commodified emotional side of caring.

Domestic services look initially highly vulnerable to claims by the defendant that he simply does not value the work provided by the claimant. The defendant may argue this on three grounds. First, he may say that the claimant's domestic work was inadequate, and therefore was of no or less objective value. Second, he may say that he did not personally want the claimant to provide these services, so he did not personally value them and should not pay for them. Third, he may argue that he would otherwise have obtained these services for free so again did not subjectively value the services and should not have to pay for them. This section takes each argument in turn, concluding that each must fail.

2. *The claimant's work is inadequate*

This argument amounts to saying that the claimant acted as a bad parent or failed to properly maintain the house. If the work is in some way inadequate, then case law suggests that the

[102] Similar but not necessarily the same, as discussed in Chapter Six.

objective value of the services is lower.[103] However, the applicability of these cases to the domestic context is questionable: in commercial cases, efficiency and completion by deadlines are often required by an agreement between the parties. In domestic cases, it is unlikely that the defendant will be able to argue that the claimant did such a bad job that the services provided by the claimant are of lower objective value, though cases requiring such an analysis can be dreamt up. One example may be where the claimant has failed to provide adequate childcare leading to claims of neglect and abuse – though it must be noted even in these cases that such 'inadequate' performance may be a result of abuse from the defendant towards the claimant.

This must, of course, be proven, and it is unlikely that such evidence will be forthcoming. It is not relevant that the defendant simply did not like how the claimant performed the services, and the defendant must show that the claimant's provision of services is of such a poor standard that they are not objectively valuable. Outside of the extreme example considered above, there will be no objective measurable standard of childcare and homemaking, meaning that this argument will in the routine cohabitation dispute be unavailable to the defendant.

3. *The defendant did not want the services*

Second, the defendant may argue that he did not want the claimant to perform the services, meaning that he can subjectively devalue them. As explained above, if the defendant has informed the claimant that he does not want certain contributions – such as homemaking – this would appear to be the end of the matter.[104] This is unlikely to be the case in this context. Otherwise, subjective devaluation is rebuttable by the claimant on the grounds that the defendant requested the services, or that the provision of the services was reasonably necessary expenditure. In many cohabitation cases, the domestic split of labour will have been agreed between the parties. The undertaking of the role of childcarer and breadwinner after a child is born is unlikely to have occurred with no discussion between the parties. If the defendant has agreed with the claimant that the claimant is to remain at home and look after children or take on household tasks, he cannot at the end of the relationship say that he did not value their provision.

Even if the parties have not made an agreement about the undertaking of domestic responsibilities, once the claimant has begun providing these services the defendant is

[103] *ERDC Group Ltd v Brunel University* [2006] EWHC 687 (TCC), [2006] BLR 255; *Lachhani v Destination Canada (UK) Ltd* (1996) 13 Const LJ 279.
[104] This aligns with both the Law Commission's reform proposals and the current law: see above.

presumably freely accepting them. To show free acceptance, the claimant must show that the services were provided non-gratuitously – with awareness of this on the part of the defendant – and that the defendant accepted the services in circumstances where he could have rejected them. If the defendant has freely accepted the claimant's provision of services for the duration of their relationship – cleaning the house, preparing his meals, looking after their children – he cannot then say he would have been happy had none of these services been provided.

Initially, it may appear that the claimant's provision of domestic services is gratuitous. This narrative appears in the common intention constructive trust cases, where these services are considered to be provided on the basis of love and affection, rather than in expectation of reward.[105] As Degeling and Roque note, however, mixed motivations exist in real life.[106] No doubt women provide domestic services due to feelings of love and affection towards their family. However, homemakers are also economically dependent on the breadwinner, and therefore provide domestic services in expectation of continued financial support from the breadwinner. Simple dichotomies do not accurately describe human motivations or behaviour. Financial reward is not incompatible with a caring motive; they are not mutually exclusive. As seen in Chapter One in the context of the common intention constructive trust and above in the context of commodification, the idea that care is solely an expression of altruism facilitates women's lack of legal remedy.[107] If the breadwinner had informed the homemaker that she will receive no financial support from the breadwinner, then we can expect that alternative arrangements would have been made. As Casad has rightly argued:

> Economic necessity does not inhibit the marketplace laborer, as it does the party who works at home, from leaving a relationship. Thus, by remaining in the relationship and continuing to accept its material benefits, the marketplace laborer can be said to have implicitly agreed to compensate the other or can be called unjustly enriched if he does not.[108]

[105] This was discussed extensively in Chapter One. See, for example: *Dobson v Griffey* (n 2); *James v Thomas* (n 2). The genesis for this idea seems to be *Pettitt* (n 68), when improvements to the property were considered something which husbands were simply expected to do, and therefore not as something which should generate an interest in the property.
[106] Degeling and Roque (n 97) 88.
[107] Wiegers (n 29).
[108] Casad (n 5).

The implicit acceptance of the need to compensate the provider of domestic services comes from the American case of *Marvin v Marvin*.[109] In America, the presumption is that parties intend to deal fairly with each other, and therefore that any financial imbalance will somehow be corrected. If the imbalance is substantial, the breadwinner must have realised that the individual at home serves with the expectation of financial support, even if there were no explicit agreements along these lines.[110] Canadian jurisprudence also assumes that domestic services are not gratuitously provided.[111] These services are instead provided with the continued expectation of economic support. Should that support end, and the claimant is no longer permitted to live in the defendant's house, the basis on which the domestic services were provided has failed and the defendant must be considered to be unjustly enriched. We can see this same argument succeed in Scottish cohabitation cases.[112] Similar arguments on the need to recognise interdependency have been made in terms of financial provisions on divorce. In *Miller; McFarlane* it was said when discussing fairness:

> This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support.[113]

To consider the provision of homemaking and childcare services as gratuitous, and therefore as something the defendant should not be expected to pay for, ignores this interdependency.[114] It paints the claimant's contributions as those done by an autonomous, commercial party, rather than provided on the basis of a dependent relationship with the defendant where the claimant is in need of continued financial support due to an inability in the circumstances to provide for themselves. This inability will stem in most cases from an agreement between the parties that the claimant will provide the relevant services or otherwise the free acceptance by the defendant of these services, indicating that requiring restitution from the defendant does not

[109] *Marvin v Marvin* 18 Cal 3d 660, 557 P 2d 106, 134 Cal Rptr 815 (1976).
[110] Casad (n 5).
[111] *Peter v Beblow* (n 42) [94].
[112] *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117.
[113] *Miller; McFarlane* [2006] UKHL 24, [2006] 2 AC 618 [11].
[114] Here we can see that the interdependency and indeed the work undertaken is functionally the same between marriage and cohabitation yet results in radically different legal consequences.

impact his autonomy. In addition, it must be accepted that very often women may feel under heavy pressure to provide these homemaking and childcare services,[115] and to consider them gratuitous appears to ignore this pressure. This pressure has been discussed at length in Chapter Two regarding relational autonomy, but in summary it has been shown that 'we ignore the fact that choice occurs within the constraints of social conditions, including history and tradition […] such conditions funnel individual decision making into prescribed channels, often operating along practical and symbolic lines to limit and close down options'.[116] We must therefore assume, given the context and circumstances, that the claimant does not provide homemaking services and childcare gratuitously, without any expectation of reward from the defendant, and further that the defendant was aware of these circumstances which allows such a presumption.

Finally, if the provision of the services was reasonably necessary expenditure, it is irrelevant whether the defendant wanted the services. If the claimant seeks to use anticipation of necessary expenditure, the court must consider whether the services the claimant provided were, in fact, necessary. In cases such as childcare this should be relatively easy, since childcare is legally necessary. The provision of childcare is, by law, required. If the claimant had not provided childcare, the defendant would have had to pay for it instead – which means the claimant has saved the defendant a necessary expense – or would have had to leave his job or reduce his hours to care for the children himself, in which case the claimant's provision of childcare has irrefutably increased his wealth by allowing him to stay in work. Childcare therefore cannot usually be subjectively devalued.

However, other services such as more general homemaking may be more difficult. These are not legally necessary services, but are instead factually necessary. The court must therefore be satisfied that the defendant would factually have had to pay for these services elsewhere, or instead would have had to provide them himself, had the claimant not:

> Even if the worker outside the home does not understand (as he should) that the worker in the home expects more than he has received, to the extent that the latter provides services which satisfy basic human needs – food, clothing, shelter – the former receives benefits that he himself would otherwise have to provide. Requiring him to make

[115] Degeling and Roque (n 97) 87.
[116] Fineman (n 95) 41.

> restitution, therefore, would not force him to pay for something he did not want and would not have procured from some source.[117]

There is a danger of undervaluing women's contributions here, as there will need to be some consideration as to the worth of these services.[118] It will therefore be up to courts to avoid this danger. Clearly, some homemaking is necessary. A certain level of cleaning, meal preparation and home maintenance are required to maintain a reasonable standard of living and therefore it is unrealistic to believe that if the claimant had not provided these services, the defendant would not have otherwise done so. This is enough to prove that the services were factually necessary.[119]

4. *The defendant could have obtained the services for free*

There will be circumstances where the defendant will say that he could have obtained the services cheaper (or for free) elsewhere. For instance, he may argue that a friend or family member could have provided childcare for free, or else that the children could have attended after-school clubs until the defendant had finished work. The defendant may argue that he would have been able to cook and clean in the evenings and weekends, in which case he could have done the services without cost himself. Cleary he must have some proof for all of this, for the burden falls upon the defendant.[120] These are not easy claims to make after the fact to avoid restitutionary liability. As Lord Clarke said in *Benedetti v Sawiris*, there must be some objective manifestation of the defendant's views. Assertions are unlikely to be accepted and conduct occurring after the provision of services is likely to carry little weight.[121] It is difficult to imagine that the defendant will ever be able to bring forward contemporary evidence that he could have obtained childcare and homemaking services totally for free, either by providing them himself or by getting third parties to provide them without charge. Even if he can, if the defendant has requested or freely accepted the claimant's provision of the services, as above, he cannot subjectively devalue these services.

An examination of unjust enrichment's capacity to deal with claims for domestic services, including childcare and homemaking services, has never comprehensively been done in

[117] Casad (n 5) 58.
[118] Degeling and Roque (n 97) 80.
[119] *Craven-Ellis v Canons Ltd* [1936] 2 KB 403.
[120] *Benedetti* (n 11) [21].
[121] *Benedetti* (n 11) [23].

England and Wales. As the preceding shows, there should be no obstacles in treating such services as valuable enrichments received by the defendant, though this is by no means an uncontroversial area. The lack of judicial authority means that much of this discussion has had to be based on predictions from normative justifications and theory, and an analysis of other jurisdictions. Nothing in the foregoing section suggests that there need by any explicit changes to unjust enrichment law, but the context of these particular enrichments – highly gendered contributions made in an interdependent relationship – must be remembered when considering and applying orthodox unjust enrichment law. The most important message from this section is that there is no reason why domestic services such as childcare or homemaking should not be considered enrichments, and that they should further be able to ground a claim in unjust enrichment.

IV. AT THE EXPENSE OF THE CLAIMANT

Once it has been shown that the defendant received an enrichment, it must further be shown that the enrichment came at the expense of the claimant. In general, this requirement will not be a particularly difficult hurdle to clear and is far simpler than the discussion above surrounding whether the benefit constitutes an enrichment. In all cohabitation cases – whether the claimant is relying on payment of a mortgage, improvements to the property or domestic services – the claimant will have spent time, effort or money on providing the benefit, and therefore will clear the 'at the expense of' hurdle. To be as comprehensive as possible, the details of this requirement will be discussed briefly here. The only difficulty is whether so-called incidental benefits can ground a claim for unjust enrichment: this will therefore be dealt with in a dedicated section below.

Clearly there is need for a causal link between the claimant and the defendant. It is not, however, entirely clear what this link needs to be. In *Menelaou*, it was held that 'the question in each case is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the [claimant] and the benefit received by the defendant'.[122] The Supreme Court has, however, noted that this 'leaves unanswered the critical question, namely, what connection, nexus or link is sufficient'.[123] There must be a 'transfer of value' between the claimant and the defendant.[124] There must also be a corresponding 'plus' on the part of the

[122] *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 [27].
[123] *Investment Trust Companies v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 29, [2018] AC 275 [37].
[124] *Investment Trust Companies* (n 122) [42]-[43]. The same argument that there must be a transfer of value between claimant and defendant is supported by Burrows: Burrows (n 6) 66.

defendant and 'minus' on the part of the claimant, which is why unjust enrichment is often called 'subtractive' unjust enrichment.[125] This is often phrased in terms of 'loss' to the claimant, though it is important to recognise that loss does not mean the same here as it does in, for example, claims for damages. The provision of services without charge involves a loss, as the provider has given up something of economic value.[126] Despite this lack of clarity, in the great majority of unjust enrichment cases the 'expense' requirement will be easy. If a claimant renovates her partner's property, it is clear that the partner has been enriched at the claimant's expense. However, there are more difficult cases. In *Investment Trust Companies*,[127] for example, the claimants paid tax on services they had bought. This tax turned out to be mistakenly charged. However, there was no direct link between the claimants and HMRC, for the claimants had paid the service providers – with the tax added to the price – who had then paid the tax to HMRC. The Supreme Court noted that there was no doubt in economic terms that HMRC was enriched at the claimant's expense,[128] but that in legal terms the lack of direct link between the claimants and defendants meant that there could be no unjust enrichment claim against HMRC. *Investment Trust Companies* made clear therefore that there must be a direct link between the claimant and the defendant for the enrichment to be considered at the expense of the claimant. It should be noted, however, that this general principle came with a raft of exceptions, including co-ordinated transactions, claims where property could be traced into the defendant's hands, and, crucially for our purposes, discharge of another's obligations.

Discharge of the defendant's obligations – such as the mortgage or utility bills – is explicitly said to be treated as a direct transfer.[129] This is the only likely contribution made by the claimant to the family home where the defendant is not the direct recipient of the benefit. The payment of money or the provision of goods or services have also been considered sufficiently direct.[130] Therefore, it is unlikely there is a problem with the 'expense' requirement except, perhaps, for the supposed rule against incidental benefits. It is to that which we now turn.

A) Incidental Benefits

A key issue surrounding whether the enrichment is at the expense of the claimant is the concept of incidental benefits. An incidental benefit is 'where the provision of the benefit was merely

[125] Birks (n 7) 78.
[126] *Investment Trust Companies* (n 122) [45].
[127] *Investment Trust Companies* (n 122).
[128] *Investment Trust Companies* (n 122) [32].
[129] *Investment Trust Companies* (n 122) [49].
[130] *Investment Trust Companies* (n 122) [46].

an incidental or collateral result of [the claimant's] expenditure'.[131] One of the best examples of incidental benefits comes from Lord President Dunedin in the Scots case of *Edinburgh and District Tramways v Courtenay*.[132] Suppose someone, as a consequence of heating their own home, inadvertently heats their neighbour's home. Clearly the neighbour has received a benefit in that they no longer have to spend money on heating. The benefit to the neighbour is only an incidental benefit: the claimant was acting in their own self-interest to benefit themself, and therefore cannot claim restitution from the defendant. Interestingly, the argument is almost a mirrored version of that found in common intention constructive trust cases, where the claimant must argue that they acted for mercenary considerations, in other words, that they *did* act for self-interest reasons and not for 'love and affection' or more realistic, family-related reasons. The rule of incidental benefits, however, suggests that the claimant should be acting for primarily selfless reasons. Those providing homemaking, childcare or improvements to property will almost always be acting for mixed motivations: for their family, in one sense, but also potentially for their own benefit.[133] The issue for this thesis is that the claimant may be vulnerable to claims that they improved the defendant's property or provided homemaking or childcare services in order to improve their own livelihood, and therefore that they were acting in their own self-interest and that any benefit received by the defendant was incidental. This argument fundamentally devalues the homemaking and caregiving that claimants – typically women – provide during a relationship, and the benefits that the defendant receives from such services. To show that such an argument cannot be made, a discussion of incidental benefits is necessary here.

Case law authority for the concept of incidental benefits is slim. Commentators have said that English law fails to deal 'coherently and consistently' with the problem of incidental benefits.[134] The leading authority is *TFL Management Ltd v Lloyds Bank Plc*.[135] A company incurred large expenditure pursuing a legal claim to recover a debt from a third party. The judgment confirmed that this company was not owed the debt, and instead it was owed to the defendant. This led to the defendant making a settlement with the debtor, in reliance on the judgment. The company's rights were assigned to the claimant, who then sued the defendant in unjust enrichment. The claim was that the defendant had benefitted from the claimant's

[131] *Investment Trusts Companies* (n 122) [52].
[132] *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99, 105.
[133] Degeling and Roque (n 97) 88; Wiegers (n 29).
[134] Adam Kramer and Adrian Beltrami, 'A Note on Incidental Benefit and Multi-Party Situations' (2013) 21 RLR 46, 46.
[135] *TFL Management Ltd v Lloyds Bank Plc* [2013] EWCA 1415, [2014] 1 WLR 2006.

expenditure on legal fees, which showed that the defendant was owed a debt, and which then ended in the defendant obtaining money from the debtor by making a settlement. The Court of Appeal was dealing with a summary application here to strike out the claim, and therefore the question is whether the claim must inevitably fail.

One argument made was that the defendant's benefit was incidental, and therefore that there is no chance that the claim could succeed as incidental benefits cannot be claimed for. The Court of Appeal rejected this argument. They noted that there is no English authority for incidental benefits, and suggested that the existing conceptual structure – questioning whether there was an enrichment at the expense of the claimant with an unjust factor – would be adequate to deal with cases without the need for a separate incidental benefits concept.[136] In order to reinforce the point, the court said that Lord Dunedin's example of the neighbour benefiting from heating not being liable to provide restitution was explained on the basis that there was no unjust factor. There would be no mistake, as the enrichment of the neighbour is an 'entirely foreseeable consequence of heating the flat below […] her remedy lies in insulation, not restitution'.[137] A similar argument is used by Birks as an answer to the question: he suggests that there is a (albeit begrudging) gift to the neighbour, as if the principle activity is intended (heating your own house) then the incidents of the activity are also intended (heating the neighbour's house).[138]

TFL Management is therefore an example of a case where the concept of incidental benefits was denied. The case was doubted, however, in *Investment Trust Companies* where it was held that the claim should have been summarily dismissed in *TFL*, due to the enrichment being an incidental benefit.[139] It was made clear in *Investment Trust Companies* that incidental benefits are not allowed.[140] However, the point that incidental benefits will often be dealt with by other areas of the unjust enrichment requirements was repeated, as the court said that 'in practice, situations where the defendant has received a benefit merely as an incidental consequence of the claimant's pursuit of some other objective are also often situations in which the enrichment of the defendant is not in any event unjust'.[141] Discussion of incidental benefits in *Investment Trust Companies* was obiter. Nevertheless, it is important Supreme Court authority.

[136] *TFL Management Ltd* (n 134) [34].
[137] *TFL Management Ltd* (n 134) [36]. The point that in the heating example there is no mistake and thus no unjust factor is supported by Virgo, see Virgo (n 4) 114.
[138] Birks (n 7) 158.
[139] *Investment Trusts Companies* (n 122) [56]-[57].
[140] *Investment Trusts Companies* (n 122) [52]-[58].
[141] *Investment Trusts Companies* (n 122) [52].

One of the problems with incidental benefits is that it is not at all clear as to what is meant by the phrase. It seems to have something to do with benefits unconnected, or collateral, to the objective of the claimant. However, it is noted in *Lowick Rose LLP v Swynson Ltd* – decided on the same day as *Investment Trust Companies* – that 'if a person with a view to obtaining a small benefit for himself at the same time unintentionally and by mistake incurs a much larger loss in conferring a much larger benefit on a third party, the picture changes, and one is again potentially in the field of unjust enrichment'.[142] This seems to involve some consideration of the relative size of benefits received by the claimant and defendant from the claimant's expenditure.

Given the lack of consistent policy on incidental benefits, we cannot conclusively say whether it even exists in English law, or if it does exist, what its boundaries are. It has not been explained by the Supreme Court what the normative justification for the concept is. Stevens argues that the concept is instead merely used to explain away cases which do not fit the theory.[143] This is a difficult conclusion to avoid, and it has been noted by several commentators that a great many cases of unjust enrichment involve the claimant acting purely in self-interest. One example is payment of another's debt.[144] This is an orthodox area of unjust enrichment law but appears to fall foul of the incidental benefits rule. In these cases, the claimant is a guarantor who discharges a debt and can claim in unjust enrichment from the defendant, the primary debtor. Yet the benefit the defendant receives appears to be incidental to the intended purpose of the payment, which is to discharge the legal obligation the guarantor owed to the creditor. This is not the only example in which the claimant acts in their own interest and yet can still make a claim in unjust enrichment. If the claimant is intending to pay a debt, making a mistake that the debt is owed in the first place, there is no question that restitution is available. Yet the claimant was clearly acting in their own interests, for they were seeking to improve their own creditworthiness and to reduce their debt. Another example is pointed out by the court in *TFL Management*.[145] The Court of Appeal refers to *Greenwood v Bennett*, where the claimant repaired a car he believed he owned.[146] The claimant was again acting in his own self-interest here (for he believed he was repairing his own car), and yet received restitution from the true

[142] *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 WLR 1161 [68].
[143] Robert Stevens, 'The Unjust Enrichment Disaster' [2018] LQR 574, 579.
[144] William Day, '"At the Expense of" in Unjust Enrichment: Causal, Direct or Intentional Transfers of Value?' [2017] LMCLQ 588, 594; Stevens (n 142) 579; Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) CLJ 521, 542; Birks (n 7) 158-159.
[145] *TFL Management Ltd* (n 134) [42]-[44].
[146] *Greenwood* (n 78).

owner of the car when the true owner claimed the car back. Day offers a further example: where the defendant enters the claimant's theatre to see a play without paying, the defendant's benefit purely is incidental, with the intention of the claimant to perform to the paying audience. However, it appears the claimant should be able to get restitution from the defendant in this case.[147]

Where does this leave unjust enrichment claims in the cohabitation context? There is unlikely to be a significant problem caused by the concept of incidental benefits. Given there is no real binding authority applying the concept, no normative justification for its use, and a raft of examples of cases which flout the rule, it would appear that there is (or should be) no concept of incidental benefits in English law. However, even if there were such a rule against incidental benefits, it is not at all certain that it should apply to cohabitation cases. First, there can surely be no argument that childcare is provided in the interests of the claimant. It is provided in the interests of the child, on the basis of a continuing interdependent relationship with the defendant. Second, homemaking is more effort for two than it is for one, and therefore it cannot be argued that homemaking is not at the expense of the claimant, or primarily for the benefit of the claimant.[148] The claimant will have had to expend more effort due to the defendant's presence in the home. The claimant is therefore not acting in their self-interest when providing homemaking contributions, and neither is the receipt of the benefit merely incidental to the provision of the services. Indeed, it seems in many cases unpersuasive for the defendant to seek to argue that the claimant is providing homemaking services for their own benefit, rather than for the defendant. Third, where the claimant has improved the defendant's property, there can be no argument that incidental benefits are relevant, as it has simply never been applied or mentioned in any cases involving improvement to property. The rule against incidental benefits is therefore not a problem for the analysis contained in this thesis: there is no authority for it, no clear principle behind it, and it cannot apply to cohabitation cases regardless.

