# *Judicial Discretion in Ownership Disputes over the Family Home*

**By**

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**Submitted to Durham University for the degree of Doctor of Philosophy**

**Submitted 9th July 2013**

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# THESIS ABSTRACT

The core focus of this thesis is on the exercise of judicial discretion in the resolution of ownership disputes over the family home. Drawing upon the academic scholarship on judicial discretion, this thesis evaluates how the exercise of discretion has been conceptualised and employed within this specific context. Focusing on both the exercise of judicial discretion in matrimonial property disputes prior to the House of Lords' decision in *Pettitt v Pettitt* in 1969 and in the modern implied trust framework, it questions whether there is evidence of judges arrogating enhanced discretion to themselves and whether this is deployed in order to take account of 'changing social and economic circumstances' surrounding the ownership of family property. Having identified an increased visibility of discretion in modern family property cases, this thesis questions whether a greater use of discretion within the context of domestic property evidences a departure from traditional property law reasoning and represents a problematic development in the law requiring a return to orthodoxy. This thesis provides a more nuanced understanding as to the exercise of discretion within this context. The claim advanced by this thesis is that judges in this specific context have increased their use of discretion to enable greater sensitivity to the domestic context and, whilst this may appear a controversial move to some, it is a beneficial, principled and structured modification of the property law framework applicable in this area.

# ACKNOWLEDGEMENTS

I would like to thank Professor Lorna Fox-O'Mahony for her guidance, critical eye and support throughout the course of this project. Thanks also go to Dr Robin Hickey and Professor Helen Fenwick who read through several chapters, provided detailed feedback and were a constant source of support. Professor Erika Rackley and Professor William Lucy provided helpful guidance on judicial discretion and judicial reasoning.

Thanks also goes to Professor John Mee, Dr Martin Dixon, Nick Piska, Dr Rob George, Dr Juanita Roche and Dr Brian Sloan for useful discussions and debates.

I would also like to thank Dr Aoife O'Donoghue, Colin Murray, Dr Kevin Brown, Laura Graham and Hayley Wharton for their encouragement and guidance.

Chris Bevan deserves my greatest thanks for his endless support, his patience and for just being there.

This thesis is dedicated to my parents, Jackie and Tony.

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# INTRODUCTION

## OVERVIEW OF THE IMPLIED TRUST FRAMEWORK

The common intention constructive trust and the presumed intention resulting trust are implied trusts applicable in ownership disputes over the family home.[1] The implied trusts represent a claimant's route for the acquisition and quantification of a beneficial interest in the home and possess distinct theoretical foundations, differing historical origins and specific legal requirements for their operation.[2] Whereas the courts can use a structured judicial discretion to redistribute property in disputes between married couples and civil partners, ownership disputes between cohabitants and home sharers are governed by general principles of property law and trusts.[3]

In terms of how implied trusts operate in an ownership dispute over the family home the starting point is that equity follows the law and thus the transfer of legal title prima facie carries with it equitable title.[4] However, where a claimant asserts that equitable ownership does not correlate with legal ownership, the onus shifts onto the claimant to establish a trust in their favour. Where successful, the sole legal title owner is converted into a trustee and holds the property or part of that property on trust for the claimant. This framework applies to both sole legal title and joint legal title disputes, albeit the starting points are different. In the former scenario, it is for the claimant to show that they have acquired an interest, and in the latter scenario, the claimant must demonstrate an intention to share beneficial ownership with the legal co-owner in unequal shares.[5]

Recent decisions in *Stack v Dowden*[6] and *Jones v Kernott*[7] demonstrate that the common intention constructive trust has been identified as the primary device employed by the

[1] The term 'implied trust' is used in this thesis to include both resulting and constructive trusts and to distinguish those two trusts from express trusts.
[2] Other routes are available to acquire a beneficial interest that are outside the scope of this thesis such as express declarations of trust and proprietary estoppel.
[3] See Matrimonial Proceedings and Property Act 1970, as consolidated by the Matrimonial Causes Act 1973 ss 23-25. These principles, following the enactment of the Civil Partnership Act 2004, now apply to civil partners through the Civil Partnership Act 2004 Schedule 5 and s 65.
[4] See *Stack v Dowden* [2007] UKHL 17 [56] (Baroness Hale).
[5] ibid and *Jones v Kernott* [2011] UKSC 53 [52] (Lord Walker and Lady Hale).
[6] *Stack v Dowden* (n 4).
[7] *Jones v Kernott* (n 5).

courts in the resolution of disputes over the shared home.[8] Originally developed from the dicta of Lord Diplock in the House of Lords' decision in *Gissing v Gissing*,[9] and later reformulated by Lord Bridge in *Lloyds Bank v Rosset*,[10] this implied trust responds to the parties' common intention as to beneficial ownership which can be established in two ways. One route requires an express common intention between the parties as to the sharing of beneficial ownership coupled with detrimental reliance by the claimant upon that common intention. In contrast, direct financial contributions to the purchase price or a mortgage repayment provide another route and generate an inference of common intention. If a claimant can acquire an interest using either of these routes, determination of the size of their share of the beneficial ownership is required. The court will begin by searching for an explicit agreement as to shares or conduct from which to infer an intention as to shares. Where this search proves unsuccessful, the court is permitted to grant a 'share which the court considers fair having regard to the whole course of dealing between them in relation to the property'.[11] This process of quantification is repeated in joint legal title disputes albeit with the claimant beginning with an equal share of the beneficial ownership generated by a presumption of beneficial joint tenancy.