V. CONCLUSIONS

This chapter has examined the concept of an enrichment at the claimant's expense as it applies in the cohabitation context. It has been argued that many of the contributions currently relevant in cohabitation disputes may be considered enrichments on unjust enrichment principles. This is an important analysis of the concept in a context which is otherwise alien to it, as enrichment

[147] Day (n 143) 594.
[148] Casad (n 5) 53.

has never been subject to case law on domestic contributions to the family. This chapter has demonstrated that the concept of enrichment commodifies contributions made by the claimant, which closes the gap between financial and non-financial contributions. Further, commodification draws attention to the economic impact of the claimant's contributions and therefore the generation of wealth for which the defendant is responsible.

It was argued that this commodification of behaviour within the home is a positive aspect of unjust enrichment reasoning, preventing the law from considering domestic contributions as gifts with no exchange value provided for love and affection. Although commodification anxiety is an understandable concern due to the fear of market norms corrupting the essence of care and introducing strategic behaviour to caring responsibilities, the practical implications are that non-commodification hides the economic impact of this behaviour. Incomplete commodification, where an anti-essentialist viewpoint is taken, is likely the strongest route, where it is accepted that market norms can be applied to contributions such as caring and homemaking, whilst acknowledging the emotional side of care which is absent from the market.

Bearing this commodification of activities within the home in mind, this chapter demonstrated that contributions such as improvements to property and domestic services may constitute enrichments. This is an improvement to the claimant's position on the relatively restrictive rules under the common intention constructive trust and shows the potential of unjust enrichment in providing legal development and new perspectives on issues inexorably present in the structure of the current law. The acknowledgement of unpaid work within the home as economically beneficial to the defendant creates an alternative narrative to those currently present in the cohabitation dispute case law, and further demonstrates the necessity of asking not about the parties' consensual dealings with the defendant's property but instead about the unjust retention of wealth by the defendant which the parties have jointly created. This development is based on a movement from disputing within the logic of ownership to disputing within the logic of unjust enrichment.

CHAPTER FIVE – THE UNJUST FACTOR

This chapter considers why the enrichment of the defendant in cohabitation cases is unjust. It does so by contrasting it with the common intention constructive trust, and in particular by examining the differing normative justifications to which each doctrine responds. By 'normative', this chapter means the moral content and theoretical justification underpinning the imposition of obligations on the defendant and the consequent right on the claimant. The normative principle behind a doctrine therefore tells us why, morally and theoretically, that doctrine exists. The normative principle on which the law rests has significant doctrinal implications. It is argued in this Chapter that the normative principle underpinning unjust enrichment is much closer to the unconscionability or 'unjustness' which may colloquially be considered present in cohabitation cases i.e. economic vulnerability and continuing dependency at the end of a cohabiting relationship.

The structure of this chapter is as follows. First, the normative foundations of the common intention constructive trust will be explored. It will be questioned what is meant by 'unconscionability' in this context and the doctrinal implications of this will be examined. It will be argued that the use of common intention makes little sense, and that the law is based on a quasi-contractual model of consensual property dealings which is inappropriate for the context in issue. Second, the normative principles behind unjust enrichment will be discussed. It will be argued that autonomy and self-determination are principles which align more closely with the key issues in the cohabitation context. Respect for the claimant's autonomy and for the liberal ideal of free exit from relationships requires a legal safety net to deal with economic vulnerability. Practically, an unjust enrichment claim that reverses unjust enrichment may help to relieve some of this vulnerability.

The relevant unjust factors will then be discussed. In the third section, failure of basis will be considered and found as the most useful and promising unjust factor for use in cohabitation disputes. This unjust factor is effective where the claimant has contributed on the basis of a particular state of affairs subsisting which then ceases to exist. It is argued that the relevant 'state of affairs' may be the parties' continuing cohabitation relationship. The fourth and final section considers the unjust factor of mistake. This is likely to be less useful than failure of

basis but may be present where the claimant believes they are in a common law marriage and therefore contributes to the home due to their mistaken belief.

I. NORMATIVE FOUNDATIONS OF THE COMMON INTENTION CONSTRUCTIVE TRUST

The common intention constructive trust is traditionally built on unconscionability.[1] This unconscionability is based on a common intention between the parties which has been relied on by the claimant to their detriment. In *Pettitt*,[2] there was an assumption that common intention on its own would be enough.[3] A year later in *Gissing* the notion of unconscionability arose. In Lord Diplock's influential speech his Lordship suggested it would be a 'breach of faith' and 'inequitable' for the defendant to go back on the parties' common intention.[4] The basis for relief under the common intention constructive trust is therefore that after detrimental reliance on the common intention by the claimant, equity will not allow the defendant to deny the interest and will construct a trust to give effect to the parties' intention.[5] Similar language is used by Lord Denning MR in *Eves v Eves*, in which the expectations of the claimant to a share of the beneficial interest of the property would have made it inequitable for the defendant to deny her an interest.[6] However, unconscionability is not mentioned in *Lloyd's Bank v Rosset*,[7] *Stack v Dowden*[8] or *Jones v Kernott*.[9] Neither, in fact, is the requirement for detrimental reliance mentioned in the majority judgments of the two leading cases of *Stack* and *Jones*. Academic commentary favours the need to show a detrimental reliance[10] and, as noted by Judge Paul Matthew, if common intention without detrimental reliance was sufficient to create a constructive trust, section 53(1)(b) of the Law of Property Act 1925 would be meaningless.[11] The requirement for detrimental reliance has recently been reaffirmed in

[1] This was recently reasserted in *Hudson v Hathway* [2022] EWHC 631 (QB).
[2] *Pettitt v Pettitt* [1970] AC 777 (HL).
[3] Lorenzo Maniscalco, 'Common intentions and constructive trusts: unorthodoxy in trusts of land' [2020] Conv 124.
[4] *Gissing v Gissing* [1971] AC 886 (HL) 900, 905.
[5] *Grant v Edwards* [1986] Ch 638 (CA).
[6] *Eves v Eves* [1975] 1 WLR 1338 (CA).
[7] *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL).
[8] *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432.
[9] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[10] Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] Conv 104, 115; Simon Gardner and Katherine Davidson, 'The Supreme Court on Family Homes' [2012] LQR 178, 179, and more recently the doubts expressed in Simon Gardner, 'The ongoing evolution of family property constructive trusts' [2016] LQR 373, 377.
[11] *Dobson v Griffey* [2018] EWCA 1117 (Ch) [20].

O'Neill v Holland, where the Court of Appeal said the requirement is 'firmly based on authority and underlying principles of equity'.[12]

However, the recent case of *Hudson v Hathway* questions the need for the claimant to show detrimental reliance in addition to a common intention, at least where express common intention is concerned.[13] On appeal in the High Court, the judge thought it was 'striking'[14] that the requirement was not mentioned in *Stack* or *Jones* and preferred the idea that no detriment was required. He noted that 'by not dealing with the issue of detriment in *Jones v Kernott*, the Supreme Court either omitted mentioning for completeness that it did not need to be proved in the case before them, or omitted to mention a crucial element of the relevant principles to be applied. In my judgment, the latter is less likely than the former'.[15] The judge thought that the matter was ultimately one of unconscionability, 'in the broadest sense',[16] and that 'the question in each case or each kind of case is what factors and what kind of evidence will satisfy, or not satisfy, the requirement of unconscionability, i.e. persuade the court that the party denying the equitable interest is not permitted to do so'.[17]

Interestingly, part of the judge's reasoning is his interpretation of 'detriment' – he notes for example that the claimant giving love to her children would not constitute detriment, but that the defendant saying 'you can have the beneficial interest in the house due to the love you have given our children' should constitute unconscionability.[18] In some small way therefore the removal of detrimental reliance would make it easier for a claimant to show she has acquired a share of the property, as judges would avoid the gendered questions of whether the claimant's conduct is referable to the common intention to share the home. However, two points mean that not much should be made of this decision. First, it is only one decision, in the High Court, and therefore it is far too early to say that detrimental reliance is not required for the common intention constructive trust. Secondly, the focus of the judge was on express common intention cases, meaning that cases in which the common intention is inferred – which represents most disputes – are unaffected by this decision. This thesis will continue therefore in the belief that detriment reliance does still need to be shown by the claimant.

[12] *O'Neill v Holland* [2020] EWCA Civ 1583, [2021] 1 P&CR DG14 [35].
[13] *Hathway* (n 1).
[14] *Hathway* (n 1) [58].
[15] *Hathway* (n 1) [61].
[16] *Hathway* (n 1) [51].
[17] *Hathway* (n 1).
[18] *Hathway* (n 1) [72].

The reference in *O'Neill*[19] to the underlying principles of equity is interesting, as some academics have argued that unconscionability forms a unifying concept in equity.[20] It provides the normative drive for such equitable principles as perfecting an imperfect gift,[21] undue influence,[22] duress,[23] secret trusts,[24] knowing receipt[25] and proprietary estoppel.[26] Unconscionability is therefore an unsurprising normative basis on which to rest the common intention constructive trust. Despite this, unconscionability is not a well understood concept and is liable to confuse. The common intention constructive trust can, for example, be contrasted with proprietary estoppel, each of which rely on unconscionability caused by detrimental reliance on an understanding.

There is a large amount of literature on the relationship between proprietary estoppel and the common intention constructive trust. They certainly rest on the same (or similar) foundation,[27] and, at times, judges have failed to properly distinguish between them.[28] It has been said that proprietary estoppel will often lead to the same result.[29] Indeed, more recently a judge has suggested that the common intention constructive trust is a sub-set of proprietary estoppel.[30] This is not the orthodox position, and there remain important differences between the doctrines. Proprietary estoppel requires an assurance that has then been relied on by the claimant to their detriment, whereas the trust requires the reliance to be on a common intention. This suggests the key difference is that proprietary estoppel deals with unilateral assurances, as opposed to bilateral intention. It is interesting to ask why the common intention constructive trust involves stricter requirements than proprietary estoppel if they are both fundamentally based on the same concept of unconscionability. If the defendant has formed and communicated an intention (relied on by the claimant) that the claimant is to have a share of the property (which would

[19] *O'Neill* (n 12).
[20] Mark Pawlowski, 'Unconscionability as a Unifying Concept in Equity' [2001] Denning Law Journal 79; Mark Pawlowski, 'Unconscionability in Modern Trust Law' (2018) 24(9) Trusts & Trustees 842; Hilary Delany and Desmond Ryan, 'Unconscionability: A Unifying Theme in Equity' [2008] Conv 401.
[21] *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 WLR 2075*; T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC).
[22] Mindy Chen-Wishart, 'The *O'Brien* Principle and Substantive Unfairness', [1997] CLJ 60; Pawlowski, 'Unconscionability as a Unifying Concept in Equity' (n 20).
[23] Mark Pawlowski, 'Unconscionability as a Unifying Concept in Equity' (n 20).
[24] *Ottaway v Norman* [1972] Ch 698 711.
[25] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 4 All ER 221 (CA).
[26] *Culliford v Thorpe* [2018] EWHC 426, [2018] BPIR 685.
[27] *Grant* (n 5).
[28] *Rosset* (n 7).
[29] *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211.
[30] *Culliford* (n 26).

show unconscionability under proprietary estoppel), why does the common intention constructive trust then go further and require the claimant to share that intention? This normative distinction between the doctrines has never been answered by the judiciary, but it would seem that recognition of the stricter requirements under the trust paves the way for a more stringent remedy, which involves a beneficial interest as of right as opposed to a discretionary equity.[31]

These observations suggest that the normative foundation of the common intention constructive trust is underdeveloped. This has not escaped academic notice. Swadling, for example, points out that:

> Until a fundamental analysis of this subject is undertaken, we will never properly understand the common intention constructive trust, nor its relationship with the remedial constructive trust, the resulting trust, or even proprietary estoppel […] Moreover, we still need to know to what category of event this trust responds. Is it unjust enrichment, wrongdoing, or something in the miscellany?[32]

Such a fundamental analysis would at least ground the concept of unconscionability in this context in a clear normative theory. Swadling's final sentence seems to come from Birks' categorisation of private law obligations into those created by consent, wrongdoing and unjust enrichment, with a miscellaneous category of last resort.[33] Although the unconscionability present in the current law is in terms of the defendant's actions, there is no suggestion that the defendant has committed a wrong. The answer therefore must be either that the trust is created due to consent or that it is a response to the unjust enrichment of the defendant. There is some suggestion that the doctrine protects the expectations of the claimant. This comes from Lord Denning MR's judgment in *Eves*, where his Lordship noted the claimant's expectations and hopes owing to the common understanding between the parties.[34] More fundamentally, however, it would seem that the common intention constructive trust involves obligations created by consent. Judge Paul Matthews accepted in *Dobson v Griffey* that, at its core, the

[31] David Hayton, 'Equitable Rights of Cohabitees' [1990] Conv 370.
[32] William Swadling, 'The Common Intention Constructive Trust in the House of Lords: an Opportunity Missed' (2007) 123 LQR 511, 518.
[33] Peter Birks, 'Misnomer' in Cornish et al (eds), *Restitution: Past, Present and Future* (Hart 1998).
[34] *Eves* (n 6) 1342.

trust is about consensual sharing of property rights,[35] and this would explain why the House of Lords in *Pettitt* based their judgments entirely on the grounds of a common intention between the parties. It may also explain why detrimental reliance was not mentioned in *Stack v Dowden* or *Jones v Kernott*. The force of the case law is that the parties' consensual dealings with the property – ordinarily invalid under section 53 of the Law of Property Act 1925 as they are oral only – can be considered enforceable if the defendant seeks to resile from the agreement after the claimant has detrimentally relied on it. There are echoes here of *Rochefoucauld*,[36] where the court held that the defendant could not use formality requirements to carry out a fraud, or of *Pennington v Waine*,[37] where after detrimental reliance by a donee, the donor could not resile from their imperfect gift.

To hold out consensual property dealings – coupled with some further unconscionability – as the normative basis of the trust is entirely consistent with wider equitable doctrine. It is, however, a strange basis for a context where it is readily accepted that parties are unlikely to ever form an agreement.[38] This is likely a consequence of the decision by the court in *Pettitt* and *Gissing* to ground this area in traditional property law and equitable analysis, deciding purely a question of proprietary entitlement between married couples (soon to be protected under statute) and anxious to reject the existence of a wider judicial discretion based on section 17 of the Married Women's Property Act 1882. As mentioned above, Birks' categorisations tell us that it is not inevitable that the trust responds to such a basis: property law may respond to a range of events, including consensual dealings with property but also wrongdoing and unjust enrichment. Mutual agreement as the basis of the trust arising between cohabiting couples is a choice, not a necessity. Why is it unconscionable for the defendant to retain the entire beneficial interest in the property at the end of the relationship? The common intention constructive trust's answer is that the parties had previously agreed to share in a different way, and the claimant had detrimentally relied on that agreement.

This normative justification has clear doctrinal implications. A theory which positions consensual property dealings as its underpinning rationale will need to consider whether the parties had a common intention or came to a shared understanding about the relevant property.

[35] *Dobson* (n 11) [10].
[36] *Rochefoucauld v Boustead* [1897] 1 Ch 196.
[37] *Pennington* (n 21).
[38] *Midland Bank v Cooke* [1995] 4 All ER 562 (CA) 575.

Using unjust enrichment as the underlying theory could, as we shall see, change our understanding of the dispute.

The nature of the intention required is for a state of affairs to come into being – that the claimant is to acquire an interest in the property, or otherwise to acquire a larger share than they currently have. Usually, if we intend for something to happen, we take steps to ensure that it does happen. If say I intend to give you £100, you might expect that I take certain actions in relation to this intention (for example, getting the money out of the bank, handing over the money). If, a month later, you have not received £100 you may begin to question whether my stated intention was genuine. Intentions without commensurate actions appear to involve merely hoping that something happens. Tuomela conceives joint intentions as either an intention to *perform* X, or to *see to it* that X comes about.[39] In the common intention constructive trust, courts find intentions which have not been actioned and, indeed, where no steps at all have been taken.[40] Often, in fact, there will be no evidence that steps were ever intended to be taken to transfer the property into the joint names of the parties. A common intention for the claimant to acquire property may be found despite the fact that there were never any steps taken to, for example, speak to a solicitor and undertake the necessary formalities. Courts therefore accept that the parties had an intention for the claimant to acquire the property without evidence that either party was ever going to carry out this intention. This implies that the unconscionability in cohabitation cases must be different from the unconscionability present when donors resile from imperfect gifts. When completely constituting a gift, equity will only intervene where the formalities have failed if the donor has completed all necessary steps[41] or the donee has detrimentally relied on a communicated intention to give.[42] The reasoning for this seems to be that equity will not help a volunteer and fill in gaps where formalities were required – under normal circumstances a voluntary gift remains completely revocable. It has not been explained why the common intention constructive trust may bite on a lower standard of unconscionability, where the donor – here the legal owner – has done nothing at all to affect their intention. Absent any intention to take steps to bring the plan to fruition and ensure the

[39] Raimo Tuomela, 'We-Intentions Revisited' (2005) 125(3) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 327.
[40] Though detrimental reliance might show a commitment to an intention, it does not necessarily show steps to action that intention.
[41] *Re Rose* [1952] Ch 499.
[42] *Pennington* (n 21).

claimant acquires a share in the property, the state of mind of the parties can instead be referred to as a 'want' or 'desire' or perhaps 'hope'.

This is particularly true as it is legally impossible for the claimant to create the state of affairs which the parties 'intend'.[43] As Tuomela argues, joint intentions seem to imply both parties as actively involved.[44] In sole legal owner situations, however, only the defendant has the power to provide the claimant with a share of the property. It is therefore difficult to see why a joint intention rather than a unilateral intention is required. The claimant can do nothing at all to acquire an interest in the property and, as a volunteer, their intention to acquire this interest would ordinarily be irrelevant. This is further the case when we consider, as noted above, that proprietary estoppel requires only unilateral action, rather than communal or joint action ('action' in proprietary estoppel being an assurance or representation) yet still considers unconscionability to arise once detrimental reliance can be shown.

The requirement for commonality of intention therefore points to an almost quasi-contractual basis of the trust, which was above referred to as consensual dealings with property rights. Galloway has argued that in this way property law acts similarly to contract law as it is concerned with exchanges.[45] Intentions act as motivations for contributions which, in turn, act as 'quid pro quos' for the acquisition of property rights. In other words, the claimant acquires a beneficial interest in exchange for contributions to the family home. Galloway uses this contractual nature of the common intention constructive trust to demonstrate why there is a retained focus on financial contributions within the case law. Domestic contributions, as already available to the defendant under the relationship due to societal expectations, cannot act as quid pro quos for the transfer of property rights.[46] Only normal transactional behaviour – usually financial or market-oriented behaviour – may provide the exchange actions required under the quasi-contractual basis of the trust. Galloway therefore argues that the common intention constructive trust is structurally and institutionally unequal, with even possible future developments relating to increased discretion on the part of judges likely to fail to deal with

[43] Carl G Hedman, 'Intending the Impossible' (1970) 45 Philosophy 33.
[44] Tuomela (n 39). See also Olle Blomberg, 'Shared intention and the doxastic single end condition' (2016) 173(2) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 351.
[45] Kate Galloway, 'The Role of Pateman's Sexual Contract in Beneficial Interests in Property' (2019) 27 Feminist Legal Studies 263.
[46] Similar to divorce law prior to 1970; see Anne Barlow, 'Configuration(s) of Unpaid Caregiving Within Current Legal Discourse in and around the Family' (2007) 58(3) Northern Ireland Legal Quarterly 251.

such inequality. The requirement for *common* intentions, and the quasi-contractual basis upon which this rests, leads to many of the issues which can be found within the case law.

II. UNJUST ENRICHMENT THEORY – AUTONOMY AND THE FREEDOM OF SELF-DETERMINATION

While the common intention constructive trust requires a common intention due to an underlying theory of consensual property dealings and unconscionability, unjust enrichment requires proof that the defendant was not intended to benefit from the claimant's conduct. This is justified by an underlying theory of autonomy. Importantly, just as the constructive trust's underlying justification of unconscionability does not mean that judges have a free discretion to impose a trust according to good conscience, the unjust enrichment theory discussed here does not mean that judges would have a discretion to broadly consider the claimant's autonomy and freedom of self-determination. It is the doctrine which provides clothing for the theoretical justification. However, by understanding unjust enrichment's theoretical justification in the cohabitation context the doctrinal implications of an unjust enrichment claim in this area will become clear. Unjust enrichment theory was discussed in detail in Chapter Two, and therefore this section aims only to set up the doctrinal analysis in sections three and four.

Unjust enrichment appears to be based on freedom of self-determination.[47] Nadler defines freedom of self-determination as 'on this view of freedom, to be free is to act from purposes that are actually self-chosen and to be able to view one's life as broadly expressive of one's own projects and goals, as the unfolding of one's self-determined ends'.[48] In other words, unjust enrichment protects one's ability to bring about certain consequences. If the claimant fails in doing so, unjust enrichment may allow restitution. So, in *Kelly v Solari*,[49] the claimant's intention when paying money to the defendant was to pay off a debt. As it turns out, this payment was not needed – no debt existed. Under the self-determination theory, restitution was required because the claimant had failed to actualise their goal: the payment of a debt. There is, in Nadler's view, a normative significance in the relationship between action and intention, for to see our life as our own we need to see self-chosen paths. The law refuses the ordinary

[47] Supported most notably in Jennifer M Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28(2) OJLS 245. See also Kit Barker, 'The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) and Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 37.
[48] Nadler (n 47) 262.
[49] *Kelly v Solari* 152 ER 24, (1841) 9 Meeson and Welsby 54.

application of property law by denying the defendant's reliance on their property right if the receipt of that right violates the claimant's freedom of self-determination. Nadler then links this theory of self-determination with the cohabitation context:

> [I]n the case of the partner in the quasi-spousal relationship who works and sacrifices for what she believes is a common enterprise but actually acquires no share of the family assets because property law gives rights of ownership to the title-holder alone […] the law lends its support to the subversion of the plaintiff's reasonable expectation. The court, as a public institution of justice, responds by preventing this effect of the law. It thus protects the plaintiff's right of self-determination where it is undermined in the circumstances by the laws of property or contract.[50]

The effect of unjust enrichment is therefore to restrict the ordinary consequence of property law, which in the cohabitation context would involve the defendant capturing all the wealth from the relationship, including economic benefits generated by the claimant without intending the defendant alone to take it. As the claimant never intended to benefit the defendant personally by her actions (instead merely intending to further the relationship and benefit the family as a whole), to allow the defendant to assert his title to the entire economic benefits generated during the relationship would violate the claimant's freedom of self-determination. The claimant's freedom of self-determination justifies unjust enrichment's interference with the ordinary consequences of an interdependent informal relationship.

We can see an implicit reference to the freedom of self-determination in Canadian jurisprudence. In *Pettkus v Becker* Dickson J held that the claimant's expectations – and therefore self-determined goals – were a foundational principle when applying unjust enrichment to the cohabitation context:

> I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances

[50] Nadler (n 47) 267.

> where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[51]

It has also been stated that finding such expectations is relatively easy.[52] This is a different formulation than English unjust enrichment, as expectations are not considered relevant when asking whether restitution is required. Domestic courts have instead looked at intentions, but the normative theory is the same. The cohabitant has acted to benefit the family and the defendant during the relationship. That is her goal. If the defendant takes all the benefits at the end of the relationship, the claimant cannot be considered to have freely provided these benefits. To protect the claimant's freedom of self-determination – and recognise her goals of benefitting the family as a whole – unjust enrichment steps in.

Freedom of self-determination fits into a broader normative foundation of the protection of the parties' autonomy. It may be useful to consider the concept of autonomy as it applies to cohabiting couples in order to understand the gaps created by the common intention constructive trust and how unjust enrichment may be able to fill them. The word 'autonomy' is nebulous. According to Fineman, its 'amorphous, overarching, and imprecise nature means that [it] can be used simultaneously by those holding disparate positions in regard to any proposal'.[53] It is therefore important to define what is meant by autonomy in this context. In the cohabitation context, autonomy is important as the claimant and defendant must be able to walk freely away from a relationship, able to live life away from the relationship. It rests on the basic idea that some degree of economic equality is required between the parties before autonomy can be enjoyed.[54] Therefore, to fulfil the liberal commitment to free exit from relationships, some level of economic vulnerability needs to be corrected and interdependency between the parties unwoven.

This sort of *relational* autonomy is not ordinarily associated with unjust enrichment in England and Wales. However, Dagan has suggested that unjust enrichment can facilitate the liberal

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[51] *Becker v Pettkus* [1980] 2 SCR 834 (SCC) [41]. For similar formulations, see *Sorochan v Sorochan* [1986] 2 SCR 38 (SCC) [20]; *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 (SCC); *Peter v Beblow* [1993] 1 SCR 980 [10]. Canadian courts made a move away from the unjust factors approach in *Garland v Consumers' Gas Co* [2004] SCC 25, but reasonable expectations are still relevant: *Kerr v Baranow* [2011] SCC 10 [44].

[52] *Pickelein v Gillmore* (1997) 30 BCLR (3d) 44 [15].

[53] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004) 26.

[54] Fineman (n 53) 29.

commitment to free exit and can protect parties from some of the consequential dangers. The risk of 'free exit' from a relationship, causing financial hardship for parties who are dependent on their former partner, is much greater for cohabiting couples than it is for those in registered relationships.[55] This is because when exiting a marriage or civil partnership, financial remedies regimes operate in a manner to prevent one party from leaving disadvantaged in comparison to her partner.[56] There is also a non-discrimination principle, where parties are treated equally regardless of whether they were the breadwinner or the care-giver.[57] However, this is not the case for cohabiting relationships, where any remedy at the end of a relationship will require the parties to have formed a mutual intention as to whether the claimant had a beneficial interest in the couple's former home. Restitution may, therefore, provide a safety net against vulnerability generated as a result of participating in an informal relationship.[58] Dagan couches this vulnerability in terms of opportunistic behaviour and breach of trust (in the non-legal sense) by one party, causing financial hardship to the other party. In allowing restitution, 'unjust enrichment claims facilitate informal intimate relationships by protecting interpersonal relationships of reciprocity, trust, and reliance and shielding the parties to such relationships against the lingering risks of opportunism and abuse of trust'.[59]

As Gordon-Bouvier rightly points out, 'a commitment to autonomy requires that exit from [relationships] be accompanied by an open future – one in which the individual can freely pursue new goals and directions without being held back by her past relationships'.[60] If a relationship ends with one party facing significant financial hardship, there is a severe limit to their autonomy to move on with life and pursue these new goals and directions. As argued in Chapter Two, 'autonomy' here is not defined by opposition to dependence and connection.[61] Friedman argues that 'because women were usually limited to dependence on men for financial support, whereas men had no comparable limitation, women doubtless suffered more than they benefitted from the cultural idealisation of autonomy'.[62] Reliance on autonomy as requiring

[55] Note that this is not necessarily true in all jurisdictions. For example, in New Zealand cohabitation without registration for three years results in treatment as if the parties were spouses. See the Property (Relationships) Act 1976.
[56] This is combined with other principles such as needs, sharing and compensation.
[57] *White v White* [2001] 1 AC 596, [2000] 3 WLR 1571.
[58] Hanoch Dagan, *The Law and Ethics of Restitution* (CUP 2004) 175.
[59] Dagan (n 58) 165.
[60] Ellen Gordon-Bouvier, 'The open future: analysing the temporality of autonomy in family law' [2020] CFLQ 75, 81.
[61] Catriona MacKenzie and Natalie Stoljar, *Relational Autonomy* (OUP 2007) 10.
[62] Marilyn Friedman, 'Autonomy, Social Disruption and Women' in Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy* (OUP 2007) 45.

individuals to be 'self-governing' and 'independent' is therefore harmful. The concept of 'relational autonomy' is preferred, where we accept that people's interests are often intertwined, and that dependence is unavoidable in family relationships.[63] Autonomy here is not used to argue that those in relationships should chase self-serving ideals or complete independence from their surrounding family. Indeed, this chapter furthers the argument that unjust enrichment actively considers the claimant's intention to contribute to family life, rather than the idea that the claimant must act for mercenary considerations. However, it must be accepted that, at the end of a relationship, any interdependence between the couple needs to be dealt with to allow the couple to continue their life separately from each other. In that way, the law must provide the couple with financial autonomy – the ability for dependence to be removed to allow the relationship to end without financial ties continuing to negatively impact the parties. This is particularly important for those who are in abusive relationships or are otherwise vulnerable due to continuing financial ties to their former partner.

As Wong notes, contributions to the family often 'become skewed in favour of one partner so as to cause greater dependency, emotional and financial, on the part of the other partner which results in his or her economic vulnerability, should the relationship terminate'.[64] To ignore this dependency between the parties at the point of relationship breakdown would allow financial hardship to flourish. Barlow and Smithson take the view that within cohabitation relationships there often exists a gendered psychological contract between the partners which is implicitly assumed and 'leads to no recognition of the assumed quid pro quo which one partner may have relied on in choosing to play a role undertaken for the benefit of the family as a whole'.[65] The law must deal with this dependency if it is to allow the parties to move on and must face up to the societal pressures which exist within relationships. Some degree of equality is required before autonomy can be enjoyed, as autonomy is only possible when one is in a position to be able to share in society's benefits and burdens.[66] Further, it is impossible to ignore the gendered nature of this discussion, as the relationship often involves a power relationship where the man

[63] Jonathan Herring, 'Relational Autonomy and Family Law' in Julie Wallbank, Shazia Choundhry and Jonathan Herring, *Rights, Gender and Family Law* (Routledge 2009).
[64] Simone Wong, 'Caring and Sharing: Interdependency as a Basis for Property Redistribution?' in Anne Bottomley et al (eds), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Bloomsbury 2009) 59.
[65] Anne Barlow and Janet Smithson, 'Legal Assumptions, Cohabitants Talk and the Rocky Road to Reform' [2010] CFLQ 328.
[66] Fineman (n 53) 29.

is able to capture a disproportionately high share of the benefits of the relationship and bear a disproportionately low share of the costs.[67]

Of course, as stated earlier, this does not mean that judges have a discretion to resolve economic inequality and assert the relational autonomy of the parties. This theory simply demonstrates that the common intention constructive trust fails to respond to some of the normative concerns in this area. That is not surprising, as it is justified by upholding otherwise unenforceable agreements about property rights. Unjust enrichment, in focusing on economic benefit rather than ownership and by considering whether the receiving of these benefits by the defendant is unjust, may respond better to some of these normative concerns. It is not aimed at relational autonomy or economic equality, but, as Dagan has argued, the function of unjust enrichment in these cases is to restore the parties to their positions prior to the enrichment being made. In this way unjust enrichment may practically further some of the normative policy goals mentioned here. A successful unjust enrichment claim is, however, still required. It is to the doctrinal requirements that this chapter now turns. There are two potential unjust factors for unjust enrichment in this context – failure of basis will be focused upon as the most useful, but a little will also be said about mistake.

III. FAILURE OF BASIS

By focusing on the commonality of the parties' intentions, the law misses the potential relevance of the claimant's own intentions when contributing to the family home. Given much of the discussion in the case law is about the effect of the claimant's contributions – and who ultimately is to enjoy the benefit of them – it is perhaps strange that the current law dedicates very little time to discovering what the claimant's intentions surrounding these contributions were. Unjust enrichment's normative weight, on the other hand, comes from such a consideration of intention, where the circumstances of the claimant's contributions are vital in order to protect the claimant's freedom of self-determination – the ability for the claimant to choose and achieve their own goals. In doing so, unjust enrichment has developed a much more sophisticated understanding of the concept of intentions that the common intention constructive trust. The current law takes the view that either the parties must have had a common intention to share, or otherwise the defendant will be able to take all the economic benefits generated in the relationship. Unjust enrichment takes the opposite view: there must have been an

[67] Dagan (n 59) 170.

(objective) intention for the defendant to take the benefits, or else restitution requires that the benefits must be shared.

Failure of basis is usually considered a quasi-contractual unjust factor which shows that the enrichment of the defendant at the claimant's expense is 'unjust'. Where the claimant has performed their side of a contract without the defendant's corresponding performance, the claimant will be able to claim breach of contract. However, where contract law cannot be used – either because a contract is yet to be formed or because it is unenforceable or void – the parties must instead utilise the law of unjust enrichment. Where the claimant performed on the basis that the defendant would act, and the defendant fails to do so, the claimant can invoke unjust enrichment to get restitution, using failure of basis as the unjust factor. For example, in *Chillingworth v Esche*,[68] purchasers agreed to purchase land 'subject to contract' and paid a deposit for the purchase. They later chose not to follow through with the purchase. It was held that the deposit was paid on the condition of a subsequent contract coming into existence and, as that had not happened, the vendors could not in good conscience keep the deposit. The cohabitation context, however, is clearly much different from this. Not only is it unlikely there will be anything resembling a contract, but it is also unlikely that the claimant will have acted on the basis of the defendant performing any specific act. Thankfully, the claimant does not need to have acted on the condition of counter-performance by the defendant. It is well established that the claimant may get restitution where the basis which failed is a state of affairs:

> [F]ailure of consideration is not limited to non-performance of a contractual obligation, although it may include that... [T]he concept embraces payment for a purpose that has failed as, for example, where a condition has not been fulfilled, or a contemplated state of affairs has disappeared.[69]

In *Re Ames Settlement*,[70] for instance, a gift was held on trust, to be paid after one year of marriage. However, the marriage was declared void ab initio. It was held that there had been a

[68] *Chillingworth v Esche* [1924] 1 Ch 97.
[69] *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 [16]. Readers will note here the use of the term 'failure of consideration' rather than 'failure of basis'. They are the same thing: basis has recently been favoured over consideration owing to the latter's use in contract law.
[70] *Re Ames Settlement* [1946] Ch 217. See also *P v P* [1916] 2 IR 400.

failure of basis – the relevant basis being the existence of the marriage – and the gift was therefore held on resulting trust for the settlor. Again, in *Shilliday v Smith*,[71] the pursuer had paid substantial amounts towards the improvement of the property owned by the respondent. She argued that this money had been paid on the basis that, in future, the parties would be married, and that the payments were therefore made on the condition of marriage. This was accepted, and restitution allowed. It should be noted further that the respondent's argument that the benefits he received were incidental, the true intention being to benefit the pursuer, was rejected.[72]

Though rare, it may be that the parties can show they acted on the basis of a future marriage – both Valerie Burns[73] and Janet Eves,[74] for example, wanted to get married to their partners. Of course, cohabitation cases do not usually involve an expectation of marriage, and it will be a rare case where the claimant can argue that they only enriched the defendant on the condition of a future marriage taking place. This thesis argues that the failure of basis argument can be pushed further. What if the basis is not marriage, but is instead the subsistence and continuation of the cohabiting relationship?

A) Failure of Basis as Failure of an Intimate Relationship

The argument made here is that if the enrichment occurred on the basis of the continuing relationship between the parties (as the claimant would not have enriched the defendant had they not been partners) then, when the relationship ends, the basis fails and restitution is required. The intention of the claimant is therefore qualified rather than absolute. By qualified intention, what is meant is that the claimant did not intend for the defendant to have the benefit of her contributions to the family in all circumstances. The claimant may well intend to benefit the family as a whole, to continue the relationship and to increase the wealth of the defendant while the relationship is still continuing. It is another thing entirely to suggest that the claimant's contributions were intended to benefit the defendant absolutely, in all circumstances, even after the relationship has ended. An intention to sustain the relationship cannot be equated to an intention to leave the defendant with a disproportionate share of the benefits once the relationship has ended. Intentions to give can be qualified and predicated on

[71] *Shilliday v Smith* 1998 SC 725.
[72] *Shilliday* (n 71) at 731, 734-735, where it was made clear that the improvement of property in consideration of marriage was the principal purpose, with the benefit to the pursuer merely incidental to this purpose. See Chapter Four.
[73] *Burns v Burns* [1984] Ch 317 (CA).
[74] *Eves* (n 6).

a condition. Unjust enrichment, in using failure of basis as an unjust factor, understands this. The claimant may want to give altruistically in certain contexts and while certain state of affairs are subsisting, but not if those state of affairs then end. The claimant's intention is qualified.

Scottish cases seem to have, to a degree, accepted this failure of basis analysis. This can be seen in *Shilliday v Smith*, discussed above.[75] In *Satchwell v McIntosh*,[76] the pursuer sold their house and paid money to the defender for the purpose of buying and refurbishing the house in which they lived. The relationship ended and the pursuer argued for the return of their money. The argument of the pursuer was that:

> The monies provided by the pursuer to the defender were made available on the basis that he would continue to reside with the defender at [their home] for the rest of his life […] had the pursuer not contemplated that he and the defender would continue to reside together at [their home] these monies would not have been so provided.[77]

There was no agreement between the parties: it was held that a mutual understanding was not necessary. It was the state of mind of the pursuer only which was relevant.[78] The judge held that 'the property was transferred on the condition that parties would continue to live together […] [i]f there required to be [an unjust factor] as suggested by counsel for the defender it was that cohabitation would not stop'.[79]

Although there are no other decided cases using failure of basis in the cohabitation context, there is a resonance with other statements of principle in other jurisdictions. In the Canadian context, McCamus has argued that:

> As in the context of frustrated contracts, a surprising event has created a situation in which one party has received an unanticipated windfall. In the absence of a clear understanding between the parties as to what should happen with respect to the wealth produced by their joint labour […] it would be unjust to allow the spouse with title,

[75] *Shilliday* (n 71).
[76] *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117.
[77] *Satchwell* (n 76) [2].
[78] *Satchwell* (n 76) [10].
[79] *Satchwell* (n 76) [12].

> typically the husband, to in effect enrich himself through the appropriation to himself of wealth produced by the other spouse's effort.[80]

A similar point can be found in *Midland Bank v Cooke*.[81] In this case Waite LJ said that:

> When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure […] For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitable be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of homebuyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.[82]

This passage indicates judicial acceptance that the common intention of the parties is an unrealistic benchmark for disputes between cohabiting couples, and it is instead much more realistic to understand parties as contributing on the basis and expectation that their relationship will continue. The High Court of Australia made a similar point in *Baumgartner v Baumgartner*:

> The arrangement for the pooling of earnings […] was designed to ensure that their earnings would be expended for the purposes of their joint relationship and for their mutual security and benefit. To the extent which the pooled funds were the source of payment of mortgage instalments by the appellant, the pooled funds contributed not only to present accommodation expenses but also to the security of the parties'

[80] John D McCamus, 'Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?' in Stephen Pitel, Mitchell McInnes and Jason Neyers (eds), *Understanding Unjust Enrichment* (Hart 2004) 365.
[81] *Cooke* (n 38).
[82] *Cooke* (n 38) 746.

> accommodation in the future. In this context it would be unreal and artificial to say that the respondent intended to make a gift to the appellant of so much of her earnings as were applied in payment or mortgage instalments.[83]

The High Court explicitly linked the resulting unconscionability to the appellant's retention of wealth intended to be for the continuation of the family. Again, the court in *Muschinski v Dodds* stated:

> The principle [of unconscionability] operates where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that he or she should enjoy it.[84]

The High Court of Australia is thereby accepting that the fundamental unconscionability in these cohabitation cases comes from the defendant's taking a disproportionate share of assets at the expense of the claimant which were intended not for the defendant personally, but for the relationship. In Canada, a similar idea has been espoused, relating to the claimant's thwarted reasonable expectations of receiving a share:

> I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[85]

[83] *Baumgartner v Baumgartner* (1988) 62 ALJR 29, 149.
[84] *Muschinski v Dodds* (1985) 160 CLR 583, 60 ALJR 52, 620.
[85] *Becker* (n 51) [41].

Again, it is the state of mind of the claimant that is important. It may be difficult to accept, given the context, the necessity of the claimant having an expectation to acquire a share,[86] although note Lord Bridge's comments in *Lloyds Bank v Rosset*, where his Lordship said that 'the expectation of parties to every happy marriage is that they will share the practical benefits of occupying the matrimonial home whoever owns it'.[87] Further, in *Gissing* it was noted that spouses will generally expect that, on death of one of them, the property will revert to the other,[88] a position supported in *Stack* for joint legal owners.[89] Regardless, unjust enrichment in the English context is not normally considered to be based on expectations of the parties, and so no more will be said on this point.

The quotations above make clear that other Commonwealth jurisdictions consider the unjust retention of wealth by the defendant as fundamentally important to the cohabitation context as it demonstrates that the defendant should not be able to retain assets from the relationship which he was not intended to have. These cases further show that contributions to the family cannot be equated with intention to benefit the defendant personally, especially once the relationship has ended. Where contributions have been made on the basis of the continuing cohabiting relationship, it is unconscionable or unjust for the defendant to retain wealth generated by the claimant. It should be clear that unjust enrichment takes a different view of unconscionability here than the common intention constructive trust. While the trust looks at mutual understandings that have been detrimentally relied upon, unjust enrichment considers the defendant's retention of economic benefits generated by the claimant (and contributed on the basis of the relationship) which he was never intended to have.

B) Absolute and Qualified Intentions

Failure of basis therefore has resonance in the cohabitation context. This is because it accepts the reality of qualified intention, that the claimant by acting on the basis of the relationship does not intend to personally benefit the defendant. This cannot be said of the current law, which deals with absolute intention. One example is where the claimant's motivations must be boxed into either 'for the family' or 'for herself'.[90] We can also see the fiction of absolute intention from *Southwell v Blackburn*.[91] Here, an assurance was made by the defendant to the

[86] John Mee, *The Property Rights of Cohabitees* (Hart 1999) 203-205.
[87] *Rosset* (n 7) 128.
[88] *Gissing* (n 4) 896.
[89] *Stack* (n 8).
[90] Explored in Chapters One and Four.
[91] *Southwell v Blackburn* [2014] EWCA Civ 1347, [2015] 2 FLR 1240.

claimant: the claimant would have the sort of security a wife has, that she would always have a home and be secure in her current one. Although romantic, it may be argued that this statement was qualified. As Georgiou says:

> When we act, or make statements about our intentions to act, much is left unsaid. If I promise to meet a friend at the cinema, I need not say that my obligation to show up on time is conditional upon there being no intervening natural disasters. Similarly, if, once we arrive, we purchase popcorn from the cinema cashier, we need not explain to the sales assistant that we only intend so to purchase if we can take the popcorn into the movie theatre itself. If we were stopped at the door to the theatre, we would be perfectly entitled to demand our money back from the cashier. All of these conditions are, without second thought, implied into our communicative acts.[92]

Let us think about the promise used in *Southwell*: 'you will always have a home and be secure in this one'. Clearly there are conditions attached. For example, 'you will always have a home unless I am made bankrupt and can no longer financially support either of us'. Or 'you will always have a home unless the house is destroyed by a fire'. Are we to suppose that Mr Southwell was making this promise regardless of any possible change in the relations between the parties? In the heat of the romantic moment, many promises may be made. Common sense tells us that the words 'unless we break up' may often be (silently) intended.

Older proprietary estoppel cases support this analysis. In *Coombes v Smith*,[93] for example, the assurance was that the claimant had no need to worry about her security and that she could continue to live in the property for as long as she wished. Council for the defendant submitted, however, that couples living together always hope or expect their relationship will be a permanent one, but what they say at this point cannot be relied upon when the relationship has broken down. The judge held that 'there is no evidence before me of any discussion at all between the plaintiff and the defendant as to what should happen in the event of their relationship breaking down and of the defendant choosing to live with another woman'.[94] The

[92] Alexander YS Georgiou, 'What's "Unjust" About Unjust Enrichment: An Answer at Last?' [2021] LMCLQ 63, 70.
[93] *Coombes v Smith* [1987] 1 FLR 352. See also *Layton v Martin* [1986] Fam Law 212 where it was held that assurances of financial security were not sufficient for proprietary estoppel.
[94] *Coombes* (n 93) 363.

defendant's assurances were understood as qualified; conditional on the continuation of the parties' relationship. This must be correct. It is important that both parties are protected on breakdown of a relationship, but courts should not strain credulity in seeking to do so by giving an unrealistically wide interpretation of assurances given by the defendant.

Of course, the lack of analytical rigour in *Southwell v Blackburn* does not need to extend to dissatisfaction with the result.[95] One may feel sympathetic to Miss Blackburn. Further, the lack of any real precision about the nature of the defendant's assurances is necessitated by a lack of consideration of conditional intentions on the claimant's side. If the claimant's intentions are pigeonholed into 'for the family' or 'for herself', then it makes sense to take an equally unsophisticated examination of the defendant's intentions. But if we accept the qualifications attached to the claimant's intentions, this kind of artificiality is not needed.

Another example of the focus on absolute intentions is from *Stack v Dowden*, where Baroness Hale (as she then was) notes Lord Hoffmann's concept of an 'ambulatory' constructive trust (where the parties' intentions may change over time) but argues that:

> At any one time [the parties'] interests must be the same for all purposes. They cannot at one and the same time intend, for example, a joint tenancy with survivorship should one of them die while they are still together, a tenancy in common in equal shares should they separate on amicable terms after the children have grown up, and a tenancy in common in unequal shares should they separate on acrimonious terms while the children are still with them.[96]

It is hard to see why not. Such qualified or conditional intention is the more realistic way of understanding intimate relationships. As Thompson argues, a feminist and relational way of understanding agreements between couples is by accounting for the fact that 'many obligations and transactions of [a relationship] cannot be delineated at the beginning of the relationship'.[97] This means that it is important to avoid binaries and unnuanced categorisation of party agency.

[95] For an argument that the discussion of the assurance in *Southwell* (n 91) lacked analytical rigour, see Andy Hayward, 'Cohabitants, Detriment and the Potential of Proprietary Estoppel' (2015) 27 CFLQ 303.
[96] *Stack* (n 8) [62].
[97] Sharon Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45(4) Journal of Law and Society 617, 633.