Operating alongside the common intention constructive trust is another implied trust - the presumed intention resulting trust. The resulting trust is a historic device[12] and operates in the context of the purchase of property in the name of one individual but through the assistance of money provided by another.[13] In this particular scenario, a presumption is generated whereby the legal title holder is presumed to hold the property on trust for the contributor. By focusing solely on contributions made at the point of acquisition, the contributor's share in the property is proportionate to the size of their contribution and cannot be increased through subsequent contributions. The resulting trust operates on the basis that it is the presumed intent of the contributor that they did not intend a gift. *Stack* and *Kernott* both indicate that the presumed intention resulting trust has a limited role to play in the informal acquisition and quantification of property rights in the shared home, particularly in instances of joint legal ownership.[14]

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[8] ibid [25] (Lord Walker and Lady Hale). See also *Abbott v Abbott* [2007] UKPC 53 [4] (Baroness Hale).
[9] *Gissing v Gissing* [1971] AC 886 (HL).
[10] *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107 (HL).
[11] *Jones v Kernott* (n 5) [51] (Lord Walker and Lady Hale).
[12] See *Dyer v Dyer* (1788) 2 Cox 92.
[13] Other contexts exist such as a purchase in joint names with financial contributions from both parties.
[14] *Stack v Dowden* (n 4) [31] (Lord Walker), [60] (Baroness Hale) and *Jones v Kernott* (n 5) [24]-[25] (Lord Walker and Lady Hale).

## THE PROBLEMS TO BE ADDRESSED BY THIS THESIS

The implied trusts have been comprehensively criticised for their potential to generate injustice to the parties concerned.[15] Indeed, extensive criticism of the implied trusts is a prominent aspect of trusts of the family home scholarship.[16] The deficiencies of the framework are wide-ranging and extensive but, as will be explored below, criticism often centres on the argument that the implied trusts do not operate effectively when the property concerned was a family home and the parties were formerly in an intimate relationship. Modern decisions, however, demonstrate attempts by the courts to modify how these trusts operate in this context. Crucially for this thesis, these attempts reveal an increased use of judicial discretion which has itself generated criticism from the courts[17] and the academic community.[18] This thesis focuses on two central problems.

### (i) The Failure of the Implied Trust Framework to Accommodate the Domestic Context

The failure of the implied trusts to accommodate the domestic nature of disputes can be evidenced from two perspectives, namely the reliance on common intention and the insistence on direct financial contributions. The common intention constructive trust requires evidence of a common intention between the parties coupled with detrimental reliance on that common intention by the claimant. The reliance on common intention has been extensively criticised by the courts: in particular, Griffiths LJ noted that there is an 'air of unreality' involved in the exercise of searching for often 'unexpressed and probably unconsidered intentions' as to the beneficial ownership of a particular property.[19] Similarly, judges have expressed disquiet at the fact that common intention has crucial significance in an ownership claim, yet that fact is unlikely to be fully comprehended by parties. The consequences of failing to appreciate this means, as one judge noted, that 'many thousands of pounds of value may be liable to turn on this fine question as to whether the relevant words were spoken in earnest or in dalliance and

[15] For general criticism of the implied trust framework see Law Commission, *Sharing Homes A Discussion Paper* (Law Com No 278, 2002) para 2.105-2111 and, more recently, Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) 154-162.
[16] See, generally, S Gardner, 'Rethinking Family Property' (1993) 109 *Law Quarterly Review* 263.
[17] See *Midland Bank v Cooke* [1995] 4 All ER 562, 575 (Waite LJ) and *Jones v Kernott* [2010] EWCA Civ 578, [2010] 3 All ER 423 (CA) [55] (Wall LJ).
[18] See G Battersby, 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *Child and Family Law Quarterly* 259 and M Dixon, 'The Never-Ending Story – Co-ownership after Stack v Dowden' [2007] *Conveyancer and Property Lawyer* 456.
[19] *Bernard v Josephs* [1982] Ch 391 (Ch) 404.

with or without representational intent'.[20] There is also the larger problem of expecting couples to form a common intention, particularly in the context of the sometimes disorganised and chaotic real-lives of litigants. As Jacob LJ in the Court of Appeal decision in *Kernott* remarked:

> 'In the real world unmarried couples seldom enter into express agreements into what should happen to property should the relationship fail and often do not settle matters clearly when they do. Life is untidier than that. In reality human emotional relationships simply do not operate as if they were commercial contracts and it is idle to wish that they did'.[21]

The requirement of common intention has also been criticised by academics.[22] With reference to cases such as *Eves v Eves*[23] and *Grant v Edwards*[24] where the courts took inventive approaches to find express common intentions, Gardner has argued that 'agreements are in reality found or denied in a manner quite unconnected with their actual presence or absence'.[25] More broadly, Gray and Gray have been particularly critical of the requirement of common intention, arguing that the common intention constructive trust has become a 'prisoner of its own dogma' through its insistence that beneficial ownership 'must be grounded in proven intentions of the parties'.[26] Indeed, Gray and Gray argue that the insistence on common intention has 'exerted a stranglehold over the development of a rational law of family or domestic property'.[27]