It is perfectly reasonable that parties will have different intentions on how the property will be dealt with depending on future actions and relations between the parties. Baroness Hale here fails to nuance the court's exploration of intention. It may well be, of course, that an acceptance of this more complex understanding of intention is simply too difficult to achieve under the current common intention constructive trust framework. That does not need to be the case and shows a weakness in the law. By accepting intention in the way unjust enrichment conceives it, we can understand that although the claimant is, for example, intending to contribute to the welfare of her children and partner, or to make the house look more pleasant, contributions such as childcare or homemaking are not intended to economically benefit the defendant *personally*, and instead are intended to further the parties' life together. On this basis, the law cannot at the end of the relationship allow the defendant to retain these economic benefits. That was not what was intended by the claimant's acts, and respect for the claimant's self-determination and autonomy means we must not allow the defendant to take benefits from the relationship, at the claimant's expense, which he was never intended to have. If the defendant was not supposed to benefit, the only other possible answer is that the defendant must provide restitution proportionate to the claimant's contributions.

The advantage of this argument is that it puts the domestic context front and centre, as it explicitly acknowledges the reason for the claimant's enrichment of the defendant – the relationship itself – and uses that as the reason for restitution. This has the advantage of moving away from searching for agreements which rarely truly exist. In considering the claimant's motivations, failure of basis turns certain judicial narratives in this area on their head. The provision of domestic services on the basis of love and affection for the defendant would not lead to a rejection of the claim, and indeed an acceptance that the claimant was acting in order to continue and improve the relationship would enhance the success of the claim, as it would show that the defendant was not intended to personally benefit (and therefore that there had been a failure of basis). It would also put financial and domestic contributions on the same footing, for they would be equally relevant to the question of whether the claimant was acting on the basis of the relationship continuing. Unjust enrichment would therefore supplant the common intention of the parties with a failure of basis analysis where the courts must decide whether the claimant was acting on the basis of a continuing cohabiting relationship or in order to benefit the defendant personally.

This is not to say that unjust enrichment does not require any meeting of minds. In one sense, it does: to be liable, the defendant must have been aware of the condition attaching to the

claimant's intention. Without this awareness, no restitution can be expected once the condition fails. However, it seems incredible that the defendant can ever not be aware that the claimant's intention to benefit the family and further the relationship is based on the subsistence of that relationship, and therefore further that the defendant is not intended to personally benefit once the relationship ends. It seems difficult for the defendant to argue that he was not aware that the claimant was intending to benefit the subsisting relationship and family generally when contributing to the home. He may not think it is fair that he should have to share his wealth with the claimant, or that the claimant's work is worth it (this point is dealt with in Chapter Four), but when asked what he believes the claimant intended, usually he would have to say that she was contributing on the basis of their continuing relationship. We can see here a shift in the power balance between the parties. In the common intention constructive trust, the defendant must consent to grant the claimant a share of the property. In unjust enrichment, so long as he was aware of the claimant's lack of intention to benefit him personally (and accepts the enrichment regardless), he cannot refuse the sharing of assets.

C) Practical Consequences – From Common Intention to Failure of Basis

If the unjust enrichment concept of understanding the parties' intentions was to be adopted, it would mean a shift in the relevance of these intentions. We are not searching for an agreement between the parties. Instead, it is the claimant's objective purpose when contributing to the family home which is of vital importance. It is this which allows us to say that the defendant was never intended to personally benefit from the claimant's contributions, and therefore that the defendant's economic benefit at the claimant's expense violates the claimant's freedom of self-determination.

Restitution is required to fix this and ensure that unjust economic benefits do not remain with the defendant. We can see therefore that a consideration of such various factors contained in paragraph 69 of *Stack v Dowden*[98] should be relevant only to the extent that they tell us whether the claimant was acting on the basis of the relationship, and therefore was not intending to benefit the defendant personally. When the relationship ends, the basis fails, and restitution is required. There may be a factual question as to whether the claimant was acting on the basis of the relationship or not. One-off gifts and joint expenses (such as grocery bills) may legitimately be considered to have been paid regardless of whether the relationship was going to continue, for they were necessary when they occurred. More substantial expenses such as improvements

[98] *Stack* (n 8).

to property would unlikely have been paid but for the basis of a continuing relationship, and certain life sacrifices such as giving up a job to take care of children will usually have been made on the basis of continuing support in a cohabitation context by the defendant. It is anticipated that this question would be reasonable easy to answer and would not require complex consideration of the relationship at hand.

Part of proving that such a basis was present may involve looking at several factors to determine the claimant's intention. It is, of course, the *objective* intention of the claimant which is required here. The length of the relationship, presence of children and nature of the parties' relationship may be relevant. A committed, long-term relationship, however, is not necessary. All that is necessary is to establish whether the claimant was acting on the basis of a subsisting relationship. If so, failure of basis can be used. Whether the claimant can show they were acting on the basis of a committed, long-term relationship (and therefore not on the basis of enriching the defendant) is certainly *relevant*, but such a relationship need not be proved. It is the claimant's own objective motivations and intentions which are relevant. Although a lengthy relationship with evidence of commitment such as children and a shared bank account could show that the claimant was likely acting on the basis of the relationship and not to enrich the defendant, large, otherwise unexplained financial expenditure merely a month into the relationship could also show this.[99] Courts would need to examine the facts on a case-by-case basis. The key point is that intention is not relevant in order to prove an agreement between the parties, it is instead relevant in order to show that the claimant was acting on the basis of a continuing relationship. If this can be shown, restitution is required and the defendant cannot capture the entire assets from the relationship. A reframing of the search for intentions is therefore needed.

This practical shift from agreement to contribution intention has a number of advantages. First, it changes the economic power balance between the parties. Under the common intention constructive trust, the claimant has no power to get a share of the property unless the defendant consents. The claimant's contributions are therefore considered by the law worthless without this consent. This means that, under the current law, the claimant may remain in a position of economic dependency on the defendant for some time after the relationship ends. Unjust enrichment does not have this problem. It views all enrichments as objectively valuable, and further places agency upon the shoulders of the claimant by focusing primarily on the

[99] The possibility of early economic imbalance was one of the criticisms made of the Law Commission's scheme in Douglas et al (n 81) 353.

claimant's intentions when contributing to the family home. The defendant must be aware of this intention but need not share it. This is a shift from consensual property dealings to recompense as of right for contributions.

This increased claimant agency is a vital part of the advantage that unjust enrichment could bring. Failure of basis (and mistake, discussed below) are claimant-oriented unjust factors. This means that the relevant intention comes from the claimant – it is the basis on which the claimant specifically is acting which is relevant. By shifting power to the economically weaker party, the law minimises the ability for the defendant to exit the relationship without obligational ties to the claimant, leaving the claimant dependent upon him. The *theoretical* change therefore from consensual property dealings to unjust economic benefits therefore causes a *practical* shift in the balance of power between the parties. This is crucial if the law is to effectively remedy the economic vulnerability experienced after cohabiting relationships by economically weaker parties.

Second, it does not matter if the claimant is acting for 'love and affection' or, indeed, for mercenary considerations. So long as the claimant was acting on the basis of the continuing relationship, an unjust enrichment claim would be possible. If the claimant was instead acting for mercenary considerations, making the mistake that she would obtain an interest in the property, she may still be able to successfully claim, as discussed below. This serves as a way to reject the prevailing narratives in the current law, explored in Chapter One and Chapter Four, which position domestic contributions such as homemaking and childcare as motivated by love and affection for the claimant's family. Proof of this – and therefore proof that the claimant was acting on the basis of a continuing relationship – would support an unjust enrichment claim.

Third, unjust enrichment's understanding of intention is more grounded in realism than that under the current law. Instead of searching for an (often artificial) agreement, unjust enrichment puts the relationship at the fore, understanding the complexity and nuances of qualified intentions. Though the claimant may have intended to benefit the family, this does not mean the defendant was intended to take a disproportionate share of the assets at the end of the relationship. At its core, unjust enrichment rests on a theory of self-determination and (relational) autonomy, which has resonance in an area where economic dependency is otherwise a reality. This dependency can be broken by protecting the claimant's freedom of self-determination and restoring benefits which the defendant would otherwise unjustly retain.

Of course, to a large degree this practical shift would require judicial creativity. However, the unjust enrichment approach keeps elements familiar to the law (a point shown in Chapters Two and Three). It focuses on contributions and intention, but the relevance of these elements takes on a different meaning under unjust enrichment. Much of this chapter has been led by developments in Scotland, the US, Australia and Canada. England and Wales remain increasingly alone in its continual search for an agreement between the parties. Although in the immediate term the judicial creativity for reform may be absent, without legislation a time will come where reform will necessarily have to come from judges. At that point, it is hoped that the arguments furthered here will be persuasive.

IV. MISTAKE

The above discussion has argued that unjust enrichment would consider the intentions of the parties on the basis that the claimant, when making contributions to the home, was not intending to benefit the defendant personally. One way of making this argument is by using failure of basis. If the claimant was contributing on the basis of a continuing intimate relationship which then failed, she should be entitled to restitution from the defendant. Another way of making this same argument – that the claimant was not intending to benefit the defendant – is by using the unjust factor of mistake. This involves saying that the claimant was making a mistake when enriching the defendant, and therefore that she should be entitled to restitution. Although this unjust factor is likely to be less useful than failure of basis, it is mentioned here primarily due to its interesting intersection with the common law marriage myth and for completeness.

It is well established that if the claimant enriches the defendant due to a mistaken belief, then the claimant may be able to get restitution. For example, in *Kelly v Solari*,[100] the claimant insurance company paid over money on a life insurance policy, not realising that the policy had lapsed because the deceased had failed to pay a premium. The claimant was entitled to restitution, despite the fact that they ought to have known that the policy had lapsed. Negligence on the part of the claimant was held to be irrelevant. The relevant mistake can now be one of law, after *Kleinwort Benson Ltd v Lincoln CC*[101] rejected the distinction between mistakes of fact and mistakes of law. This implies that should a claimant pay money over on the basis of a mistaken belief about their legal rights, restitution may be available.

[100] *Kelly v Solari* (n 49).
[101] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349.

With regards to cohabitation property disputes, this concept of mistake may have a surprising amount of resonance. According to research carried out by the National Centre for Social Research (NATCEN), 47% of people in England and Wales believe in the existence of 'common law' marriage, with the same legal rights as a formal marriage.[102] These legal rights, of course, include the right to apply for a variety of financial provision orders upon divorce or dissolution.

There are several reasons for the continuing problem of the common law marriage myth. The media plays a part, as research has found it continues to use the language of 'common law marriage/wife/husband' in stories, despite media campaigns to prevent cohabitants believing in the myth.[103] Probert notes that in the vast majority of stories the myth is not explained. The persistent nature of this myth may be bolstered by the fact that in a limited number of circumstances cohabitants are, in fact, treated as if they were married. This is true as a matter of law, where cohabitants are able to access social security benefits and tax credits in the same way as spouses, but perhaps more importantly is true as a matter of lived law.

As Duncan, Barlow and James note,[104] common law marriage reflects how people experience life. People assume that the law follows the socially and morally logical argument of supporting families. Cohabitants present themselves as married and are treated as married by others in most social situations, and institutions similarly treat cohabiting couples the same as married couples. Insurance providers, for instance, often use 'common law marriage' as a selectable category to describe the applicants' relationship. In this respect, the common law marriage myth is not a myth, and reflects the parties' lived reality. This means that the myth is particularly damaging to couples whose lived reality differs most dramatically from their legal position, which will often be couples in religious-only marriages who are considered married within their own religion but remain cohabitants in English law.[105]

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[102]Muslihah Albakri, Suzanne Hill, Nancy Kelly and Nilufer Rahim, 'Relationships and gender identity: Public attitudes in within the context of legal reform' in John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: the 36th Report* (The National Centre for Social Research 2019).

[103] Rebecca Probert, 'Why Couples Still Believe in Common-Law Marriage' (2007) 37 Family Law 403.

[104] Simon Duncan, Anne Barlow and Grace James, 'Why Don't They Marry? Cohabitation, Commitment and DIY Marriage' (2005) 17(3) CFLQ 383.

[105] Anne Barlow, 'Modern Marriage Myths: the Dichotomy Between Expectations of Legal Rationality and Lived Law' in Rajnaara Akhtar, Patrick Nash and Rebecca Probert (eds), *Cohabitation and Religious Marriage: Status, Similarities and Solutions* (Bristol University Press 2020). This problem may soon disappear: see Law Commission, *Celebrating Marriage: A New Weddings Law* (Law Com No 408, 2022).

Could a claimant, having contributed to their family under a mistaken belief that they are in a 'common law' marriage, use the unjust factor of mistake to get restitution? It will be argued that, as long as the claimant could prove an enrichment of the defendant at their expense, and that such an enrichment would not have been provided 'but for' their mistaken belief, an unjust enrichment claim should be possible. Of course, it may be difficult in practice for a claimant to prove that they would not have provided certain contributions had they not incorrectly believed they had certain legal rights. As detailed below, the mistake must be causative. However, 'difficult' does not mean 'impossible', and the legal avenue is certainly not closed.

How does one prove the unjust factor of mistake? It is merely required that the enrichment of the defendant would not have been made 'but for' the claimant's mistake. In *Barclays Bank v JW Simms,*[106] Goff J set out the following relevant legal principles:

> (1) If a person pays money to another under a mistake […] which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.
>
> (2) His claim may however fail if […] the payer intends that the payee shall have the money at all events, whether the fact be true or false.[107]

Goff J's pronouncement on the causation test for mistaken payments was endorsed in *Deutsche Morgan Grenfell*.[108] Here, 'but for' causation was laid down as the test. The claimant must show that they would not have made the payment 'but for' their mistake. In this case, the claimants paid tax that they thought was due. However, this tax was separately litigated over and found to be illegal by the European Court of Justice. The claimants therefore sought restitution for the tax, the mistake being that the claimants thought the tax was legally required. It was held that the claimant must have been able to say that 'if he had known of the true state

[106] *Barclay's Bank v JW Simms* [1980] QB 677 (QB).
[107] *Barclay's Bank* (n 106) 695. Formatting added. Reference to a mistake of fact predates the case of *Kleinwort Benson* (n 101) where it was decided that mistakes of law could also ground a claim in unjust enrichment.
[108] *Deutsche Morgan Grenfell Group v Her Majesty's Commissioners of Inland Revenue* [2006] UKHL 49, [2007] 1 AC 558.

of the facts or of the law at the time of the payment he would not have made it'.[109] In other words, the mistake must have been causative.

There is, however, a difficulty here. How mistaken must the claimant have been? It is clear that there is a difference between varying types of mistakes. Lord Walker in *Pitt v Holt* distinguishes between an incorrect conscious belief (an active mistaken belief), an incorrect tacit assumption (a passive belief) and mere causative ignorance (no belief at all).[110] Lord Walker suggests that 'mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference'.[111] This seems to suggest that the claimant must be labouring under an active incorrect belief or at least a passive assumption, rather than acting without addressing their mind to the matter at all.

The presence of doubt is also important. In *Deutsche Morgan Grenfell*, the claimant was aware that a current legal dispute was ongoing over the relevant tax. A key question, therefore, is whether any doubt on the part of the claimant as to the legality of the tax would mean that the claimant was not making a mistake of law if they then paid it. It seems that there is room for some doubt:

> Contestants in quiz shows may have doubts about the answer ("it sounds like Haydn, but then it may be Mozart") but if they then give the wrong answer, they have made a mistake. The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money.[112]

The key, therefore, is risk-taking. If the claimant is understood to be taking a risk then they cannot get restitution. This means that restitution will also not be available for a claimant who is simply 'mispredicting' the future rather than making a mistake as to current facts.[113] If the claimant is speculating the future, then they are taking the risk that they may be incorrect and will therefore not be able to claim in unjust enrichment. In such circumstances, there is 'no

[109] *Deutsche Morgan Grenfell* (n 108) [59].
[110] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [109], referring to the categories espoused in Mitchell et al (n 8).
[111] *Pitt v Holt* (n 110) [108].
[112] *Deutsche Morgan Grenfell* (n 108) [26].
[113] *Klienwort Bensen* (n 101) 399.

incorrect perception of reality'.[114] This means that if the claimant is contributing to the home in the hope that they will one day get married to the defendant, they are not making a mistake if the marriage never occurs. They have simply mispredicted the future. Although this may seem sensible, the difference between mistakes and mispredictions causes problems.[115] A good example is *Re Griffiths*,[116] where the deceased put his shares on trust in an attempt to reduce tax liabilities. Unfortunately, shortly after he executed the trust deeds, he was diagnosed with lung cancer and died. If he had never executed the trusts, the shares would not have been assessed for inheritance tax. His executors therefore attempted to have the trusts put aside for mistake. The judge noted the difference between mistakes and mispredictions, and decided the case therefore on a slim finding of fact: did the deceased have cancer when he executed the trust deeds? If so, he was making a mistake (that he was in good health and would therefore survive long enough for his plans to be beneficial tax-wise); if not, he was mispredicting his future health. The distinction between mistake and misprediction seems unhelpful when seen from this angle, as very small and, on principle, insignificant differences in the facts have a material impact on the outcome.

The question therefore for the claimant cohabitant is whether they were acting – by spending money improving the defendant's property, for example – on the mistaken belief that, under a common law marriage, the claimant would have an entitlement to the property should the parties separate. This will always be a question of fact. It may be that this mistaken belief will often be difficult to prove, and the unjust factor of mistake is therefore unlikely to be of use to the same degree as failure of basis. However, it is perfectly reasonable to assume that there will be cases in which cohabitants, relying on their passive belief in the existence of common law marriage, contribute financially and non-financially to the family home. In these circumstances, it should be open for the claimant to sue in unjust enrichment on the basis of their mistake.

In scenarios where one partner is contributing significantly to the family home or making significant life sacrifices (e.g. giving up their job to look after children) it may be that they are more likely to be acting with a specific idea in mind of their own legal or financial position. In such cases, an active mistaken belief may be present. An example might be *Walsh v Singh*,[117]

[114] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) 9-08.
[115] *Pitt v Holt* (n 110) [109].
[116] *Re Griffiths* [2008] EWHC 118, [2009] Ch 162.
[117] *Walsh v Singh* [2009] EWHC 3219 (Ch), [2010] 1 FLR 1658.

where counsel for Miss Walsh argued for a tracing remedy owing to Miss Walsh being mistaken when advancing money to Mr Singh that she was getting a beneficial interest when she was not. If this mistake is proven by the claimant and is shown to be causative, then it would satisfy the unjust factor requirements for unjust enrichment.

It is more likely in this context however for the claimant to be acting based on an incorrect tacit assumption rather than an active mistaken belief. This would mean that the claimant was contributing the family home on the causative assumption that she would be entitled to financial recompense at the end of her relationship. For those that believe in the common law marriage myth – about half of the British public – it may be the case that contributions are made on the basis of such an assumption, particularly in sole name cases where the claimant is contributing to paying off the defendant's mortgage or improving property, for example. In such a case, again, the unjust factor of mistake might be satisfied.

The key issue for an unjust enrichment claim based on mistake is that the mistake needs to be causative. It is not necessary that the mistake is the *only* reason for the claimant's contribution, but it is necessary that the contribution would not have been made but for the mistake. The problem here is that, very often, cohabitants will not be acting in a well-thought through, considered manner. In this way, unjust enrichment risks ignoring feminist concerns about relational autonomy, overlooking that partners are likely to act for a number of different reasons, each important, and that often no single reason can be described as causative. A cohabitant might pay off her partner's mortgage despite having no legal interest for a number of reasons, including trusting that the relationship will continue, ensuring that she and her family are not liable for possession proceedings from the mortgagee and on the mistaken assumption that she will get an interest in the property due to her common law marriage. It is difficult to say that any one of these is causative, and even more difficult to subject this to proof.

Of course, different types of cohabitants might have different chances of success. Barlow and Smithson identify four different categories under which cohabitants might fit.[118] The category which a couple fall into might tell us something about their chances at successfully showing they have acted owing to a mistake. 'Pragmatist' couples, for example, have chosen to cohabit or marry according to their understanding of the legal and financial consequences. It may be that decisions made within pragmatist relationships involve active consideration of the legal

[118] Barlow and Smithson (n 65).

consequences, in which case it might be easier to show a causative mistake should the believed consequences be incorrect. This can be contrasted with 'romantic' couples, who cohabit as a step towards marriage. These couples may be less likely to make decisions on the basis of the legal consequences of those decisions, and therefore may not be acting under a mistaken belief as to their legal rights. Instead, their actions are more likely to be based on romantic notions of life together.

As the above shows, it is likely that mistake as an unjust factor does not significantly help cohabitants. Many cohabitants will not act with anything other than ignorance about their legal position and, even if some incorrect belief is present, proving such a mistake will not be easy. It may be that cases where the claimant's mistaken belief has been fraudulently induced by the defendant would be subject to a less strict test. In cases where the defendant knowingly encourages a mistaken belief, the claimant only needs to show that the mistake was a contributing cause to their actions.[119] An example might be where the defendant tells the claimant that they are in a common law marriage, or suggests that if the claimant contributes in a certain way that they will have an interest in the property. These cases may have significant overlap with proprietary estoppel. However, without any modern case law on induced mistakes it is difficult to make firm conclusions on this point. This thesis therefore argues that failure of basis is a stronger foundation for unjust enrichment claims in this context.

V. CONCLUSIONS

This chapter has contrasted the normative justifications of the common intention constructive trust and unjust enrichment. While the former appears to focus on consensual property dealings enforceable due to the unconscionability of the defendant resiling from the parties' agreement, unjust enrichment instead concerns itself with providing restitution of economic benefits which the defendant was not intended to benefit from or retain. Doctrinally, unjust enrichment actions these normative concerns with two unjust factors – failure of basis and mistake. While mistake is unlikely to be helpful in the majority of cases (except where the claimant can show that they contributed only due to their mistaken belief in their legal entitlements), failure of basis is argued to have strong potential to allow restitution in a large number of cohabitation cases. If the claimant was acting on the basis of a continuing cohabitation relationship, it would be unjust for the defendant to retain all of the assets generated by the relationship once it ends.

[119] *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *Derry v Peek* (1889) 14 App Cas 337; Virgo (n 47) 187.

This is a principle which has been applied in Scotland, Canada and Australia (albeit not always using an unjust enrichment approach). Importantly, failure of basis accepts the claimant's qualified intentions around contributions to the home, allowing additional nuance over that of the current law when investigating intentions.

The common intention constructive trust focuses on traditional property law and, therefore, transfers of proprietary interests. This is an entirely unsurprising basis on which the trust rests and aligns with a wide range of other equitable principles. However, the central argument of this chapter is that it does not adequately respond to the concerns of cohabiting couples who risk leaving a relationship with little in the way of economic security. Unjust enrichment, on the other hand, though still a private law doctrine with little in the way of flexibility or discretion (and certainly with no inherent design to respond to the cohabitation context), manages to, at least, align itself with an examination of unjust economic benefit on the part of the defendant, and therefore represents a move away from consensual property dealings and towards a rights-based entitlement of the claimant to restitution at the end of a cohabiting relationship.