Another prominent criticism of the implied trust framework is the recognition of financial contributions for the purposes of acquiring a proprietary interest. A direct financial contribution channelled towards the purchase price is capable of generating the presumption of resulting trust in favour of the contributor alongside an inferred common intention constructive trust under the principles of *Rosset*. Where the contribution takes the form of post-acquisition conduct such as a mortgage repayment, a common intention constructive trust can be established but not a resulting trust as the latter focuses solely

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[20] *Hammond v Mitchell* [1992] 2 All ER 109, 121 (Waite J).
[21] *Jones v Kernott* (n 17) [90].
[22] See, generally, J Eekelaar, 'A Woman's Place – A Conflict between Law and Social Values' [1987] *Conveyancer and Property Lawyer* 93, Gardner (n 16), N Glover and P Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325 and U Riniker, 'The Fiction of Common Intention and Detriment' [1998] *Conveyancer and Property Lawyer* 202.
[23] *Eves v Eves* [1975] 3 All ER 768 (CA).
[24] *Grant v Edwards* [1986] 2 All ER 426 (CA).
[25] Gardner (n 16) 263, 264. Echoed in Law Commission, *Sharing Homes* (n 15) para 2.106.
[26] K Gray and S Gray, *Elements of Land Law* (5th edn, OUP 2009) 872.
[27] ibid 876.

on the point of acquisition. However, it is clear that indirect financial contributions, for example, where the claimant assumes responsibility for domestic expenditure to enable the defendant to make financial contributions, are not recognised in the acquisition of an interest for both trusts.[28] Similarly, domestic contributions such as child care or homemaking are incapable of forming the basis for an acquisition claim.[29]

The prioritisation of direct financial contributions by the courts evidences how the implied trust framework continues to respond to what has been termed 'the solid tug of money' and, as a result, has been criticised from a variety of different perspectives.[30] For Yeo, an overt focus on money 'reduces the complex interplay of mutual sacrifice and assistance which characterises family relationships into a stark balance sheet of monetary sums'.[31] Therefore by focussing on monetary contributions within complicated interpersonal relationships, the courts are failing to recognise the myriad of different types of contributions made by parties when acquiring property. Another criticism is the exclusionary effect that the requirement of a direct financial contribution has on particular types of litigant when trying to acquire a proprietary interest. As the Law Commission noted, 'the current law discriminates against those who do not earn income from employment'.[32] This, in turn, has prompted academics[33] to argue that the requirement of a direct financial contribution disadvantages women who statistically earn less on average than their male partners and are therefore less likely to make direct financial contributions.[34] Indeed, the claimant Valerie Burns in the case of *Burns v Burns*, who was unable to make direct financial contributions to the acquisition of property acquired in her partner's sole name, has now become a cause célèbre and

[28] *Lloyds Bank v Rosset* (n 10) 132-133 (Lord Bridge). See also *Buggs v Buggs* [2003] EWHC 1538 [48]-[49] (Nicholas Davidson QC).
[29] *Burns v Burns* [1984] 1 All ER 244 (CA).
[30] *Hofman v Hofman* (1965) NZLR 795, 800 (Woodhouse J).
[31] R Yeo, 'The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman?' (2010) 24(2) *International Journal of Law, Policy and the Family* 123, 132.
[32] Law Commission, *Sharing Homes* (n 15) para 2.108.
[33] See, for example, M Oldham, 'Homemaker Services and the Law' in D Pearl and R Pickford, *Frontiers of Family Law* (2nd edn, Wiley 1995), S Wong, 'Constructive Trusts over the Family Home: Lessons to be Learned from Other Commonwealth Jurisdictions?' (1998) 18 *Legal Studies* 369 and A Barlow and C Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (1999) 19 *Legal Studies* 468. A more critical perspective on the actual detriment of these principles to women has been offered in R Probert, 'Trusts and the Modern Woman' [2001] 13(3) *Child and Family Law Quarterly* 275 and A Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181.
[34] Evidence of this can be found in the Office of National Statistics, *Annual Survey of Hours and Earnings Provisional Results 2012* (22nd November 2012). See also J Scott and S Dex, 'Paid and Unpaid Work: Can Policy Improve Gender Inequalities' in R Probert and J Miles, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009).

'iconic figure' illustrating the deficiencies of trusts law.[35] Whilst academics have queried whether litigants in the same position as Mrs Burns still exist today,[36] recent case law indicates not only that there are some litigants that continue to be in similar position as Mrs Burns,[37] but also that there still is a basis for the judicial view that the 'law of property can be harsh on people, usually women'.[38]

When analysed together the use of common intention as the basis for the constructive trust coupled with the requirement of a direct financial contribution reveal, as the Law Commission noted, the implied trust framework's 'failure to respond to the realities of family life and the problems of family breakdown'.[39] The need for common intention evidenced expressly or inferred through a financial contribution has often meant that ostensibly meritorious claimants have not been able to establish the acquisition of a proprietary interest for a failure to comply with a body of rules that are recognised to 'sit badly beside the social phenomena which they attempt to regulate'.[40] This has generated a narrative which views the limitations of the implied trusts as part of a failure of the law of property itself to accommodate interpersonal relationships. Thus, from a broader theoretical perspective, the implied trusts principles have been viewed as being influenced by property law's traditional commitment to legal certainty through 'bright-line' rules which are features noted by Rose[41] and Birks.[42] Rose has argued property law has a signalling function which is 'heavily laden with hard-edged doctrines that tell everyone where they stand'[43] and there is evidence of a desire to preserve this quality in the subsequent interpretation of Lord Bridge's sole judgment in the House of Lords' decision in *Rosset.* As a result, it has been said that the informal acquisition of interests follows relatively precise rules.[44] Ultimately, the use of common intention and the requirement of a direct financial contribution resonate with what Birks terms the 'primarily facilitative' nature of land law which values the marketability and efficient