This movement can also be considered a movement from real property ownership to unjust retention of wealth, in that the common intention constructive trust considers purely the ownership rights of the parties whereas unjust enrichment considers economic benefits at the expense of the claimant. It is argued in the next chapter that when considering the future economic prospects of the parties and when attempting to disentangle the parties' interdependencies, it is economic advantage/disadvantage and not ownership which should be in issue. Unjust enrichment may therefore represent a more principled doctrine for use at the end of cohabiting relationships.

CHAPTER SIX – REALISING AN UNJUST ENRICHMENT CLAIM

This thesis proposes a development of the common intention constructive trust by understanding the obligations created at the end of a cohabiting relationship as triggered by unjust enrichment. This reorientation and development along the lines of unjust enrichment has significant advantages. A number of these advantages have been revealed in the preceding chapters, including the more equal treatment of financial and domestic contributions to the family and the shift to a claimant-oriented doctrine away from a quasi-contractual, bilateral approach. Building on the rest of the thesis, this chapter takes these arguments further, suggesting that unjust enrichment provides a more flexible basis on which to develop the law as it unlinks claims made at the end of a cohabiting relationship from questions about ownership of the family home.

This chapter therefore takes a birds-eye view of the unjust enrichment claim, expressing it in full and drawing out the key advantage: the removal of the exclusive focus on ownership. In so doing, unjust enrichment can be seen to familialise the law, creating a claim which can effectively respond to the socioeconomic circumstances which many cohabiting couples find themselves in. As has been argued throughout this thesis, this is particularly true for the economically weaker party, to whom otherwise the economically stronger party would have no continuing obligation to. This chapter constructs its arguments upon the foundations of the points made in the previous chapters in order to further show the potential of restitutionary claims in the cohabitation context.

In order to draw together the unjust enrichment claim considered in this thesis, this chapter will first discuss the potential remedies. Personal restitution is the ordinary remedy for unjust enrichment, but this section will argue that proprietary restitution should also be permitted, owing to the differing context. Most arguments against proprietary restitution use commercial logic which is inappropriate in the domestic context. Second, the quantification of the remedy will be discussed with a broad-brush, holistic discretion being preferred, targeted at the removal of the defendant's unjust enrichment. The defences of counter-restitution and change of position will be important when judges utilise their discretion and therefore will be considered here. This chapter will then go on to draw out some key themes and advantages which stem

both from this chapter's consideration of remedies and the wider unjust enrichment claim proposed by this thesis. In particular, the ownership focus of the current law will be critiqued, and it will be contended that unjust enrichment represents a liberalisation of claims made at the end of cohabitation relationships owing to an increased remedial flexibility. Finally, the unjust enrichment claim proposed in this thesis will be set out in full, with the key advantages again indicated.

I. REMEDIES FOR UNJUST ENRICHMENT

Once it is found that the defendant has been enriched at the claimant's expense, and that there is an unjust factor, the question turns to what remedies may be available to the claimant. The claimant can get personal restitution in the form of a fixed payment representing the monetary value of the defendant's unjust enrichment. This will often be a more helpful remedy for the claimant cohabitant than a beneficial share of the property and represents a move to disputes over unjust retention of economic benefit away from questions over the ownership of the family home.

Although it is necessary for the claimant to have access to personal monetary payments, it may be that a proprietary interest is a preferred option. Where the money is not immediately necessary, a proprietary interest will allow the claimant to benefit from increases in the value of the property. In proprietary estoppel cases (where there is a wide flexibility open to the court), the claimant will often seek a beneficial share of the property.[1] The pertinent question, therefore, is whether restitution for unjust enrichment can take the form of a proprietary interest. It will be argued that proprietary restitution should be possible in these circumstances, and therefore, as will be explored later, that the use of unjust enrichment as the event triggering obligations represents a familialisation of the law.

The question of proprietary restitution for unjust enrichment is highly controversial. Although academics have been exchanging theories for decades, the court has rarely seen fit to comment on the issue. Part of the complexity derives from the absorption of the question into debates over the width of the doctrine. Those who argue that unjust enrichment provides the theoretical justification for numerous equitable doctrines, such as resulting trusts, proprietary remedies for breach of trust and knowing receipt, must further argue that unjust enrichment allows

[1] See for example *Dobson v Griffey* [2018] EWHC 1117 (Ch); *Culliford v Thorpe* [2018] EWHC 426, [2018] BPIR 685; *Liden v Burton* [2016] EWCA Civ 275, [2017] 1 FLR 310; *Layton v Martin* [1986] Fam Law 212 (Ch).

proprietary restitution in order for the doctrine to 'fit' with these equitable rules. Academics who have a narrower conception of unjust enrichment may in consequence be predisposed to deny proprietary restitution. Virgo is perhaps a good example of this latter type of academic, as he prefers to consider claims where the defendant has unjustly received title to property as 'vindication of property rights' rather than proprietary restitution for unjust enrichment.[2] The House of Lords in *Foskett v McKeown*[3] appears to have supported Virgo's argument. Prima facie, proprietary restitution does seem to have *some* role in the law of unjust enrichment – the House of Lords and Supreme Court respectively allowed subrogation as a remedy in *Banque Financière v Parc*[4] and *Bank of Cyprus v Menelaou*,[5] meaning that the claimant could receive a proprietary interest – a charge over the property – due to the unjust enrichment of the defendant. However, Virgo has questioned even this, noting that the House of Lords in *Banque Financière* held that the claimant should be subrogated to the charge *only as between the parties*, meaning that as between the parties to the dispute and third parties, the position was unchanged.[6] It is therefore not at all clear whether proprietary restitution is ever available for unjust enrichment.

The most well-known argument for the use of proprietary restitution comes from Chambers,[7] who argues that the resulting trust is triggered by transfer of assets from the claimant to the defendant without any intention on the part of the claimant for the defendant to benefit. Under this thesis, if the claimant were to use her money to purchase a property which was put in the sole name of the defendant, equity would presume that the claimant was not intending to benefit the defendant and therefore impose a resulting trust in favour of the claimant. It is unjust enrichment which shows that despite the transfer the claimant did not intend to benefit the defendant. This could be because there was no consent for the transfer in the first place (such as where the property was stolen), or because the consent given was qualified (often because the claimant had transferred on the basis of a particular state of affairs or counter-performance, or on the basis of a mistake).

This argument – that resulting trusts operate on a lack on intention to benefit and are therefore part of the law of unjust enrichment – has not been universally accepted. Swadling prefers to

[2] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) Chapter 22.
[3] *Foskett v McKeown* [2001] 1 AC 102 (HL).
[4] *Banque Financière De La Cité v Parc (Battersea)* [1999] 1 AC 221 (HL).
[5] *Bank of Cyprus v Menelaou* [2015] UKSC 66, [2016] AC 176.
[6] Virgo (n 2) 560.
[7] Robert Chambers, *Resulting Trusts* (OUP 1997).

consider presumed resulting trusts as being triggered on the basis of a presumption that the claimant declared a trust in their own favour.[8] Lord Browne-Wilkinson has offered a further answer, suggesting that the resulting trust gives effect to the common intention of the parties.[9] It is important therefore to note that Chambers' theory is one of many.

The Singaporean Courts appear to have accepted that resulting trusts respond to a lack of intention to benefit, notably in the context of cohabitation disputes. In *Chan Yuen Lan v See Fong Mun*[10] and *Chia Kok Weng v Chia Kwok Yeo*[11] there was no explicit recognition of resulting trusts responding to unjust enrichment, but there is an acceptance of resulting trusts operating due to the claimant's lack of intention to benefit the defendant. In *Chan*, for example, it was held that 'going forward, the lack of intention analysis may potentially provide a more sensible basis for the principled yet pragmatic development of this equitable doctrine'.[12] This was explicitly preferred to Lord Browne-Wilkinson's positive intention theory from *Westdeutsche*, and the court in the same case adopted Lord Neuberger's preferred use of resulting trusts in the cohabitation context from his dissenting speech in *Stack v Dowden*.[13] In England and Wales, Lord Millett has also supported the theory that resulting trusts respond to a lack of intention to benefit:

> Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest.[14]

Chambers' lack of intention theory therefore seems to be the most obvious way of linking unjust enrichment to proprietary restitution and, further, to disputes that arise at the end of a cohabitation relationship. As has been argued in the previous chapter, the claimant's intention

[8] William Swadling, 'Explaining Resulting Trusts' [2008] LQR 72.
[9] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 708.
[10] *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36, [2014] 3 SLR 1048.
[11] *Chia Kok Weng v Chia Kwok Yeo* [2017] SGCA 54, [2017] 2 SLR 964.
[12] *Chan* (n 10) [44].
[13] *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432.
[14] *Air Jamaica v Charlton* [1999] 1 WLR 1399 (PC) 1412.

to provide benefits for the relationship cannot be considered to indicate an intention to benefit the defendant personally. In the absence of this intention, Chambers' theory would require a resulting trust to be imposed to correct the defendant's unjust enrichment. However, Birks has made clear that a resulting trust should only bite where there was never any intention for the defendant to receive the benefit of the property and, crucially, not where that intention was conditional or qualified.[15] The line is therefore drawn between cases in which the defendant has never had the assets at their free disposition (where proprietary restitution should be available) and cases where the defendant has been free to use the assets, but a subsequent failure of basis means that restitution is now required (where proprietary restitution should not be available). In cohabitation cases, the defendant will, of course, have had the economic benefits generated by the claimant at his free use, and therefore even under Birks' theory there can be no proprietary restitution in these cases.

The rationale for this reluctance to allow proprietary restitution in any but the most deserving of cases – where the defendant was never intended to have beneficial use in the first place – appears to come from two concerns. First, the increase in the incidence of property rights that would occur would cause difficulties for third parties.[16] There is obviously a worry that third parties will be surprised to find themselves bound by a prior unmentioned party who can show an unjust enrichment of the defendant. In the cohabitation context, this concern will most often be seen where a claimant seeks to show an interest that, combined with actual occupation of the property, can act as an overriding interest (under Schedule 3 of the Land Registration Act 2002) taking priority to the interest of a mortgagee.[17] Second, easier access to proprietary remedies has the danger of causing problems for the already complex provisions on insolvency.[18] The concern is elucidated by Roy Goode:

> Every property right given against assets held by the debtor reduces the value of its estate available for redistribution and, as a corollary, the interest of unsecured creditors

[15] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) Ch 8.
[16] This comes from Lord Browne-Wilkinson's speech in *Westdeutsche* (n 9) 704.
[17] A good example is *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL), where Mrs Rosset sought to show she had an overriding interest by way of having a beneficial interest under a common intention constructive trust for the purposes of being in actual occupation.
[18] See for example: Roy Goode, 'Proprietary Restitutionary Claims' in William Cornish et al (eds) *Restitution: Past, Present and Future* (Hart 1998); Andrew Burrows, 'Unravelling Proprietary Restitution: A Response to Professor Lionel Smith' (2004-2005) 41 Can Bus LJ 424; William Swadling, 'Property and Conscience' [1998] 12(4) Trusts Law International 228-239.

> in the liquidation process and the value of insolvency law itself. It is because of this that in relation to consensual interests insolvency law sets clear boundaries to the recognition of proprietary rights and remedies.[19]

The concern that restitutionary proprietary remedies may impact insolvency law has caused Burrows to suggest that the question of proprietary restitution should instead be answered by whether the claimant has taken the risk of the defendant's insolvency.[20] If the claimant has taken this risk, no proprietary remedy will be forthcoming. Burrows notes that answers under this theory will be very similar to that provided by Birks' theory of initial failure of consent or subsequent failure of consent, because if the claimant has provided the asset for the defendant's free use then it is likely that the claimant has taken the risk of the defendant's insolvency. This will not always be the case though, and it is highly doubtful whether we can say that one cohabitant takes the risk of their partner's bankruptcy when making contributions to the family home.

It will always be extremely difficult to answer the question of whether a cohabitant has taken the risk of their partner's bankruptcy. In many ways, the question itself presupposes a commercial relationship and makes little sense within the framework of cohabiting couples. Very rarely will couples think that by living with their partner and contributing to the family home they are risking their economic fortunes on the possibility of their partner's bankruptcy. It *may* be said that, by not getting married, a cohabiting couple is risking economic instability should either member of that couple be declared bankrupt or, more importantly for our context, should the relationship end. However, the argument that cohabiting couples are taking the risk of economic insecurity breaks down in two ways.

First, the idea that a partner is taking a risk by contributing to the family home suggests that there was an alternative option freely available to them. Presumably, this alternative option involves not contributing to the home: not providing childcare, paying household expenses etc, or asking for immediate recompense by the defendant for providing such contributions. This is, however, a false option, and ignores the great societal pressures put often upon women to

[19] Goode (n 18) 65.
[20] Andrew Burrows, *The Law of Restitution*, (3rd edn, OUP 2011) Ch 8; Burrows (n 18).

perform these tasks and suggests a family economy where both partners can work outside the family home in order to protect their own financial independence.

Second, the well-established optimism bias or unrealistic optimism of couples in romantic relationships suggests that, again, cohabiting couples are less likely to make informed choices on the risks they are willing to take. Optimism bias can be defined as 'a favourable difference between the risk estimate a person makes for him- or herself and the risk estimate suggested by a relevant, objective standard'.[21] One example of optimism bias is that couples are unlikely to believe they will break up. In one study,[22] a group of newly married people could accurately predict the national rates of divorce but when asked to predict the risk that they would personally get a divorce the median response was 0%. As Baker and Emery argue:

> A more realistic appreciation of the risk and likely consequences of divorce, as well as of the statutory laws governing divorce, might at the margin affect various choices made during marriage. Among the most common such decisions are whether to be a full-time homemaker or have a career in the paid workforce; how many children to have and when to have them; and how long to stay out of the paid workforce following the birth of a child. Young women may be particularly disadvantaged by their idealism since, following divorce, the typical wife suffers a substantial decline in her standard of living in comparison.[23]

Studies have shown that optimism bias is present not just in married couples but between cohabiting couples and those who are merely dating.[24] People simply do not think their relationships will end, despite knowing the objective base rates of relationship breakdown. The argument that partners in a cohabiting relationship are taking the risk of each other's bankruptcy suggests an informed and unbiased approach to risk by the couple completely at

[21] James A Shepperd, William MP Klein, Erika A Waters and Neil D Weinstein, 'Taking Stock of Unrealistic Optimism' (2013) 8(4) Perspectives on Psychological Science 395.
[22] Lynn A Baker & Robert E Emery 'When Every Relationship Is Above Average—Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 Law and Human Behaviour 439.
[23] Baker and Emery (n 22) 448.
[24] TK MacDonald and M Ross, 'Assessing the Accuracy of Predictions about Dating Relationships: How and Why do Lovers' Predictions Differ from those Made by Observers?' (1999) 25 Personality and Social Psychology Bulletin 1417; Roger Buehler, Dale Wesley Griffin and Michael Ross, 'It's About Time: Optimistic Predictions in Work and Love' in Wolfgang Stroebe and Miles Hewstone (eds), *European Review of Social Psychology: Volume 6* (John Wiley & Sons 1995).

odds with established research. The Burrows approach, therefore, of allowing proprietary restitution where the claimant has not taken the risk of the defendant's insolvency should mean that proprietary restitution should be available for cohabitants.

The question to be answered is whether unjust enrichment, when considering a claim that the defendant has captured an economic benefit at the expense of the claimant at the end of a cohabiting relationship, can provide the claimant with a beneficial share of the family home. The arguments against proprietary restitution discussed above have each been developed within the context of commerce, where undoubtably there is a danger of significant loss to creditors should the rules on insolvency not be treated seriously. However, it is far from obvious that these policy arguments should carry over to the domestic context, where there are far fewer interested parties and the additional policy and social concern of the protection of vulnerable cohabitants at the end of a relationship. This thesis therefore contends that it is important to reject essentialist arguments about unjust enrichment, and to accept that the rules applied may be different depending on the context.[25]

The idea that unjust enrichment can be normatively plural, and that rules may differ depending on the claim, seems to be settling into orthodoxy. Some academics, chiefly Hedley[26] and, more recently, Stevens,[27] have suggested that there is no normative principle underlying all unjust enrichment claims, and therefore that different kinds of unjust enrichment claim have little in common with each other. Burrows has pushed back against this claim, suggesting that although structurally the unjust enrichment claim is unified, this does not mean 'that one has to accept that the same answer will be given to each of those four elements whichever example of unjust enrichment one is talking about […] Nor does it equate to saying that there is a single test for answering each of the four elements'.[28] A unified unjust enrichment scheme is therefore possible only if we accept the diverging normative principles behind various claims within the structure, and the differing rules that may result.[29]

[25] Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in *Understanding Unjust Enrichment*, Jason W Neyers, Mitchell McInnes and Stephen JA Pitel (Eds) (2004 Hart).
[26] Steve Hedley, 'Fairwell to Unjustified Enrichment?: A Common Law Response' (2016) 20(3) Edinburgh Law Review 326; Steve Hedley, 'The Taxonomic Approach to Restitution' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004).
[27] Robert Stevens, 'The Unjust Enrichment Disaster' [2018] LQR 574.
[28] Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) CLJ 521.
[29] Pablo Letelier, 'A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims' (2020) 136(Jan) LQR 121.

The consequences of all this for the purposes of an unjust enrichment claim in the domestic sphere is that it is not necessary to uncritically adopt the rules that have been created for the commercial context. Proprietary restitution may be problematic in the context of companies with multiple unsecured creditors going insolvent, but between cohabitants the issue is not nearly so difficult. The only creditor which will usually be affected is a mortgagee bank, and modern practice is to require signatures of all those living in the property at the time of purchase. Should the claimant have moved into a property purchased by the defendant with a mortgage, the mortgage will have priority over any property interest of the claimant regardless. Further, it is not obviously the case that the defendant's creditors should have access to economic benefits unjustly received by the defendant at the claimant's expense. On a practical level, a proprietary remedy is already given for cohabitants if they can claim under the common intention constructive trust, and although unjust enrichment is a wider doctrine than the trust it is unlikely to be so much easier to claim under unjust enrichment that dramatic problems will arise for third parties.

A) Constructive or Resulting Trust?

Even if it is accepted that a claim based on unjust enrichment can in the cohabitation context lead to proprietary restitution, it is not entirely clear whether this would (or should) take the form of a resulting or constructive trust. Resulting trusts historically have been linked to unjust enrichment as has been explained above, yet the current law uses the constructive trust by linking the normative justification of the law to unconscionability. The move therefore to a resulting trust might be considered a fundamental change of direction, particularly because its use has been doubted in the cohabitation context.[30] Further, both Canada and the US use constructive trusts in the family home context to respond to unjust enrichment.

There have been some supportive comments made in England and Wales about a remedial constructive trust to be used as a remedy for unjust enrichment. Most notably, in *Westdeutsche Landesbank Girozentrale*[31] Lord Browne-Wilkinson rejected the use of a resulting trust for proprietary restitution in unjust enrichment, due to the dramatic increase in property rights his Lordship thought would occur. However, his Lordship suggested that a remedial constructive trust may be conceivable as a response to unjust enrichment, as it can then be tailored to the

[30] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776; but see *Marr v Collie* [2017] UKPC 17, [2018] AC 631.
[31] *Westdeutsche* (n 9).

circumstances of an individual case and better protect innocent third parties.[32] Further, Barker notes that:

> [T]he admission of "discretionary" remedies to the law of unjust enrichment, even (dare one suggest?) discretionary proprietary remedies, might not be as radical or apocalyptic a step for judicial reasoning as is sometimes assumed. It all depends upon the way in which discretions are structured, the extent to which factors operating within that structure are articulated; and the extent to which judges are consistent in the way in which these factors are applied.[33]

A principled discretion, therefore, in which the court can provide a proprietary remedy if needed and can make flexible, broad-brush decisions as to the quantification of the award may sit perfectly well with reversing the unjust enrichment of the defendant. This is particularly true in the cohabitation context, where flexibility and judicial discretion take on an increased importance compared to the commercial context. However, the use of such a discretion as part of a *remedial* (rather than institutional) constructive trust seems to have been shut down by the Supreme Court in *FHR European Ventures*, where it was said that the 'remedial constructive trust […] is a concept which has authoritatively been said not to be part of English law'.[34] Despite this, there have been arguments that the common intention constructive trust is already a type of remedial constructive trust. Etherton, for example, notes that the permissibility of imputation means that the court is using its discretion to impose a trust that simply cannot be considered to have been created outside of or independent from the judge's discretion.[35] The ambulatory nature of the trust also appears to support this conclusion, as noted by Piska.[36] Lord Scott seems also to have referred to the common intention constructive trust as remedial in *Thorner v Major*.[37] However, there is no authoritative judicial statement that remedial constructive trusts are indeed part of English law. Development of the law according to unjust

[32] *Westdeutsche* (n 9) 716.
[33] Kit Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' (1998) 57(2) CLJ 301, 317.
[34] *FHR European Ventures v Cedar Capital* [2014] UKSC 45, [2015] AC 250 [47].
[35] Sir Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67(2) CLJ 265; Terence Etherton, 'Constructive trusts and proprietary estoppel: the search for clarity and principle' [2009] Conv 104.
[36] Nick Piska, 'Ambulatory Trusts and the Family Home' (2010) 24(1) Trusts Law International 87, 91.
[37] *Thorner v Major* [2009] UKHL 18, [2009] 2 P&CR 24 [20].

enrichment principles will require a large amount of judicial creativity; this thesis therefore uses an institutional trust as a more palatable option than a remedial trust.

The decision to use the constructive trust for cohabitation disputes rather than the resulting trust seems to have been made in the 1990s, over two decades after the trust was created in *Pettitt v Pettitt*[38] and *Gissing v Gissing*.[39] Undoubtably part of this choice came from distaste for the presumption of resulting trust, criticised in *Pettitt*. However, Lord Diplock in *Gissing* said it was 'unnecessary for present purposes to distinguish between these three classes of trust'[40] – meaning constructive, resulting and implied trusts. Trust theory has moved on, and of course in modern understanding the implied trust is not a category of its own but is instead an umbrella term used to separate trusts imposed by the law – such as the constructive and resulting trusts – and express trusts created by the parties themselves. However, Lord Diplock was clearly uninterested in determining which type of trust was appropriate for the domestic context, and this confusion lingered – in decisions through the 1970s and 1980s, cases tend to either simply refer to the imposition of a trust without mentioning the category, or to use the terms 'resulting' and 'constructive' interchangeably. In *Burns v Burns*, it was noted that 'whether the trust which would arise in such circumstances is described as implied, constructive or resulting does not greatly matter'.[41] Finally, in *Lloyds Bank v Rosset* Lord Bridge used a constructive trust alone to define the common intention trust which had developed, and this seems to have been the turning point.[42] In subsequent decisions the resulting trust was still used, but as a separate doctrine which responded purely to differing contributions to the purchase price as opposed to the common intention of the parties. Ultimately, Lord Diplock's assertion in *Gissing* that it is 'unnecessary' to distinguish between the different types of trust for the purpose of cohabitation disputes likely continues to be true. It is the doctrine itself – whether it is based on the common intention of the parties or the unjust enrichment of the defendant – which gives shape to the consequential trust. Whether that trust is labelled resulting or constructive is unlikely to matter.