[35] Bottomley (n 33) 183. See also J Mee, 'Burns v Burns: The Villain of the Piece' in S Gilmore, J Herring and R Probert, *Landmark Cases in Family Law* (Hart 2010).
[36] Probert (n 33).
[37] Similar facts to those of *Burns v Burns* are present in *Thomson v Humphrey* [2009] All ER (D) 280.
[38] *Curran v Collins (Permission to Appeal)* [2013] EWCA Civ 382 [9] (Toulson LJ).
[39] Law Commission, *Cohabitation* (n 15) para 2.4 referencing the Consultation Paper (Law Com CP No 179, 2006) Part 4.
[40] Gray and Gray (n 26) 876.
[41] See, for example, C Rose, 'Crystals and Mud in Property Law' (1987-1988) 40 *Stanford Law Review* 577.
[42] P Birks, 'Before We Begin: Five Keys to Land Law' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 457.
[43] Rose (n 41) 577.
[44] See, generally, N Hopkins, *Informal Acquisition of Rights in Land* (Sweet and Maxwell 2000).

transfer of land.[45] However, both elements generate profound difficulties when the property concerned operated as a family home.

### (ii) The Exercise of Judicial Discretion to Accommodate the Domestic Context

Academics have often criticised the 'relationship blindness' of the implied trusts.[46] However, it is arguable that the impact upon litigants of this so-called blindness requires modern reappraisal as recent case law reveals attempts by the courts to use discretion in the resolution of these disputes with a view to enabling greater recognition of the fact that the property concerned served as a family home.

Case law developments in the area of quantification of a beneficial interest suggest that the implied trust framework is becoming more responsive to the relationship between the parties. *Midland Bank v Cooke*[47] provides early evidence of a shift in the judicial approach to quantification of a beneficial interest which saw the court move away from the previously mathematical approach to quantification of an interest.[48] When quantifying an interest, it demonstrated that there will be 'no necessary link between the amount put in and the amount received back' thereby revealing a shift away from prioritising financial contributions.[49] Following *Cooke*, Hopkins identified 'the re-introduction of an element of discretion at the stage of quantifying beneficial shares'.[50] Furthermore, when those principles were further developed by the later Court of Appeal in *Oxley v Hiscock*,[51] which endorsed the use of fairness as a method of quantification, Battersby expressed concern that the court's methodology was now shifting towards dispensing discretionary 'palm-tree justice'.[52]

More recent developments in the context of joint legal title disputes arguably provide even greater evidence of the use of judicial discretion with a view to recognising the

[45] Birks (n 42) 457. Protection of the interests of third parties such as creditors is also noted as a concern in J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 327, 333 and J Dewar, 'Give and Take in the Family Home' [1993] *Family Law* 231.
[46] A Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998).
[47] *Midland Bank v Cooke* (n 17).
[48] As seen in *Huntingford v Hobbs* [1993] 1 FCR 45 (CA) and *Springette v Defoe* [1992] 2 FCR 561 (CA).
[49] Dewar (n 45) 327, 333.
[50] Hopkins (n 44) 125.
[51] *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 3 All ER 703 (CA).
[52] Battersby (n 18) 264.

family context of these disputes. In *Stack* the majority in the House of Lords distinguished the family home through recognition of the 'domestic context' as distinct from the 'commercial context', and held that the context of the family home justified the creation of principles that were more sensitive to the parties' relationship.[53] For example, whilst the House of Lords stated that quantum of the beneficial ownership remained dependent on the parties' common intention, the majority believed that '[m]any more factors than financial contributions may be relevant to divining the parties' true intentions'.[54] *Kernott* developed this further and, in a unanimous decision, the Supreme Court held that where express common intention or conduct from which to infer a common intention as to shares was absent,[55] the parties will be 'entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property'.[56]

Cumulatively, these decisions and subsequent case law suggest that at the quantification stage the trust framework may be 'pushing at doctrine to achieve a policy end' which is 'the recognition of the context and logic of sexual-domestic relationships'.[57] Indeed, it can be argued that these modern authorities illustrate the *de facto* application of judicial discretion, a direct engagement with the concept of fairness, and an increasing recognition of relationship dynamics.[58] This viewpoint is supported by academics who have, in particular, noted the presence of judicial discretion.[59] However, the use of judicial discretion has not always been viewed positively and, as Dixon noted, *Stack* was 'so generous in the giving of judicial discretion that just about any result in any set of circumstances can be justified'.[60]

In relation to the acquisition of an interest, there is some limited scope for the recognition of the domestic context to these disputes. For example, in *Grant*, detrimental reliance which is necessary to justify equity's intervention under the express common intention constructive trust could be established using a non-financial contribution.[61] However, it is clear that the overt use of judicial discretion has been far more limited at

[53] *Lloyds Bank v Rosset* (n 10).
[54] *Stack v Dowden* (n 4) [69].
[55] *Jones v Kernott* (n 5).
[56] ibid [51] (Lord Walker and Lady Hale).
[57] Bottomley (n 46) 216.
[58] S Wong, 'Shared Commitment, Interdependency and Property Relations: A Socio-Legal Project for Cohabitation' [2012] 24(1) *Child and Family Law Quarterly* 60.
[59] See, for example, G Battersby, 'Ownership of the family home: Stack v Dowden in the House of Lords' [2008] 20(2) *Child and Family Law Quarterly* 255 and Dixon (n 18).
[60] ibid 460. Analysed further in A Hayward, 'Finding a Home for 'Family Property'' in N Gravells, *Landmark Cases in Land Law* (Hart 2013).
[61] See *Grant v Edwards* (n 24) and *Hammond v Mitchell* (n 20).

the acquisition stage and focus in this context has shifted to instead highlighting the deficiencies of the implied trusts. The majority in *Stack* criticised the acquisition principles from *Rosset,* and the insistence on a direct financial contribution was queried by Baroness Hale who believed that Lord Bridge may have set the 'hurdle rather too high'.[62] Lord Walker echoed these views, stating that in relation to the acquisition routes the law has 'moved on'.[63] Despite these calls for more flexibility at the acquisition stage, it is apparent that subsequent cases have not sought to ameliorate the *Rosset* principles.

The use of judicial discretion has stimulated extensive debate but a key problem to be addressed by this thesis is how the use of discretion can be explained, particularly since these disputes continue to be governed by property law principles. One interpretation is that the modification of 'general principles of land law or trusts to accommodate the specific needs of family members' demonstrates the 'tendency' first identified by John Dewar in 1998 towards the 'familialization' of property law.[64] Writing before *Stack* and *Kernott,* Dewar argued that judges applying the trusts framework acted in response to the unique familial context within which the acquisition and enjoyment of domestic property is situated.[65] Dewar argued that this responsiveness led the courts to creating what he termed a 'specialised body of doctrine' unique to the home.[66]

Another bolder explanation for the exercise of discretion is that it reveals that 'family law principles have infiltrated trusts law'.[67] Whilst polarising property law and family law is unhelpful, this analytical approach is prominent in modern academic discourse.[68] Following *Stack* and *Kernott,* comparisons to the discretionary system of ancillary relief were made by academic practitioners[69] and the media.[70] Indeed, Bailey-Harris and

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[62] *Stack v Dowden* (n 4) [63] (Baroness Hale).
[63] ibid [26] (Lord Walker).
[64] Dewar (n 45) 328.
[65] ibid. See also A Hayward, 'Family Property and the Process of Familialization of Property Law' [2012] 23(3) *Child and Family Law Quarterly* 284.
[66] Dewar (n 45) 331.
[67] Probert (n 33) 286.
[68] WT Murphy and H Clarke, *The Family Home* (Sweet and Maxwell 1983) v. For a synthesis of these two schools see R Probert, 'Family Law and Property Law: Competing Spheres in the Regulation of the Family Home' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Routledge Cavendish 2003) 37. cf J Mee, 'Property Rights and Personal Relationships: Reflections on Reform' (2004) 24 *Legal Studies* 414, 418.
[69] See, for example, A Ralton, 'Co-Owners, The Transfer, The Intent and Stack' [2007] *Family Law* 712 and R Bailey-Harris and J Wilson, 'Hang on a Minute! (Or is *Kernott* the New *White*)' (*Family Law Week*, 10 February 2011) <http:www.familylawweek.co.uk/site.aspx?i=ed79632> accessed 2 July 2013.
[70] F Gibb, 'Unmarried couples come closer to winning legal divorce rights' *The Times* (London, 26 April 2007), F Gibb, 'Unmarried couples win rights to half of shared properties' *The Times*

Wilson questioned whether *Kernott* should be viewed as 'the new *White*'.[71] This reference was to the House of Lords' decision in *White v White*,[72] and the parallel was drawn due to the explicit endorsement of 'fairness' as a principle of quantification in *Kernott*. However, it should be noted that these comparisons may be unsurprising as Gardner has noted that 'discretionary resolution is par excellence the technique of family law'[73] whilst Probert has stated that the family home is where 'family law and property law meet, overlap and compete for priority'.[74] In light of the first problem identified above, this use of discretion reveals 'a clash of cultures between a failing, but classical, law of trusts dominated by a long standing commercialist ethos and the rather different mutualist ethic which underlies the property relationships of families'.[75]

The failings of the implied trust framework have been noted by courts,[76] academics[77] and reform bodies.[78] However, despite this strong criticism of the trust framework by the Law Commission, attempts to formulate legislation for cohabitants have been unsuccessful. Numerous jurisdictions have in fact legislated for cohabitants,[79] but plans to introduce statutory schemes in England and Wales have not come to fruition,[80] despite calls for the introduction of a scheme from the senior judiciary.[81] The Government's decision to take cohabitation reform off the agenda has been met with widespread disappointment and as Professor Elizabeth Cooke, current Law Commissioner for England and Wales, has noted, 'the need for reform of the law can only become more pressing over time'.[82] In the absence of statutory reform, there is evidence of an

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(London, 25 April 2007) and T Ross, 'Unmarried couples granted new legal protection by courts' The Telegraph (London, 9 November 2011).

[71] Bailey-Harris and Wilson (n 69).