If a constructive trust responds to unconscionability and a resulting trust responds to a lack of intention to benefit the defendant,[43] the context would appear to support a resulting trust

[38] *Pettitt v Pettitt* [1970] AC 777 (HL).
[39] *Gissing v Gissing* [1971] AC 886 (HL).
[40] *Gissing* (n 39) 905.
[41] *Burns v Burns* [1984] Ch 317 (CA) 326.
[42] *Rosset* (n 17).
[43] As noted above, these theories, while often persuasive, are by no means correct.

approach, as unjust enrichment has nothing to do with unconscionability. This thesis therefore suggests that a resulting trust, used to prevent the defendant being unjustly enriched by the claimant's contributions during the relationship, could provide a principled development of the current law away from questions of ownership to questions of unjust retention of economic benefits. The issue of quantification will be addressed next.

II. QUANTIFICATION

Once it has been shown that the claimant enriched the defendant at her expense and further that an unjust factor is present, the claimant will have proven prima facie that the defendant is liable for unjust enrichment. As discussed above, both personal and proprietary restitution should be possible. There remain two questions, each which will need to be dealt with here: how might the remedy to be quantified, and what defences could the defendant bring? These questions are vital for the operation of unjust enrichment as the cause of obligations at the end of a cohabiting relationship, for they will practically effect the ability for unjust enrichment to strip unjust economic benefits from the defendant and thereby shield the economically weaker party – the claimant – from harm.

A) Quantification of the Claim

Enrichments are valued at the time of receipt.[44] Where the enrichment is the provision of services, it is the services themselves which are valued, rather than any end product created.[45] The test is one of objective market value: 'the price which a reasonable person in the defendant's position would have had to pay for the services'.[46]

In *Benedetti v Sawiris*,[47] Mr Benedetti had rendered services of significant value to Mr Sawiris as an advisor and broker, under the impression that the parties would together purchase a valuable Italian company. The court therefore had no difficulty in deciding what the market value of the services were. Two difficulties may be presented with this method of valuation in the cohabitation context. First, there may be no real market for the work undertaken by the claimant. Of course, financial contributions to household bills may be readily quantifiable, but domestic services such as childcare and homemaking may not be. The care that a parent would

[44] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [14]. See also *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB).
[45] *Benedetti* (n 44) [14]. For example, see *Yeoman's Row v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713.
[46] *Benedetti* (n 44) [17].
[47] *Benedetti* (n 44).

provide to a child, her partner and indeed the house itself cannot be equated to the hourly paid work of a childminder or cleaner. The work is not the same. A reasonable person in the defendant's position could simply not purchase childcare that would equate to a mother's care for her children. Second, even if a market value is to be found for these activities, it will often be all but impossible to quantify a remedy using a strict calculation of enrichment. Unlike commercial actors, parties in a relationship do not produce invoices and receipts. They do not note down the amount of time they have spent from day to day doing housework. There will be little evidence with which to prove this quantification.

As Chapter Four argued, there is a danger of using the narrative that it is impossible to value a mother's care, as this simply means that a value is not attached to these services, no financial impact is uncovered and women therefore continue to experience structural disadvantage in the law. It is possible to value the services themselves by commodifying them and thereby utilising market norms while also accepting that there is an emotional dimension which will not be captured in the market.[48] A broad-brush, holistic approach risks yet again prioritising more traditional contributions to the home such as payments to the purchase price and mortgage instalments. However, it is accepted that to adhere entirely to precise mathematic accounting would be wholly unrealistic in the circumstances. Therefore, this thesis suggests a middle ground: developing the law in terms of unjust enrichment would mean the judge must calculate the extent to which the defendant has been unjustly enriched to the best of their ability, but need not require every penny to be proven in evidence. A broad-brush approach is possible, but the aim must be to as accurately as possible reverse the unjust enrichment – in economic terms – of the defendant.

It is interesting in this regard to examine the way in which Canadian courts have applied unjust enrichment to the cohabitation context. In *Kerr v Baranow*,[49] the Supreme Court of Canada decided that a 'fee-for-services model' – involving a highly detailed accountancy-based method – should be rejected. It was held that such a method would be highly artificial and difficult to do in practice. The Supreme Court instead introduced the concept of joint family venture. Both parties have contributed to the accumulation of wealth, and one party has left the relationship with a disproportionate share of the assets. The Supreme Court decided therefore that the remedy for unjust enrichment could be flexible, rather than mathematic. Further, it is

[48] See Chapter Four, and the references to 'incomplete commodification' in Margaret Jane Radin, 'Market-Inalienability' (1987) 100 Harv L Rev 1849.
[49] *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 269.

reasonable to assume that each party expected a share of the wealth created by the relationship, not a fee-for-services approach.[50]

It should be noted that, in contrast to the Canadian unjust enrichment/joint family venture doctrine,[51] English unjust enrichment is backwards looking and therefore seeks to provide restitution for contributions made, not to protect future expectations. It is on this basis – the fulfilment of expectations – that the Canadian jurisdiction has been criticised by restitution scholars. Degeling and Roque, for example, have noted that the real work being done by the Canadian doctrine is the fulfilment of party expectations, and the doctrine is therefore not really about reversing an unjust enrichment at all.[52] Of course, should the claimant's expectation of an interest lead the claimant to make contributions they otherwise would not have made, the contribution itself may be relevant to the unjust enrichment claim, and any representation made by the defendant to cause this expectation may bring the claim into the realm of proprietary estoppel. However, there is no English doctrine in this context which protects the claimant's expectations alone.

This does not mean that the Canadian concept of joint family venture is not useful. Indeed, in *Benedetti v Sawiris,* Lord Reed appeared to support the flexibility which Canadian courts had developed:

> I note that the Canadian Supreme Court has taken a straightforward economic approach to the questions whether the defendant has been enriched by the plaintiff and whether the plaintiff has suffered a corresponding deprivation, and has dealt with other considerations, including arguments concerning individual autonomy, at the stage of deciding whether the defendant's retention of the benefit is unjust […] That approach appears at first sight to have the virtue of simplicity, in so far as it groups normative issues under an explicitly normative heading, and applies Occam's razor […] It does not entail a descent into unstructured reasoning about injustice.[53]

[50] *Pickelien v Gillmore* (1997) 30 BCLR (3d) 44 [15].
[51] *Kerr v Baranow* (n 49).
[52] Simone Degeling and Mehera San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 Sydney L Rev 69. See also Mitchell McInnes, 'Reflections on the Canadian Law of Unjust Enrichment' (1999) 78 Canadian Bar Review 416; Mitchell McInnes, 'Cohabitation, Trusts and Unjust Enrichment in the Supreme Court of Canada' 2011 127(Jul) LQR 339; Jason W Neyers, 'One Step Forwards, Two Steps Back: Unjust Enrichment in the Supreme Court of Canada' [2004] LMCLQ 435.
[53] *Benedetti* (n 44) [118].

It is necessary for English courts, even in the cohabitation context, to remember that unjust enrichment is backwards looking and has nothing to do with the expectations of the claimant or the defendant. Unjust enrichment reverses the unjust enrichment of the defendant, received at the expense of the claimant in an unjust way. However, this does not mean that courts cannot be flexible when considering what the appropriate value to be placed on the defendant's unjust enrichment is. The aim is to reverse the unjust enrichment of the defendant. Calculations of market value of services and of bills paid must be used in a holistic way by the judge to determine the ultimate value of the enrichment.

B) Defences: Counter-Restitution and Change of Position

Part of the court's discretion on the appropriate quantification of the claimant's remedy must include a consideration of defences. Two such defences will be discussed here: counter-restitution and change of position. Each may allow the defendant to get credit for actions taken during the relationship and therefore may affect the final award given to the claimant.

1. *Counter-restitution*

The first defence is what in the proprietary estoppel case law is known as 'countervailing benefits'. This is the acknowledgment that, although the claimant has benefitted the defendant throughout their relationship, the claimant may also have been benefitted by the defendant's actions. It is therefore unfair to expect the defendant to transfer value back to claimant without getting credit for benefits already provided to the claimant throughout the relationship. In unjust enrichment, this principle is known as 'counter-restitution' and requires both parties to make appropriate restitution to each other. Unfortunately, the principle is highly uncertain and, as with most unjust enrichment principles, has only been used in the commercial context. This leaves us with very little to go on.

The most recent case of counter-restitution is *School Facility Management Ltd v Governing Body of Christ the King College*.[54] The court decided that there were four ways in which the principle of counter-restitution may be justified. First, benefits received by the claimant may reduce the amount by which the defendant has been enriched. Second, benefits received by the claimant might make the defendant's enrichment not unjust. Third, benefits might be treated as giving rise to cross claims in unjust enrichment. Fourth, it may be a condition for a successful

[54] *School Facility Management Ltd v Governing Body of Christ the King College* [2021] EWCA Civ 1053.

claim in unjust enrichment that credit is given for benefits exchanged. Unhelpfully, the court refused to decide which of these was the correct analysis of the principle and would get no narrower that this: the benefits for which the defendant had to be given credit for were those which were sufficiently closely connected with the benefits provided to the defendant that justice required him to do so.

This tells us very little. Even if the judges had made a decisive judgment on the correct operation of the counter-restitution principle, there are no guarantees that such an analysis would have been appropriate in the domestic context. Intimate relationships are messier than commercial ones, with several benefits going both ways over a large amount of time. It is useful to examine the doctrine of proprietary estoppel where countervailing benefits have experienced more in-depth analysis. As Hobhouse LJ has noted, 'in many of its applications the equitable doctrine of proprietary estoppel bears a close relationship to restitutionary principles where one party has acquiesced in or encouraged another in conduct whereby that other at his own expense would have, if no remedy were granted, unjustly enriched the former'.[55]

In *Sledmore v Dalby*,[56] it was held that consideration of the appellant and her needs should have been undertaken and balanced against the respondent's. The respondent had lived rent-free in the apartment, during which time the appellant paid for the insurance and for a reroofing. The disadvantages that the respondent had suffered were therefore dwarfed by the benefits he had received. The benefit of enjoying rent-free accommodation has been particularly important in proprietary estoppel cases – in *Davies v Davies* free accommodation was 'a factor [the judge] had to keep in mind in the evaluative exercise in which he was engaged',[57] and in *Henry v Henry*[58] and *Campbell v Griffin*[59] the claimant's free accommodation was instrumental in reducing the final award to satisfy the equity. In *Southwell v Blackburn* – a cohabitation case – Tomlinson LJ noted that the benefits flowed both ways.[60] The claimant received rent-free accommodation and financial assistance completing a degree course. However, the claimant also supported and helped the defendant, with his career for example, and he consequently received promotions leading to increased earnings and pensions.

[55] *Sledmore v Dalby* (1996) 72 P&CR 196 (CA).
[56] *Sledmore* (n 55).
[57] *Davies v Davies* [2014] EWCA Civ 568; [2014] 2 P&CR DG12 [54].
[58] *Henry v Henry* [2010] UKPC 3; [2010] 2 P&CR DG8.
[59] *Campbell v Griffin* [2001] EWCA Civ 990, (2001) 82 P&CR DG23.
[60] *Southwell v Blackburn* [2014] EWCA Civ 1347, [2015] 2 FLR 1240.

Proprietary estoppel takes an approach of looking at all the factors in the round in order to decide whether an equity has been raised which must be satisfied. One of those factors is the benefits that have flowed each way. However, although there are similarities between the doctrines of unjust enrichment and proprietary estoppel, their differing operations means it would not be advisable to port over wholesale proprietary estoppel's approach to countervailing benefits. Proprietary estoppel is about a claimant acting to their detriment based on a representation made by the defendant. Unjust enrichment, on the other hand, is about benefits provided at the expense of the claimant. It is therefore a vital part of unjust enrichment claims that there is both enrichment and detriment.

The consequence of this is that the defendant should only get credit for benefits he provided to the claimant *at his expense*. Benefits that did not cost anything are therefore irrelevant. This, in effect, uses option three of the Court of Appeal's four options in *School Facility Management*. This option also finds academic support: Burrows argues that counter-restitution is based on a counterclaim of unjust enrichment and is therefore similar to set-off.[61] Birks concurs – counter-restitution operates where a benefit has been received by the claimant from the defendant in exchange for the enrichment which the claimant is seeking to recover from the defendant.[62] There must, in Birks' view, be bilateral unjust enrichment. This makes sense: it preserves the equality between the parties by requiring that each party must show not only that they have provided benefits to the other, but that they have done so at their own expense.

Free accommodation therefore is unlikely to be considered when weighing up the benefits which flow between the parties. Although it is a significant enrichment of the claimant, it is unlikely to be at the defendant's expense (except perhaps in some minor way, such as increased utility bills). Further, the parties living together represents the basis on which the claimant is relying in order to provide these benefits: put another way, the claimant may not have paid for mortgage instalments or other bills or undertaken domestic contributions without living with the defendant. The defendant surely cannot therefore use the very basis which caused the claimant's contributions in the first place in order to deny the claim. Other benefits provided by the defendant, such as payments towards the mortgage instalments or towards acquisition of the property will not enrich the claimant if the property is solely owned by the defendant. One-off payments such as holidays for the family and payments towards groceries and other household bills will, however, enrich the claimant at the defendant's expense (so long as an

[61] Burrows, *The Law of Unjust Enrichment* (n 20).
[62] Birks (n 15) 225.

unjust factor such as failure of basis can be shown), and these will have to therefore be considered when quantifying the claimant's remedy. Commensurate with the holistic, broad-brush approach suggested above, these expenses will have to be of some significance – the payment of a £500 holiday ten years ago is unlikely to affect the court's quantification of the claimant's restitution award. The aim, overall, is to provide restitution so that the claimant is given credit for the contributions she has made to the family home, and to prevent the unjust enrichment of the defendant.

2. *Change of position*

The second relevant defence is change of position. Suppose, due to the claimant's childcare and homemaking, the defendant is able to work full-time outside the home and earn a large amount of money. In reliance on this, the defendant decides to spend £10,000 gambling and loses all the money. If the relationship breaks down and the claimant brings an unjust enrichment action, can the defendant rely on change of position in order to say that he has spent some of the money he was enriched by?

Change of position was first accepted as a defence in *Lipkin Gorman v Karpnale*,[63] where Lord Goff said that 'where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution'.[64] Importantly, the defence is not open to a defendant who was acting in bad faith when changing his position. One example is where the defendant had 'knowledge of the facts entitling him to restitution'.[65] Further, Virgo argues that 'it is clear that the defendant will have acted in bad faith where he or she changed his or her position knowing of the facts which entitle the claimant to restitution. Similarly, the defence should be unavailable if the defendant knew that there was a risk, albeit small, that he or she was not entitled to the enrichment'.[66] Further, the change of position must occur in reliance on the enrichment. Ordinary expenditure, such as rent, utility bills and mortgage instalments will not constitute a change of position for the purposes of the defence.

The defence will therefore not be available where the defendant was not acting in good faith, where the defendant was aware that there was a risk they were not entitled to the enrichment, or where the defendant was not acting in reliance of the enrichment. In *McDonald v Coys of*

[63] *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL).
[64] *Lipkin Gorman* (n 63) 579.
[65] *Lipkin Gorman* (n 63) 579.
[66] Virgo (n 2) 691.

Kensington,[67] for example, the defendant when changing his position was aware that the claimant would be pursuing him to obtain the enrichment – here a personalised number plate. The court held that the paying away of the mark could not therefore have been made in reliance on the defendant's security of receipt and cannot have been made in good faith.

In cohabitation cases, the defendant will almost always be aware of the facts which entitle the claimant to restitution, being in full knowledge of the contributions made and the basis on which they were made. It is therefore difficult to see how the defendant could be acting in good faith for the purposes of the defence. Further, the defendant may well think there is a risk that, should the parties break up, the claimant may be entitled to some degree of recompense. This is especially true given the popular belief in the common law marriage myth. This again would mean that the defendant could not rely on the defence.

Finally, 'one of the most important [questions] is whether the defence applies to all restitutionary claims'.[68] It is not at all clear that change of position as a defence should be relevant to the cohabitation context. Certainly, it does not appear to be available to defendants where the claim is based on some wrongdoing of the defendant, such as undue influence or duress. Further, it is not available to public authorities where such authorities have wrongly levied tax,[69] or in cases of mistakenly paid tax illegal under EU law.[70] The question is whether it should be allowed in cohabitation cases.

Three points suggest that it should not be. First, as already noted, in the vast majority of cases the defendant will be aware of the facts that entitle the claimant to restitution, meaning the defendant would not be able to rely on the facts regardless. Second, as the focus of this claim is to restore to the claimant the enrichments they have provided to the defendant, only counter-restitution should be taken into consideration by the judge in deciding what credit the defendant should get for his payments. Third, as Huddart JA has noted, 'the increased spending must be directly attributable to the receipt of the enrichment […] the mutuality of enrichment and deprivation in the family context will preclude that proof in practice.'[71] The continual 'give and take' of benefits within the family context might give rise to claims for counter-restitution, but will make it difficult for the defendant to show that any expenditure made (e.g. the gambling

[67] *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 WLR 2775, 2792.
[68] Virgo (n 2) 679.
[69] *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue and Customs* [2014] EWHC 4302 (Ch), [2015] STC 1471 [293].
[70] *Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249 (Ch), [2014] 2 CMLR 10 [188].
[71] *Wilson v Fotsch* 2010 BCCA 226, 319 DLR (4th) 26 [40].

payments in the example above) were made in reliance of an enrichment received at the expense of the claimant.

Regardless, as argued, the requirement for the judge is to reverse the defendant's unjust enrichment, quantifying such enrichment by using objective market value in a holistic, broad-brush approach. Enrichments paid the other way, at the defendant's expense, must also be relevant.

III. THE OWNERSHIP FOCUS

The common intention constructive trust remains purely (as a matter of doctrine) within the realm of property law. One of the key advantages of unjust enrichment is the unlinking of the doctrine from questions about ownership. The common intention constructive trust requires the parties to have come to an agreement about the ownership of the property – it is not sufficient for the parties to have discussed asset division at the end of the relationship, or any other details as to what should happen on separation. Ownership is prioritised both as an outcome and as a central, defining aspect of the doctrine. There is no possibility of providing a personal monetary payment to the claimant as a remedy.

This focus on ownership is to be expected given that the common intention constructive trust is a property law device. However, Dewar has posited that reform of the law has been side-tracked by treating ownership as the main vehicle to satisfy family needs.[72] Unmarried couples are therefore forced to dispute in terms and in the language of ownership, despite the fact that the claimant may well prefer to receive a monetary payment.[73] A proprietary remedy means that the claimant's interest is locked away in the property. Either the claimant will be unable to access the funds they need, or the house will need to be sold. Further, there may be cases where continuing financial ties to an ex-partner has a significant adverse effect on the claimant, in particular where there have been allegations of domestic abuse. A monetary payment – offering a 'clean break' – escapes these difficulties. Of course, depending on the amount payable, the house may still need to be sold. The defendant is unlikely to have accessible assets to fund the monetary payment needed. Regardless, personal rather than proprietary remedies offer distinct

[72] John Dewar, 'Land, Law and the Family Home' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998).
[73] Resolution argues for legislation allowing maintenance orders on cohabitation breakdown 'to reflect the economic advantages or disadvantages caused by the relationship which could not be accommodated by other types of orders'. See Resolution, 'Written Evidence' The Rights of Cohabiting Partners (2021) (https://committees.parliament.uk/writtenevidence/37411/html/ accessed 10/05/2022).

advantages, and Dewar therefore argues that 'ownership thinking may have become a bit of a strait-jacket'.[74]

Dewar's argument is made in terms of 'familialisation', meaning the increasing specialism of law applying to the family home. Familialisation carries with it the increased use of family law logic in the judging of disputes. Hayward has furthered Dewar's thesis, noting that the modern common intention constructive trust, after *Stack v Dowden*[75] and *Jones v Kernott*,[76] includes many traditional elements of family law, including increased judicial discretion, direct engagement with the concept of fairness and a greater recognition of relationship dynamics.[77] Hayward notes, however, that familialisation happens primarily at the quantification stage of the doctrine. The problems in the acquisition stage have been noted in the preceding chapters, in particular Chapter One. Further, there has yet to be any familialisation of the remedies applicable once a common intention constructive trust has been proven. Although the context of the relationship can be considered via the use of judicial discretion when quantifying the parties' respective equitable interests in the property, the relationship or circumstances of the parties has no bearing on the form of remedy, which must always be a beneficial interest under a trust.

A centring of ownership within cohabitation disputes therefore represents an obstacle to increased familialisation of this area of law, and a retention of a traditional property law focus. As has been argued previously, it is the nature of needing an agreement as to the *ownership* of the home which provides the impetus for considering domestic contributions as irrelevant for finding a common intention at the acquisition stage, for they are not considered referable to such an agreement. Wong argues that a shift away from ownership will allow a break away from the courts' present preoccupation with direct financial contributions towards the acquisition of the property, as this is inextricably linked to the issue of ownership.[78] Wong goes on to argue that an unjust enrichment approach may facilitate this shift in emphasis. That is not to say that unjust enrichment would make claims for the beneficial interest of the property

[74] Dewar (n 72) 353.
[75] *Stack* (n 13).
[76] *Jones v Kernott* (n 30).
[77] Andy Hayward, '"Family Property" and the Process of "Familialisation" of Property Law' [2012] CFLQ 284.
[78] Simone Wong, 'Property Rights for Home-Sharers: Equity Versus a Legislative Framework?' in Susan Scott-Hunt and Hilary Lim, *Feminist Perspectives on Equity and Trusts* (Cavendish 2001). See also Simone Wong, 'When Trust(s) is Not Enough: an Argument for the Use of Unjust Enrichment for Home Sharers' (1999) 7(1) FLS 47.

impossible; merely that there is an added flexibility of being able to argue for a personal remedy in the form of a monetary payment *or* a proprietary remedy in the form of a beneficial interest under a trust. Claimants could therefore elect to argue for either a proprietary or personal remedy. This would represent the removal of property law's monopoly on cohabitation disputes,[79] and therefore would involve a liberalisation of claims made at the end of cohabitation relationships. Unjust enrichment looks at ownership as only one potential consequence of a successful claim. There will undoubtably be times when a beneficial interest in the property is useful, but the advantage here is a decoupling of the claim from the remedy. The central point is that an unjust enrichment approach would shift the focus away from ownership of specific property to the wealth of the parties more broadly, and particularly to the defendant's unjust enrichment of wealth contributed to the relationship by the claimant.

A) Ownership, Equity and the 'Female Voice'

The inherent focus on ownership within the cohabitation dispute framework is a consequence of relying on English Land Law, which prides itself on being internally stable and rational.[80] This may be more conductive to 'masculine' rather than 'feminine' reasoning, and Auchmuty has noted that 'the sorry saga of disputes over the family home in English trust law is a classic instance of judges operating entirely within the equitable domain, but failing to hear the woman's point of view or to comprehend her approach to justice'.[81] Auchmuty refers to Gilligan's *In a Different Voice*, where Gilligan argues that women's approach to justice is different to men's, in particular that the female approach involves the use of discretion, taking notice of contextual factors and, ultimately, consideration of claims on a case-by-case basis.[82] In this way, it is easy to link Gilligan's construction of the female voice with the concept of familialisation discussed above, contrasted with a more masculine land law perspective. This is because increasing familialisation in the area of the cohabiting family home relies on the use of discretion, context and a concept of fairness, which are all key elements of Gilligan's

[79] In terms of the applicable area of law, at least. It is accepted that these disputes would continue not to be heard by family law judges.