[72] *White v White* [2001] 1 AC 596 (HL).

[73] S Gardner, 'The Element of Discretion' in P Birks, *The Frontiers of Liability* (OUP 1994) 186, 199. See also CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991).

[74] Probert (n 68) 37.

[75] Gray and Gray (n 26) 876.

[76] See, for example, *Fowler v Barron* [2008] EWCA Civ 377 (CA) [50] (Toulson LJ) and *James v Thomas* [2007] EWCA Civ 1212 (CA) [38] (Sir John Chadwick).

[77] See S Bridge, 'Cohabitation: Why Legislative Reform is Necessary' [2007] *Family Law* 911 and C Rotherham, 'The Property Rights of Unmarried Cohabitees: The Case For Reform' [2004] *Conveyancer and Property Lawyer* 268.

[78] Law Commission, *Cohabitation* (n 15) 154-162.

[79] Various states in Australia and Canada provide remedies for eligible cohabitants. Closer to home, Scotland has provided limited remedies through the Family Law (Scotland) Act 2006 alongside Ireland through the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

[80] See the Government response: Hl Deb 6th Sep 2011 vol 730 col WS18-19.

[81] See *Gow v Grant* [2012] UKSC 29 [56] (Lady Hale).

[82] See Law Commission, Statement on the Government's response to the Law Commission report Cohabitation: The Financial Consequences of Relationship Breakdown (6 September 2011)

increased use of judicial discretion by the courts and, as Baroness Hale stated in *Stack*, this meant that 'the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament'.[83] As a consequence, there are important issues to be addressed concerning how judicial discretion is being used in trusts of the family home disputes and whether the presence of judicial discretion presents a problem for the future development of the law.

## JUDICIAL DISCRETION AND OWNERSHIP DISPUTES OVER THE FAMILY HOME: RESEARCH QUESTIONS IN THIS THESIS

It is arguable that the failings of the implied trusts have generated judicial responses that provide for greater recognition of the context and nature of interpersonal dealings within the family home. Owing to difficulties in providing statutory rights and remedies for cohabitants and home sharers, it is likely that the courts will continue to modify trust principles. Problematically, these judicial developments have generated extensive debate in the academic community not only as to the coherence of these principles, but also as to whether they suggest that the implied trusts can no longer be conceptualised as falling within property law.

This debate forms the context to this thesis and generates several research questions. The core focus of this thesis is on the exercise of judicial discretion in the resolution of ownership disputes over the family home. Drawing upon the academic scholarship on judicial discretion, this thesis evaluates how the use of discretion has been conceptualised by the courts and how it has been employed. Furthermore, the motivations behind its use will be examined. It will be questioned whether, as some have argued,[84] the greater use of discretion does indeed reflect a departure from traditional property law reasoning in family property cases or whether it can be explained on a different basis. It will be asked whether there is evidence that the judges are increasingly arrogating enhanced discretion to themselves, and if so, whether this is deployed in order to take account of 'changing social and economic circumstances' in relation to family property. The thesis considers whether an enhanced judicial acceptance of the use of discretion in the domestic sphere would represent a problematic move and whether a return to orthodoxy would be preferable. As a consequence of this enquiry, this thesis

<http://www.justice.gov.uk/lawcommission/docs/20110906_Statement_on_Govt_response.pdf> accessed 9th August 2012.

[83] *Stack v Dowden* (n 4) [46].

[84] See Battersby (n 18) and Dixon (n 18).

will ask whether legal scholarship should embrace and seek to accommodate this discretionary approach in the future development of implied trusts of the family home.

## METHODOLOGY AND STRUCTURE

In order to understand the modern use of judicial discretion in trusts of the family home cases, this thesis provides a theoretical framework of judicial discretion and applies that framework in a chronological analysis of case law in this area. This thesis considers the implied trusts applicable to ownership disputes over the family home and therefore excludes analysis of the express trust which also operates in this context.[85] In a similar manner, as this thesis has a specific focus on the development of the implied trusts in England and Wales, which as a jurisdiction favours a substantive or institutional constructive trust, remedial constructive trusts will not be analysed.[86] Proprietary estoppel is also excluded from this analysis.[87]

Chapter One analyses the theoretical literature on judicial discretion, and in particular considers the various forms of discretion. The purpose of this chapter is to identify how discretion is conceptualised, how it can be conferred upon a decision-maker alongside the benefits and also criticisms of discretionary resolution of disputes. An analysis of the theoretical perspectives on judicial discretion will provide a foundation for Chapters Two and Three. These chapters investigate whether a potential source of guidance as to the modern use of judicial discretion can be found by analysing judicial developments pre-*Pettitt v Pettitt*[88] and *Gissing v Gissing*[89] wherein the judiciary developed a 'discretionary jurisdiction for the assistance of married claimants, in the days before the divorce reforms in 1969'.[90] Chapter Two begins by analysing the default property law rules governing ownership over the matrimonial home, in particular, the presumed intention resulting trust. Whilst the common intention constructive trust had not been developed prior to *Gissing*, the courts deployed various devices to determine the intention of contributors to the purchase price during this period which may provide

[85] For analysis of how the express trust operates within this context see M Pawlowski, 'Informal Variation of Express Trusts' [2011] *Conveyancer and Property Lawyer* 245 and E Cooke, 'In the Wake of Stack v Dowden: The Tale of TR1' [2011] *Family Law* 1142.
[86] On the use of discretion in this context see S Gardner, 'The Element of Discretion' in Birks P, *The Frontiers of Liability* (OUP 1994) and J Mee, *The Property Rights of Cohabitees* (Hart 1999).
[87] For an analysis of the role of proprietary estoppel within the home see E Cooke, *The Modern Law of Estoppel* (OUP 2000), Hopkins (n 44) and Mee (n 86) Ch 4.
[88] *Pettitt v Pettitt* [1970] AC 777 (HL).
[89] *Gissing v Gissing* [1971] AC 886 (HL).
[90] E Cooke, *Land Law* (OUP 2012) 87.

insights relevant to the modern period. Chapter Two goes on to consider the early use of judicial discretion and the judicial interpretations of what was viewed by some members of the judiciary as an express statutory grant of discretion, namely section 17 of the Married Women's Property Act 1882. Chapter Two will focus on the early interpretation of judicial discretion predominantly from the post-World War II period to 1958 whereas Chapter Three will analyse the later use of judicial discretion from 1958 up until the House of Lords' decision in *Pettitt* in 1969. With a view to answering the aforementioned research questions, both chapters will investigate how judicial discretion was used alongside the motivations behind its use.

In the light of the foregoing discussion of use of judicial discretion, Chapter Four analyses the House of Lords' decisions in *Pettitt* and *Gissing* and the various opinions of their Lordships. This analysis will show that both decisions rejected the substantive use of judicial discretion under section 17 that previously was viewed permissible by some members of the judiciary. As there was no longer a statutory grant of judicial discretion, it will be questioned whether these decisions provided scope for the informal or implicit use of judicial discretion in the interpretation of implied trust principles. Viewing the incremental development of implied trusts of the family home as a continuum, Chapters Two to Four will interrogate the exercise of judicial discretion applicable to disputes between married couples. However, noting that the equitable jurisdiction has 'grown organically from marital to extra-marital relationships',[91] Chapters Five and Six analyse the application of implied trust principles primarily to cohabitants.

Chapter Five analyses the leading authority on the acquisition of a beneficial interest under a common intention constructive trust, namely *Rosset*.[92] Chapter Six analyses the principles used for quantification of a beneficial interest under a common intention constructive trust. In Chapter Five the bright-line rules of *Rosset* will be analysed with a view to identifying the potential for the use of discretion. In Chapter Six the modern use of judicial discretion will be analysed, in particular its expression through the judicial application of fairness when quantifying shares, the focus on the 'domestic context' and the breadth of factors used when divining common intentions. Using the most recent decisions of *Stack* and *Kernott*, Chapter Six queries whether the courts have, in fact, created an expansive discretion in this context that resonates with the historical development of statutory discretion stemming from section 17.

[91] P Sparkes, 'Morality, Amorality and Equity' [1990] 5 *Denning Law Journal* 91, 103.
[92] *Lloyds Bank v Rosset* (n 10).

In its concluding chapter the thesis sets out to provide a new understanding of the use of judicial discretion in ownership disputes over the family home. It is envisaged that the revisiting of judicial discretion will provide a new understanding in an area that is 'well-travelled' both in terms of judicial pronouncements and academic literature.[93] As noted above, recent developments have been criticised for representing challenges to the 'purity and logic of the law of property'.[94] Endeavours to recognise the specific needs of family members have been criticised as unprecedented 'judicial legislation'[95] which lacked a coherent unifying policy and had an end result of 'complexity and internal inconsistency'.[96] Dewar even went so far as to state that any 'attempt to accommodate the resolution of family disputes within the land law framework has significantly disturbed the conceptual orderliness of the land law itself'.[97] Similarly, Cloherty and Fox have queried whether trust principles offer the correct tool for the redevelopment of the law in this area. In relation to the practice and the limitations of trust principles, they observe that:

> '…it is not the function of an express or constructive trust to impose on the parties some just re-distribution of their assets, which takes into account their various contributions to the entire relationship or the future needs of themselves and any dependent children…The trust depends narrowly on what the parties intended about their beneficial ownership'.[98]

Yet if judicial development is moving in the direction of providing further accommodation of the domestic dimension, a re-evaluation of the effectiveness of judicial discretion and the role that it plays in this development is crucial. The thesis queries whether an enhanced judicial acceptance of the use of discretion would represent a problematic move and whether a return to orthodoxy is required. The concluding chapter will also question whether separating 'family property' from the law of property as advocated by modern academic commentary would generate problems for the future development of implied trust principles.

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[93] *Drake v Whipp* [1996] 2 FCR 296 (CA) 298 (Peter Gibson LJ).
[94] R Probert, 'Cohabitation: Current Legal Solutions' (2009) 62 *Current Legal Problems* 316, 332.
[95] Dewar (n 45) 329.
[96] ibid.
[97] J Dewar, *Law and the Family* (2nd edn, Butterworths 1992) 183.
[98] AJ Cloherty and D Fox, 'Proving a Trust of a Shared Home' (2007) *Cambridge Law Journal* 517, 519. Echoed in S Singer, 'What Provision for Unmarried Couples Should the Law Make when their Relationship Breaks down?' [2009] *Family Law* 234, 235 who noted that 'it is not the function of the law of trusts to achieve fairness'.