[80] Anne Bottomley and Hilary Lim, 'Feminist Perambulations' in Hilary Lim and Anne Bottomley (eds), *Feminist Perspectives on Land Law* (Routledge 2007).

[81] Rosemary Auchmuty, 'The Fiction of Equity', in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish 2001) 10.

[82] Carol Gilligan, *In a Different Voice* (Harvard University Press 1982). It should be noted that Auchmuty herself considers that Gilligan's view is sometimes thought of as essentialist, and indeed Joan Williams has argued as much: Joan C Williams, 'Deconstructing Gender' (1989) 87 Mich L Rev 797. Gilligan's claim is considered here as a link to familialisation and equitable principles, both of which have been claimed to represent a more female voice than traditional land law principles and should not be taken as a universal truth of how women approach justice.

description of to the female approach to justice. The consequence of this is that it is women who are more likely to benefit from increasing familialisation of the law.

Equity itself may be more conductive to this so-called female reasoning than the common law, as it takes circumstances and contexts into account, allowing a decision to be made on a more case-by-case basis rather than by the strict formalities of the common law. Historically, equitable principles, by relying less on documentation and form, did aid women who would have had less access to these. There are also numerous examples of equity 'helping' women: one example is the recognition of a marriage settlement to avoid or undermine the strict coverture rules. However, the measures that equity allowed would often only apply to wealthy women who would have the resources to set up a trust. Further, as Hayward notes this trust would usually not allow married women financial independence but instead would allow fathers protection over their daughter's inheritance.[83] Further, wealthy men often used equity to circumvent favourable rules for women. A key example is inheritance, where property would go to daughters if there were no sons, leading men to set up trusts to divert property away from their daughters to other male members of the family. Therefore, it is more likely the case that 'equity has assisted some women, some of the time, but not all women and not consistently'.[84]

The common intention constructive trust can be seen as another example of the application of equitable principles failing to properly appreciate the difficulties that women may face, by focusing on ownership of the property in circumstances where such a remedy may not be in the best interests of the claimant, and by further linking questions about ownership to questions about financial behaviours alone (at least at the acquisition stage). As Bottomley notes, 'the attempt to focus only on agreements and activity geared towards ownership tears one element from a much more complex framework of interrelated detail'.[85] The focus on finances, caused by litigating on ownership, means that certain behaviours are ignored. Commodification of such behaviours, thereby revealing their financial impact, might allow courts to treat them as relevant at this acquisition stage, but as argued in Chapter Four such a task may require an unjust enrichment understanding of contributions as enrichments of the defendant. Continuing to require intentions about *ownership*, specifically, requires the construction of female claimants in ways that show their behaviour as referable to such agreements about ownership.

[83] Andy Hayward, 'Married Women's Property Act 1882' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks* (Bloomsbury 2018).
[84] Maggie Conway, 'Equity's Darling?' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish 2001) 27.
[85] Anne Bottomley, 'Self and Subjectivities: Language of Claim in Property Law' (1993) 20 JLS 56.

It is therefore the focus on ownership of property which leads, as Bottomley argues, to the construction of Janet Eves by Lord Denning MR in *Eves v Eves*[86] as the wife/mother/innocent against an irresponsible, dishonest man and a glamorous woman.[87] Gray and Gray have noted that it was Janet Eves' ability to go beyond her traditional gender role – by taking on more manual labour than an 'ordinary' wife would have been expected to – which meant that her claim succeeded.[88] As Stretton points out, counsel arguing cases have long constructed narratives, played on prejudices of their audiences and emphasised certain characteristics in order to increase their chances of succeeding at law.[89] Historically, argues Stretton, women used their vulnerability and helplessness, making clear their poverty and asking for help, in order to attract maximum sympathy.[90] There is a clear parallel here to Lord Denning MR's treatment of Janet Eves. The unrealistic construction of women within cohabitation cases, and in particular the unrealistic approach to women's motivations for contributing to the home, still exists today, as has been argued in Chapter One and exemplified by cases such as *James v Thomas*[91] and *Dobson v Griffey*.[92] Bottomley notes that these constructions can then be used to deny the claims of other women who do not fit within this paradigm.[93] In this way, the law has a normative effect by forcing a concept of 'women' who fit a certain stereotype. If claims are bound to issues surrounding ownership – and therefore necessarily have consequences for both the defendants' and third parties' property rights – it appears to be difficult for courts to accept that it is the claimant's intentions which are of most relevance, or that domestic work alone should be sufficient for a successful claim. The focus on ownership therefore causes many of the issues with the trust.

A final note should briefly be made on the distinction between rights and remedies. Bottomley has noted the normative importance of rights-based (as opposed to remedial) forms of thinking.[94] It is important for claimants to be able to come to court and obtain a proprietary

[86] *Eves v Eves* [1975] 1 WLR 1338 (CA).
[87] Bottomley (n 85).
[88] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) 894.
[89] Tim Stretton, *Women Waging Law in Elizabethan England* (CUP 2009).
[90] See also Rosemary Auchmuty, 'The Married Women's Property Acts: Equality Was Not the Issue' in Rosemary Hunter and Maria Drakopoulou (eds), *Rethinking Equality Projects in Law: Feminist Challenges* (Bloomsbury 2008). Auchmuty notes that Victorian feminist writers often used female vulnerability and their perceived need for protection strategically to secure legal reform.
[91] *James v Thomas* [2007] EWCA Civ 1212, [2008] 1 FLR 1598.
[92] *Dobson v Griffey* (n 1).
[93] Bottomley (n 85).
[94] Anne Bottomley, 'Our Property in Trust: Things to Make and Do' in Susan Scott-Hunt and Hilary Lim, *Feminist Perspectives on Equity and Trusts* (Cavendish 2001).

interest *as of right*, rather than coming to court and asking for a discretionary remedy. The common intention constructive trust grants the claimant a right – if she fulfils the criteria for a trust, she has a right to the defendant's property. The court's function is merely to declare an existing right.[95] This can be contrasted with proprietary estoppel, which instead grants the court much more discretion to satisfy any equity raised for the claimant.[96] As will be seen later in this chapter, that may mean that in proprietary estoppel cases the claimant receives nothing at all. The claimant therefore has much more security under a rights-based doctrine. As Virgo has noted, 'whenever it can be shown that the defendant has been unjustly enriched at the expense of the claimant the defendant will be obliged, by operation of law, to restore to the claimant the value of the benefit which the defendant has received'.[97] Although the method of restitution may be at the discretion of the court (as discussed above), there is no doubt that the court is merely declaring that a right to restitution has been created by the unjust enrichment of the defendant at the expense of the claimant. The claimant therefore will importantly continue to have a rights-based entitlement at the end of her relationship.

B) Application to Renting Couples

The removal of the focus on ownership within cohabitation disputes is also necessary to widen the class of people who can successfully claim. Although not a direct concern for this thesis, it is interesting to briefly consider how much wider an unjust enrichment claim may apply in comparison to a claim under the common intention constructive trust. This is particularly true as some jurisdictions – for instance New Zealand[98] – have removed altogether the requirement for partners to be cohabiting before a claim can be made. Currently, claimants who are renting can apply for the tenancy to be transferred to them from the defendant under Schedule 7 of the Family Law Act 1996, and on the death of one partner the other can succeed to an assured shorthold tenancy under the Housing Act 1988 section 17. This may provide security for the claimant but will do little to deal with financial vulnerabilities caused by the relationship. The common intention constructive trust is limited to those living in a house owned by one (or both) of the parties. Those who are renting their home therefore have no possibility of making a

[95] *Re Sharpe (a Bankrupt)* [1980] 1 WLR 219. Note, however, Etherton's consideration of the common intention constructive trust as a remedial trust: Sir Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (n 35).
[96] Patricia Ferguson, 'Constructive Trusts: A Note of Caution' (1993) 10 LQR 114.
[97] Virgo (n 2) 51.
[98] Property (Relationships) Act 1976 Section 2D lists 'the nature and extent of common residence' as only one of the factors to be considered whether deciding whether two people are in a de facto relationship.

claim. There are few policy reasons why this should be so – perhaps it can be argued that those who own their own home are more likely to have made larger financial contributions i.e. to property improvements and/or mortgage instalments. However, as has been argued in Chapter Four, cohabitation claims should be available to those who have contributed domestic work to the household. There are plenty of couples renting their home who are unmarried and who also have children, and the law should not allow domestic work performed within a rented home to be valued less than the same work performed in a home owned by one or both of the parties. There is no reason why, should renting couples separate, claims should be treated differently to those couples that own their own home. The interdependency of the relationship and the consequent vulnerability which may be experienced do not depend on the ownership of the family home.

As Probert has noted, the only possibility of a successful claim for couples in rented property – other than the transfer of tenancies – is over individual items.[99] This will involve the claimant showing that an express trust has arisen over the defendant's personal property. For example, in *Paul v Constance* the female cohabitant successfully claimed that the contents of a bank account – in the name of the male cohabitant but used by both parties – were held on an express trust for her benefit.[100] In *Rowe v Prance*,[101] Mr Prance made promises that he would live with and marry Mrs Rowe, and Mr Prance purchased a boat in his name with the intention that the parties would live in it together. Mr Prance often referred to the boat as 'ours' and indicated that it represented Mrs Rowe's financial security. It was held that Mr Prance was an express trustee of the boat for the benefit of himself and Mrs Rowe in equal shares. It is possible then for cohabitants without ownership of the family home to make claims over particularly valuable personal property, provided that the required intention to set up a trust over that property can be shown. Similarly, in *Parrott v Parkin* the claimant succeeded in showing that financial contributions to a yacht in her partner's name raised a presumption of resulting trust.[102] However, there is (as the law stands) no possibility of a claim against a former partner's wealth.

[99] Rebecca Probert, 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' [2001] CFLQ 275.
[100] *Paul v Constance* [1977] 1 WLR 527 (CA).
[101] *Rowe v Prance* [1999] 2 FLR 787 (Ch).
[102] *Parrott v Parkin* [2007] EWHC 2010 (Admlty), [2007] 1 Lloyd's Rep 719.

This is an issue. The private rented sector is growing, with an increasing number of households renting rather than owning their own home.[103] In 2008-09, cohabiting couples were far more likely than married couples to be renting rather than owner occupiers: about 18% of married couples were renting as compared to 42% of cohabiting couples.[104] If the law is to respond effectively to the potential for economic vulnerability at the end of relationships, then it must allow claims regardless of the housing status of the parties. This requires a decoupling of claims made at cohabitation breakdown from the issue of ownership. With its focus on wealth generation and unjust retention of economic resources by the defendant, and more importantly with its decentralisation of ownership, unjust enrichment is well-placed to allow claims between renting cohabiting couples on the same basis as home-owning couples.

IV. PIECING TOGETHER THE CLAIM

This thesis argues that development of the common intention constructive trust on the basis that unjust enrichment is the 'driver' or 'event'[105] triggering the obligation imposed on the defendant might lead to significant improvements on the current law. Criticisms of the trust, including the highly gendered issues which exist around the different treatment of financial and non-financial contributions, mean that the current law does not protect economically vulnerable claimants from relationship-generated disadvantage once their relationship breaks down. Indeed, as Chapter Five argued, that is not what the trust is designed to do. Instead, the trust responds to the quasi-contractual basis of consensual property dealings. Unjust enrichment may, in some ways, offer a stronger doctrinal theory on which to rest claims in this context, which leads to a more principled response to the socio-economic reality of cohabitation for many couples. This is because it tends to treat financial and domestic contributions as equal and allows greater remedial flexibility. Further, the unjust factors of failure of basis and mistake are claimant-oriented. This is a change from the bilateral nature of the common intention constructive trust, and represents a shift in the power dynamics between the parties. Under the current law, the defendant can prevent the claimant receiving anything. Using unjust

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[103] Office for National Statistics, *UK Private Rented Sector: 2018* (Jan 2019) https://www.ons.gov.uk/economy/inflationandpriceindices/articles/ukprivaterentedsector/2018 accessed 10th August 2021.

[104] Ministry of Housing, Communities and Local Government, *English Housing Survey: Household Report 2009-10* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/6718/1937206.pdf accessed 10th August 2021.

[105] 'Driver' is the term used in Simon Gardner, 'Family Property Today' (2008) 124 LQR 422. Peter Birks would categorise unjust enrichment as an 'event' causing obligations: Peter Birks, 'Misnomer' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart 1998).

enrichment, the claimant would be entitled to a remedy based on her own motivations and intentions when contributing to the family.

The claimant must first show that she has enriched the defendant. This will be easy where she has given money to the defendant, transferred property to him or discharged his liabilities such as a mortgage. Improvements to property should also be sufficient to show an enrichment as argued in Chapter Four. The most important contributions are so-called domestic contributions, namely homemaking and childcare, as these cannot show a common intention at the acquisition stage under the current law. Allowing domestic contributions alone to ground a claim for financial relief at the end of a relationship is one of the key significant contributions that an unjust enrichment basis could provide. It was argued in Chapter Four that domestic contributions will constitute an enrichment of the defendant if either the defendant would have had to work less in order to provide them or if he would have had to pay someone else to provide them. It was noted that subjective devaluation is not likely to be possible.

Not only must the defendant have been enriched, but that enrichment must have come at the expense of the claimant. Where she has spent time, money or effort providing services then clearly the enrichment will have come at her expense. The concept of incidental benefits, where the enrichment of the defendant is merely a by-product of a benefit that the claimant has received is not based on authority. Further, is unlikely to be relevant in the cohabitation context as the defendant is unlikely to be able to persuasively argue that the claimant was acting primarily in her self-interest to the extent than any benefit received by the defendant is merely incidental. The defendant should not be able to deny the claimant a remedy merely because she was also benefitted by, for example, domestic work.

It is also necessary for an unjust factor to be present. This thesis has argued that failure of basis and mistake are the most important factors which might show the defendant's enrichment is unjust. Both are claimant-oriented factors, and are based on relational autonomy and self-determination. If the claimant has enriched the defendant on the basis of the continuing cohabiting relationship which then fails, then she should be entitled to restitution of that enrichment. This is a much more relational foundation on which to rest claims made at the end of cohabiting relationships, as it does not pigeonhole the claimant's motivations into 'mercenary considerations' or 'love and affection'. Instead, it understands qualified intention, where the claimant may intend to benefit her family and her relationship with the defendant but might not intend the defendant to take a disproportionate economic benefit on relationship breakdown. Of course, not all enrichments will be liable to such analysis. Purchases like

grocery bills, for example, are unlikely to have been made on the basis of a continuing relationship, and it is difficult for the claimant to argue that they would not have spent such money had they known their belief was mistaken. The same might be said for one-off gifts to the defendant, or perhaps money spent on a holiday for the family.

Mistake is another interesting consideration. The common law marriage myth is a persistent myth believed by about half of the public that cohabiting couples who have not married may otherwise be common law spouses. This is a mistake of law, and therefore might ground a claim in unjust enrichment if the claimant was enriching the defendant owing to this mistake. However, this might be difficult to prove, especially in cases where the defendant has not fraudulently induced the mistake. Nevertheless, it is an interesting way of interpreting this well-known myth.

If the claimant can show these three requirements, the court would need to consider the remedy which the claimant should receive. A key question is when proprietary restitution would be possible. Courts will have to decide the question of which contributions can produce a proprietary interest and which will merely allow a personal monetary payment – it is suggested here that all behaviour within a relationship is inherently connected to the home in which the relationship takes place, and therefore that all contributions, supposing they constitute a successful claim for unjust enrichment, should in principle allow for a proprietary remedy. However, courts may wish to curb the amount of proprietary restitution awarded, and an obvious division is to allow a proprietary claim for contributions affecting the property and allow only a monetary payment for other contributions.

By reducing the effect of proprietary restitution, this proposal is likely to be more palatable than the alternative suggestion of allowing all unjust enrichment claims in the cohabitation context to attach to the family home. Indeed, if the enrichment is not concerned with the house, the trust which results might begin to look remedial rather than institutional. The question is to what degree the relevant behaviour must concern the home. In the Canadian courts, there must be a sufficient link between the enrichment and the property. Indirect contributions of money and direct contributions of labour may suffice, provided that there is a connection between the plaintiff's labour and the acquisition, preservation, maintenance or improvement of the property.[106] This thesis will not attempt to, in the abstract, elucidate exactly which contributions are sufficiently connected to the home for a proprietary remedy. Payments toward the purchase

[106] *Kerr v Baranow* (n 49) [51]. See also *Peter v Beblow* [1993] 1 SCR 980.

price or mortgage instalments certainly will be, as will improvements to the property. Generally speaking, payments towards other bills are likely to fall on the other side of the line, as are homemaking and childcare. Having said that, one can imagine bills (such as payment for labourers) and domestic tasks (such as gardening or decorating) which are sufficiently connected to the home so as to allow a proprietary remedy. All will depend on the facts, and the degree of judicial willingness to extend access to property rights.

A few miscellaneous issues need to be dealt with. First, the discussion of this unjust enrichment-based claim has focused on the situation where the relationship ends and the parties separate. However, it is equally applicable where one party dies, leaving the other to make a claim against the estate. In such a circumstance, it may be that proprietary restitution becomes more important as the claimant will want an institutional trust to show they are a secured creditor of the estate. The basis on which the claimant was contributing – the continuing relationship – has still failed, meaning that nothing said in this thesis should be different in situations of one party's death. Further, the Inheritance (Provisions for Family and Dependents) Act 1975 allows certain persons – including those living as if the applicant and the deceased were a married couple or civil partners – to receive reasonable financial provision from the estate of their deceased partner. The situation where a claimant will need to make an unjust enrichment claim against their partner will likely be fairly niche.

Second, little has been said in this thesis about the use of unjust enrichment in circumstances where cohabiting couples have not broken up, yet one party still wishes to show they have an interest in the home. This scenario is most famously seen in *Lloyds Bank v Rosset*,[107] where Mrs Rosset needed to show a proprietary interest in the family home in order to successfully claim she had an overriding interest against the mortgagee bank.[108] This means that the proprietary interest must have arisen prior to the mortgage being granted. This thesis has not considered the unjust enrichment response to this scenario, instead focusing on claims occurring when the parties break up. A related question is at what point proprietary restitution allows an equitable interest to arise. Clearly any trust under unjust enrichment is institutional, rather than remedial, meaning that it is retrospective. However, does the proprietary interest arise when the contribution (and therefore enrichment) is made, or when the relationship fails? The answer *may* change depending on the unjust factor used – failure of basis will only occur

[107] *Rosset* (n 17).
[108] Under s70(1)(g) of the Land Registration Act 1925; now Schedule 3 of the Land Registration Act 2002.

when the relationship fails, yet mistake may occur at any time a contribution is caused by the claimant's incorrect belief (or assumption).

V. CONCLUSIONS

There are significant advantages to the use of unjust enrichment as the event triggering obligations at the end of a cohabiting relationship. The increased relevance of domestic contributions, claimant-orientation and liberalisation of remedies have the effect of protecting the economically weaker party from relationship breakdown. The development of the law along unjust enrichment principles represents a familialisation of the law, allowing it to better respond to the interdependence faced by the claimant. This has already been shown in preceding chapters by using relational autonomy, discussions of power-balance and by conceiving of domestic contributions as 'enrichments' of the defendant. In this chapter, familialisation was drawn out and applied to the increased remedial flexibility permitted by this thesis' use of unjust enrichment.

This increased remedial flexibility is highly controversial within academic discourse. However, it has been argued in this chapter that arguments against proprietary restitution invariably use commercial logic, meaning that they are less persuasive in the domestic context. The relevance of contrasting contexts has been a key theme throughout this thesis in seeking to apply unjust enrichment, and is a novel way of considering the constituent elements of an unjust enrichment claim. It has been argued in this chapter that there are significant differences which must be respected in the cohabitation context in contrast to the commercial context – this again reflects the increased familialisation within the law caused by this use of unjust enrichment.

On a practical level, the use of unjust enrichment in the Chapter and in this thesis more widely represents a positive reform of the law. Development of the common intention constructive trust from within by considering the doctrinal basis of the device allows a reassessment of some of the concepts which have evolved – the use of common intention, for example, or the relevance of different types of contributions. This thesis has taken a birds-eye view of the advantages of an unjust enrichment basis by noting the potential increased familialisation and improvements to the position of – in particular – the economically weaker party. Nothing said here is intended to doubt the importance of legislation to remedy economic disadvantage at the end of a cohabiting relationship. However, in the absence of such legislation, academics and judges alike will have to use private law to achieve important policy goals. Unjust enrichment may be one way to do so.

CONCLUSION

The background to this thesis, described in the introduction, is an increasing number of couples cohabiting without getting married and without possessing any specific legal protections should they separate. This problem is only exacerbated by the fact that many of these couples will be unaware of their legal status (or lack thereof). This is increasingly a uniquely English and Welsh issue. Many Commonwealth countries have passed legislation dealing with the problem by either extending financial remedies on divorce to cohabiting couples or by enacting new bespoke legislation for cohabitants. English cohabiting couples, however, must still dispute within property law, by bringing an ownership claim for the family home. The common intention constructive trust exhibits several issues which ultimately mean that an economically weaker partner may struggle to make a successful claim. In the absence of legislation, this thesis has considered how judicial development of the law could transpire.

Although there has been attempted statutory reform, there has been no political appetite to legislate on the issue. It is an unavoidable conclusion that reform will have to come through the courts. One way forward could be continued case-by-case development of the common intention constructive trust. However, there has been little advancement of the law since *Jones v Kernott* in 2011,[1] and the structural inequalities facilitated by the law, including by the inexorable focus on agreements about ownership, would form a barrier for improving how the law works for couples. Unjust enrichment is an obvious alternative, well-known for its use in the area in Canada. Given the doctrine's focus on economic advantage and disadvantage, it also has a strong similarity to the Law Commission's 2007 proposals. This may increase positive judicial reaction to development of the law along the lines of restitution.

The core argument made in this thesis is that understanding the obligations created at the end of a cohabiting relationship as arising owing to unjust enrichment opens the door to improvements in the law, particularly for the economically weaker partner. This is an argument not for wholesale replacement of the common intention constructive trust – unpalatable owing to the doctrine of precedent – but instead for a case-by-case development of the law according to unjust enrichment doctrine as the theoretical 'event' allowing a claim. Judicial recognition of unjust enrichment as this 'event' would provide access to legal development and the reorientation of the trust utilising restitutionary principles discussed throughout this thesis. It

[1] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

was argued that the improvements caused by such a development would come from new perspectives which unjust enrichment thinking could provide on longstanding criticisms of the common intention constructive trust. This conclusion will first discuss some key findings from this thesis before considering the significance of these findings.

I. FINDINGS

This thesis considered the implications of developing the law applying to cohabitation disputes according to the doctrine of unjust enrichment. Under Birks' classification of obligations into those created due to wrongs, consent and unjust enrichment,[2] this thesis asked what the law would look like if the obligation upon the defendant to provide a remedy to the claimant at the end of a cohabiting relationship was created by the unjust enrichment of the defendant. Several controversies of the common intention constructive trust are old, having existed for over 50 years following the decisions of *Pettitt* and *Gissing*.[3] In order to move the law forward, new, creative angles on the issues are needed. It was therefore thought that unjust enrichment may provide a novel perspective on these old debates.

The significant contribution of this thesis is a sustained, detailed examination of whether and how unjust enrichment could work in the cohabitation context. Several commentators have considered the application of unjust enrichment to cohabitation disputes in England and Wales. Most often this has been done in a descriptive sense, where unjust enrichment is used as a highly abstract principle, indicating what is unfair or unconscionable with the defendant taking an economic benefit at the end of a relationship, leaving the claimant with an economic disadvantage. Sometimes this involves consideration of Canadian law, which is significantly different to English and Welsh unjust enrichment. It is comparatively rarer to see research into the use of unjust enrichment in the substantive sense, in which unjust enrichment *as a doctrine*, defined with a high degree of rigour, is considered. There has been little research prior to this thesis which has considered whether a cause of action in unjust enrichment could arise at the end of a cohabiting relationship, or how such a cause of action could operate. It is argued that this gap is therefore filled by this thesis.

There is a separate question, however, about the practical implications of this proposal. The common intention constructive trust has been in use for about 50 years in one form or another,

[2] Peter Birks, 'Misnomer' in WR Cornish et al, *Restitution: Past, Present and Future* (1998 Hart); Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 UW Austl L Rev 13 17.
[3] *Pettitt v Pettitt* [1970] AC 777 (HL); *Gissing v Gissing* [1971] AC 886 (HL).

and it is difficult to see strong judicial willingness for an immediate and radical change in the law. It has previously been noted that it is not clear what theoretical 'event' the common intention constructive trust is based on. Is it consent, wrongdoing or unjust enrichment? Or does it fall into the miscellany? As cases continue to come before the courts, judges will have to make decisions on the facts before them. Their judgments will depend on established precedent, on how counsel frame their argument, and, at higher levels, on the theoretical basis of the law. An acknowledgement by the Court of Appeal or the Supreme Court that unjust enrichment could act as the basis on which the trust rests would create a new road down which improvements could be made on many common criticisms of the law. This would involve reorientation of the trust towards unjust enrichment principles. The effectiveness of this proposal is constrained by judicial desire and creativity, but this thesis points out realistic directions for future travel. Such a change in basis has occurred in other jurisdictions. The Canadian courts decided that an unjust enrichment basis for the law was better than the concept of 'common intention'. Australian courts preferred a more flexible unconscionability principle. There is nothing, in theory, to stop English and Welsh courts doing similar, and this thesis therefore signposts *how* this development could work and why it would be favourable for litigants.

Should there be judicial willingness for an unjust enrichment development, the Canadian experience cannot be replicated. In England and Wales, unjust enrichment has primarily been used in the commercial context. Perhaps its most well-known use has been in dealing with cases of mistakenly paid (or unlawfully levied) taxation. The use of unjust enrichment in the domestic context in this jurisdiction is new. Chapter Two suggested a theoretical justification for the doctrine's intervention in cohabitation breakdown disputes. Broadly, this justification took the form of respect for autonomy and freedom of self-determination. By 'autonomy', this thesis has not sought to deny the interdependence that parties in intimate relationships experience, and instead uses 'relational autonomy', where autonomy is not defined in opposition to dependency and connection. Further, a realistic view of the nature of intimate relationships is required, where social constraints – including the societal gendered expectations of women in particular – are considered as part of the law's response to cohabitation breakdown. The ability to freely exit relationships means that one party – usually women who are financially dependent on their partner – could face significant economic harm at the end of their relationship. A commitment to relational autonomy therefore was considered

to mean that the law must prevent the defendant from leaving the relationship with no legal obligations to their former partner.

Canada and Scotland have both used unjust enrichment to respond to disputes on cohabitation relationship breakdown, and Chapter Three examined the laws of these jurisdictions and undertook an analysis of the use of unjust enrichment in the cohabitation context in this jurisdiction. Canadian law was seen as particularly useful due to its relatively successful use of unjust enrichment and its development of the joint family venture concept, which sought to apply a more realistic construction of family relations. Further, it was noted that there was a history of both academic and judicial mention of unjust enrichment in the cohabitation context in England and Wales. Lords Reid and Walker have both considered the doctrine (in *Pettitt* and *Stack*,[4] respectively), but the doctrine has been argued only once in the cohabitation context. Academic literature suggesting its application was more plentiful, with academics variously arguing that unjust enrichment should be used in the substantive sense (using unjust enrichment as a doctrine) and, more commonly, considering that unjust enrichment is useful in its descriptive sense (to show that the defendant has received an enrichment which is unjust). It was therefore found that there was quite the ancestry of considering unjust enrichment use in the English cohabitation context, despite a consistent and significant study never being undertaken on the topic.

Part Two of this thesis used the background and context explored in Part One to question how unjust enrichment could offer insights into well-known issues with the common intention constructive trust. It was structured around these issues, which fell into three categories: first, the prioritisation of financial contributions to the home over domestic contributions, second, the nature of the search for party intention and, third, the focus on ownership.

One of the key issues with the common intention constructive trust is that it considers domestic contributions irrelevant when searching for a common intention at the acquisition stage. This is caused by the motivation of 'love and affection' being attached to any unpaid work in the home, meaning that such work cannot be considered referable to intentions about ownership of the family home. Chapter Four found that one of the most important impacts of an unjust enrichment perspective was the commodification of domestic contributions, which introduced market norms when evaluating these contributions. Commodification revealed the economic impact of domestic contributions, reconceiving responsibilities such as homemaking and

[4] *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432.

childcare as work which undoubtably enriched the defendant. Furthermore, it was found that it was unlikely defendants would be able to subjectively devalue the enrichment which the defendant received due to the claimant's domestic contributions to the home, as they will have been requested and freely accepted and further will often be reasonably necessary work. Chapter Four also considered that improvements to property, the payment of money, the discharge of the defendant's debts (such as a mortgage) and the transfer of land and goods could all constitute enrichments. Broadly, this means that a wider range of contributions to the home would be relevant under an unjust enrichment claim than under the common intention constructive trust.

The use of the economic theory of commodification – a theory underlying the concept of 'enrichment' – casts unpaid domestic work in the home as valuable *financial* contributions to the family, and therefore questions the gulf in the case law between treatment of financial and domestic contributions. It was argued that judicial use of the concept of enrichment as it is used in the doctrine of unjust enrichment might indicate a development away from the traditional hierarchy of contributions to the home (with financial contributions on top) and towards a more equal treatment of all contributions which economically benefit the defendant. This is because, by considering the trust as based on the 'event' of unjust enrichment, contributions to the family home are relevant depending on their economic enrichment of the defendant. Domestic services such as childcare and homemaking can cause such an enrichment in the same way as payment of utility bills or mortgage instalments, for example. An unjust enrichment theoretical basis of the law therefore could indicate a reconceiving in the way contributions are envisaged.

Chapter Five examined the normative basis on which the common intention constructive trust rests and compared it to the theory behind unjust enrichment. It was seen that the trust is based on preventing the unconscionability that would arise should the defendant resile from a common intention (which the claimant detrimentally relied on) between the parties that the claimant is to have a share of the property. The current law is therefore grounded in consensual property dealings, and further appears to operate on a quasi-contractual basis. It was argued that this is not a strong justification for intervening in cohabitation breakdown disputes, primarily because the intentions found by judges are often fictitious and artificial. Unjust factors were discussed including failure of basis – where the claimant enriched the defendant on the basis of a continuing cohabiting relationship which then failed – and mistake, which had an interesting alignment with the common law marriage myth. Both unjust factors were based on the freedom of self-determination, where unjust enrichment protects the claimant's

autonomy by refusing to allow the defendant to retain an economic enrichment that he was never intended to personally benefit from. It was argued that this was a more realistic rationale for the law's intervention in cohabitation disputes, as it takes seriously the claimant's qualified intentions – they may seek to benefit the defendant in the context of the broader relationship (and family), but that does not mean they intended for the defendant to personally benefit by retaining, at the end of the relationship, economic benefits generated by the claimant. This is a more nuanced interpretation of intentions.

Should unjust enrichment be accepted as the basis of the obligations imposed at the end of a cohabiting relationship, Chapter Five suggests that future development might involve a movement away from *common* intentions to focus more on what the claimant intended to do with her assets with which she contributed to the family. By grounding the question in terms of qualified intention – whether on the basis of a continuing relationship or due to a mistaken knowledge of the law – development might involve adopting a more realistic perspective of the interdependence common in intimate relationships. Perhaps the closest this thesis comes to suggesting an already possible unjust enrichment claim in the law, needing no development or modification of unjust enrichment concepts, is a claim based on mistake of law. This uses the common law marriage myth to argue that the claimant's intention has been negated due to her mistake. Despite the potential this argument holds, the need for a *causative* mistake means that it is unlikely most claimants will be able to successfully claim based on mistake.

Finally, this thesis tackled the issue of ownership in Chapter Six. This issue is fundamental to the core argument in this thesis, as it represents a break from property law logic. Chapter Six therefore involved a development of the arguments made throughout the thesis, noting that the problems with domestic contributions and bilateral quasi-contractual agreements were based on the need for claims to be made about ownership in the family home. It was argued that reorientation of the trust towards an unjust enrichment approach would divorce the issue of ownership from claims made at the end of a cohabiting relationship. This way, parties would not need to dispute in terms of ownership, which is not an appropriate remedial outcome for many cohabitants. It was argued that unjust enrichment would allow an election between a personal monetary payment or a beneficial interest under a trust in the family home and, further, that the quantification of the defendant's enrichment (and thus the remedy) should be undertaken in a holistic and broad-brush manner. This was necessary due to the common paucity of evidence in these types of claims, meaning that an accounting-based remedy, seeking to accurately calculate the enrichment of the defendant, was practically impossible.

Future development based on unjust enrichment might therefore indicate an increased remedial flexibility. Although no private law doctrine can be as flexible as legislation could be, Chapter Six indicates that the possibility of election between a personal or proprietary remedy would be very positive for claimants who have immediate need of the money and who would therefore not need to get an order for sale of the house. Chapter Six found that the overarching advantage of developing the law towards unjust enrichment was the removal of the inexorable link between ownership claims and cohabitation disputes, as this was the cause of many of the current law's faults.

The acceptance of unjust enrichment as the basis for disputes at the end of a cohabiting relationship would therefore have significant implications on the future development of the law. It is clear an unjust enrichment perspective sheds new light on certain elements of the common intention constructive trust. Unjust enrichment appears to take a claimant-oriented approach to the law, which contrasts with the bilateral approach of the common intention constructive trust. Unjust enrichment, as the event creating these obligations, would induce the law to stop focusing on ownership and instead on the contributions of the claimant themselves. The claimant's intentions and aims when making these contributions should be of vital importance, and further these contributions – even if they take the form of homemaking or childcare – have a significant economic impact on the defendant. On this understanding, the claim becomes one of unjust economic benefit rather than consensual property dealings. As has been argued, wholesale replacement of the common intention trust with unjust enrichment is not likely – however, by recognising that unjust enrichment acts as the event triggering obligations in this context, case-by-case judicial development might draw on some of the elements mentioned in this thesis.

II. IMPLICATIONS

The above discussion shows that recognition of unjust enrichment as the theoretical basis for cohabitation disputes may provide an opportunity to advance longstanding issues within the case law. Development of the law in line with unjust enrichment principles may help to resolve these debates, and further may offer an approach which accords with the practical realities of these disputes. By drawing out the broader themes of this thesis, we can see that the arguments contained here could have significant implications for both the doctrine of unjust enrichment as a whole and the way in which cohabitation relationship breakdown is dealt with, more specifically. Three key implications emerge.

A. Unjust Enrichment's Place in the Domestic Context

Although this thesis considers unjust enrichment's application to the cohabitation context, it is useful to question whether the doctrine could be applicable more broadly in the domestic context. As noted above, unjust enrichment's primary use in England has been to resolve commercial disputes. This is perhaps unsurprising – after the doctrine was admitted to English law in 1991, it was used most famously in the 'interest-swap' cases throughout the 90s.[5] This led to a reaffirming of the doctrine, in particular the removal of the mistake of law bar. Further, development of unjust enrichment came in several cases involving mistakenly paid EU taxes,[6] which further cemented it as a doctrine for use in commercial situations. The genesis of unjust enrichment in England can be contrasted with the same in Canada, where the seminal cases involved intimate relationships.

It is therefore unsurprising that English unjust enrichment law is considered a commercial doctrine. The nature of 'enrichment', possibly due to the commercial logic necessitated by these cases, has been defined in relation to objective market value, precisely calculated on an accounting-based approach. This is at odds with the much more flexible Canadian doctrine. Until this thesis, the English law of unjust enrichment had never been under a sustained consideration of its use in the domestic context.

Recent academic literature suggests that the continued unity of an unjust enrichment claim in the substantive sense – where the doctrine can be stated as a high degree of rigour, to be used as a cause of action – relies on an acceptance of normative plurality. It was argued in Chapter Two that this means that the normative justification underpinning the doctrine might be different in cases concerning the domestic context than it might in cases concerning the commercial context. It was suggested that the normative theory of unjust enrichment in the domestic context might be based on societal norms such as relational autonomy and the realities of gender differences in intimate relationships. Throughout this thesis, differences in application in the commercial and the domestic contexts have been indicated – the most important perhaps is the use of proprietary restitution in the domestic context – to take into

[5] See for instance *Westdeutsche Landesbank Gironzentrale v Islington LBC* [1996] AC 669 and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

[6] For example *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558; *Prudential Assurance Company v Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 39, [2018] 3 WLR 652; *Investment Trust Companies v The Commissioners of Her Majesty's Revenue and Customs* [2017] UKSC 29, [2018] AC 275; *Test Claimant's in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2020] 3 WLR 1369.

account the specific needs to parties in family relationships, and to reduce the impact of commercial logic on these claims. This thesis also introduced concepts such as the commodification of domestic labour and linked them to both feminist theory and unjust enrichment's understanding of 'enrichment'. In this way, this thesis has advocated, in effect, for a familialisation of unjust enrichment.

Further, the doctrine of unjust enrichment has not yet, in an English context, undergone any extended examination from a socio-legal angle. Although this thesis is doctrinal, it has argued to some extent on the lines of socio-legal consideration of the doctrine. Perhaps most important is the argument that the concept of enrichment may commodify domestic labour and therefore change the way such contributions to the home are conceptualised (as economically impactful activities). This is highly relevant in the cohabitation context where narratives of 'love and affection' have often been applied to women's motivations for contributing to the family home. The analysis of the way unjust enrichment may apply to domestic contributions fits with Degeling and Roque's work and suggests that there is further potential for the doctrine to develop in the domestic context.[7]

Should the arguments made in this thesis be accepted, new possibilities emerge to consider whether unjust enrichment could have potential for further development in the domestic context. For instance, restitution scholars often argue that undue influence is part of the law of unjust enrichment. One of the most important fact patterns for undue influence is a female claimant who, due to the (actual or presumed) undue influence of a male partner, acts as guarantor for a loan benefitting her partner. If unjust enrichment is to act as the basis for these disputes, then further research will be needed on the ability of unjust enrichment to deal with power-relations between parties, and in particular the impact of gender on these disputes. Separately, Sloan has discussed unjust enrichment's use regarding private carers,[8] and Nield has examined whether cases where testamentary promises to reward caregivers later fail could utilise unjust enrichment.[9] These examples show that there is a history of consideration of unjust enrichment's use in the domestic context, but there has been little sustained analysis of whether the doctrine is up to the task. In particular, if unjust enrichment is to be used in this

[7] Simone Degeling and Mehera San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 Sydney L Rev 69.
[8] Brian Sloan, *Informal Carers and Private Law* (Hart 2013).
[9] Sarah Nield, 'Testamentary Promises: A Test Bed for Legal Frameworks of Unpaid Caregiving' (2007) 58 Northern Ireland Legal Quarterly 287.

context, it requires a detailed analysis of the doctrine's socio-legal impacts, in particular its impact and implications on gender.[10]

B. The Use of Property Law in Disputes Involving Informal Relationships

The common intention constructive trust is the current device applying to disputes that occur at the end of cohabitation relationships. It is a property law device, fitting with the surrounding Land Law rules – including the Trusts of Land and Appointment of Trustees Act 1996 – and equitable rules, including express and resulting trusts but also more fundamentally the use of unconscionability to justify the imposition of a constructive trust. As it is based in property law, the trust is about transferring ownership of property. Unsurprisingly, it has been convincingly argued by many that the use of property law to deal with disputes at the end of relationships is not ideal. The context of the common intention trust in *Pettitt* and *Gissing*[11] is the House of Lords rejecting Lord Denning's attempts in earlier Court of Appeal cases to allow a broad-brush doctrine facilitated by section 17 of the Married Women's Property Act 1882. Further, the House of Lords were imposing a trust on the basis that legislation might soon deal with the problem. Indeed, after the Matrimonial Causes Act 1973 was passed, the common intention constructive trust only retained its relevance to married couples by dealing with property rights during the marriage and before divorce. Yet it is this trust to which cohabitants must now turn to at the end of their relationship (apart, perhaps, from proprietary estoppel).

Much of the argument in this thesis has been about the inappropriateness of using property law – with its inherent focus on ownership – to deal with these kinds of disputes. At the end of their relationship, the complex interdependencies experienced by couples cannot be reduced to questions of ownership of the family home. Where the home is owned by the defendant and the parties have taken on traditional gender roles during the relationship, the claimant will need a degree of economic stability to allow her to exit the relationship as an independent and autonomous person. A beneficial interest under a trust is not necessarily the remedy such a claimant will want. The common intention constructive trust, existing as a property law device, is not designed to deal holistically with economic benefit and disadvantage experienced by the parties during their relationship. The question asked – whether the parties had a common intention about ownership which the defendant detrimentally relied on – does not help the economically vulnerable claimant. But the key point is that it is not designed to do so. This

[10] For a rare consideration of the matter in the English context, see Degeling and Roque (n 5).
[11] *Gissing* and *Pettitt* (n 3).

thesis suggested that the law may better work for both parties to the relationship if the claim made is divorced from ownership as a *necessary* consequence, instead positioning ownership as a possible remedy if so chosen by the claimant. The implication is that property law is not an appropriate tool for use in this context. A key theme of this thesis has been to suggest that recognition of unjust enrichment as the theoretical basis of the defendant's obligation might allow development away from ownership as the exclusive remedy and towards a higher degree of flexibility for the claimant.

C. The Need for Legislation (and what to do without it)

As noted above, property law is not designed to deal with disputes on cohabitation relationship breakdown, and the focus on ownership of the family home fails to properly understand the relationship dynamics of the parties that use the law. However, similar criticism can be levelled against unjust enrichment. This thesis suggests that development of the law along the line of unjust enrichment principles would improve the current law: by taking domestic contributions into account, by being claimant-oriented and by divorcing these disputes from ownership of the family home. Chapter Six argued that unjust enrichment had a remedial flexibility that the common intention constructive trust did not, by being able to allow both personal and proprietary restitution.

This remedial scheme would still be much more restrictive when compared to that afforded to married couples under the Matrimonial Causes Act 1973 or to civil partners under the Civil Partnership Act 2004. There is no doubt that a legislative scheme for cohabiting couples would be more flexible and would accord more with the needs of parties than is possible under any private law doctrine, unjust enrichment included. Further, legislation allowing claims to be made by cohabiting couples would mean that family law judges – as opposed to Chancery ones – would hear these disputes. This thesis argues that unjust enrichment is the best the common law can do, not that it is the best possible reform idea. Legislation is clearly the reform which cohabiting couples need.

This thesis, however, has side-lined the possibility of Parliament intervention. This is because, in the current political climate, such legislation has a very slim chance of success. This thesis began being written in 2018 – at that time, Theresa May was Prime Minister, and it was thought that legislation relating to cohabiting couples was unlikely in the short term due to the protracted negotiations surrounding the United Kingdom's departure from the European Union. In 2022, Brexit continues to take up Government time, but of course the broader

problem for any legislation passing the house is the Covid-19 pandemic which has meant that few legislative initiatives not relating to the pandemic have passed the Houses of Parliament since early 2020. Perhaps the biggest problem, however, is the lack of political will. The Women and Equalities Committee's Inquiry into the Rights of Cohabiting Partners will be reported on soon, but outside this there is little political appetite for change, with none of the main parties calling for reform and a Conservative majority in Parliament which may be supportive of the 'sanctity of marriage'.[12]

This thesis therefore has suggested that, in the continuing absence of legislation, the law can develop in two ways. Either the common intention constructive trust continues – in which case the structural inequalities discussed throughout this thesis will continue – or the law pivots towards a different doctrine. The argument made here is that judicial recognition of unjust enrichment as the theoretical obligation-creating event might open the door to development along the line of restitutionary principles discussed throughout this thesis.

III. FINAL THOUGHTS

The common intention constructive trust has several longstanding issues. These issues are often institutional – the structural development of the trust as focused on agreement about ownership means that it exists as a bilateral, finance-oriented device designed to remedy unconscionability where the defendant resiles from informal property dealings. Owing to the characterisation of these issues as inexorable to the current structure of the trust, judicial development of cohabitation disputes requires creative angles to be considered. It has never been clear on what basis the trust obligations at the end of a cohabiting relationship are created. Judicial recognition of the event which creates these obligations might pave the way for more principled future development. This thesis has argued that unjust enrichment is a strong candidate for the theoretical basis of these obligations, owing to a number of advantages which the doctrine could provide.

The key advantage created by this unjust enrichment basis is a shift in focus from ownership toward economic benefit of the defendant. The election of a remedy between personal and proprietary would be a significant development, but this shift in emphasis has further consequences. By focusing on economic benefit, contributions to the family are judged in light

[12] There is, of course, left-wing objection to cohabitation reform. However, the Conservative reaction to increasing rights for cohabitants is comparatively more important given the current dominance of right-wing Members of Parliament.

of their commodified market value. This leads to a reduction in the gap between financial and domestic contributions, an issue which is at the core of the common intention constructive trust. Spotlighting economic benefit of the defendant also moves away from law structured around bilateral agreements and instead focuses on the claimant's motivations and intentions when contributing to the home, as the relevant question is always whether the claimant was intending to benefit the defendant. It has been argued that these advantages together represent a more realistic reaction to the complex interdependencies between cohabiting couples.

Judicial recognition of unjust enrichment as the event creating obligations in cohabitation disputes might therefore be an advantageous way forward for an aging area of law, especially in the context of other jurisdictions moving away from the common intention concept. In the absence of legislation, judicial creativity will need to be relied on for development of the law. Principled advancement of the law need not however involve a sudden and immediate change but, in keeping with the doctrine of precedent, once unjust enrichment is the admitted theoretical justification for legal intervention in cohabitation property disputes it will become easier for judges to draw on many of the ideas contained within this thesis. In this way, the law applying to cohabitation disputes concerning the home might be nudged ever closer to a more realistic and principled framework.

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