# CHAPTER ONE

# THEORETICAL PERSPECTIVES ON DISCRETION

## INTRODUCTION

The exercise of judicial discretion has become a prominent feature in modern trusts of the family home case law.[1] Several academics have noted that when the courts are quantifying a beneficial interest under a common intention constructive trust they are exercising a broad redistributive discretion.[2] This overtly discretionary approach to quantification of a beneficial interest stands in stark contrast to the 'concrete "bright-line" formulae' that exists at the acquisition stage.[3] Before analysing this exercise of judicial discretion in the context of ownership disputes over the family home, it is vital to explore the concept of discretion from a theoretical perspective. This chapter does not seek to provide a comprehensive analysis of the various ways in which discretion has been viewed by courts and academics. Rather it aims to generate a foundation for the subsequent discussion of how discretion operates within the implied trusts context. Drawing upon academic scholarship that has theorised the use of discretion, this chapter focuses on four key issues that will assist in the analysis of the implied trust framework in subsequent chapters. Firstly, this chapter begins by exploring how discretion has been defined in the academic literature. Secondly, and related to the first inquiry, this chapter explores the relationship between discretion and rules which has often assisted in the formulation of a definition of discretion. Thirdly, the chapter then proceeds to evaluate how discretion is conferred upon the judiciary and then finally analyses the numerous advantages and disadvantages of the use of discretion. The purpose of this chapter is to better understand how discretion is defined, conceptualised and employed in a court's adjudication of a dispute. This understanding will then be applied specifically to ownership disputes over the family home.

[1] As evidenced by *Midland Bank v Cooke* [1995] 4 All ER 562 (CA), *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 3 All ER 703 (CA), *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 (HL) and *Jones v Kernott* [2011] UKSC 53, [2011] 2 WLR 1121 (SC).

[2] See G Battersby, 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *Child and Family Law Quarterly* 259 and M Dixon, 'The Never-Ending Story – Co-ownership after Stack v Dowden' [2007] *Conveyancer and Property Lawyer* 456.

[3] S Gardner, 'A Woman's Work…' (1991) 54 *Modern Law Review* 126, 124 noting *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107 (HL).

## ANALYSING ACADEMIC SCHOLARSHIP ON DISCRETION

Whilst the concept of judicial discretion had been explored by the judiciary from the 17th century onwards,[4] prior to the 1960s rarely was there any systematic attempt to view discretion in a broader systematic manner.[5] Furthermore, there were no attempts at viewing discretion as an overreaching concept underpinning the diverse range of executive, administrative or judicial actions. Prior to the 1960s, analysis of discretion often focussed on context-specific scenarios, for example, analysing judicial discretion as deployed by the Court of Chancery prior to the Judicature Acts 1873-5 in the time of Lord Eldon.[6] Atiyah noted that this context-specific analysis of judicial discretion may have even stymied the academic debate regarding discretion as it often involved calls for 'firming up' or 'concretising' discretion owing to fears of its abuse or indeterminate nature which occurred in the time of Lord Mansfield.[7] It is, therefore, largely attributable to the work of Kenneth Davis,[8] Ronald Dworkin,[9] Denis Galligan[10] and Aharon Barak[11] from the 1960s onwards that discretion, operating across institutions and at all levels of a decision-making process, became a primary focus of study.

More recently, the use of discretion by administrative officials and the judiciary has stimulated extensive debate. Indeed, as Rosenburg noted, 'to speak of discretion in relation to law is to open a thousand doorways to discussion'.[12] With a view to understanding these analyses of discretion, it should be noted from the outset that academics view discretion differently depending on whether they are jurists or social scientists.[13] For jurists and legal philosophers, the study of discretion is often orientated around how discretion interacts with rules coupled with how discretion is authorised, for

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[4] See, for example, Sir Edward Coke's *Institutes of the Laws of England*, Volume IV, 33, 41, John Selden's concerns of expansive equitable discretion in F Pollock, *Table Talk of John Selden* (Selden Society 1927) 43 and also Lord Mansfield's views on discretion in *R v Wilkes* (1770) 4 Burr 2527, 2539.

[5] See M Rosenberg, 'Judicial Discretion of the Trial Court, Viewed from Above' (1970-1971) 22 *Syracuse Law Review* 635, 635.

[6] PS Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' [1980] *Iowa Law Review* 1249, 1252 and R Pound, 'The Decadence of Equity' (1905) 5 *Columbia Law Review* 20, 22-24.

[7] ibid 1251-1252.

[8] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977).

[9] R Dworkin, *Taking Rights Seriously* (Bloomsbury 1997).

[10] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986).

[11] A Barak, *Judicial Discretion* (Yale University Press 1989).

[12] Rosenberg (n 5) 635.

[13] See K Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins, *The Uses of Discretion* (OUP 1991) 11 and N Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K Hawkins, *The Uses of Discretion* (OUP 1991) 361, 363.

example whether it is expressly granted upon the decision-maker or assumed through their exercise of interpreting of rules. In particular, as Lacey has noted, jurists are keen to 'define discretion in the tradition of analytical jurisprudence' and thus a key focus for jurists is to situate discretion (most often judicial discretion) within a system of legal taxonomy.[14] As will be explored below, Dworkin's analysis of 'weak' and 'strong' discretion coupled with his exploration of the interface between rules and discretion supports this endeavour and they are often viewed as the primer for any jurist's discussion of discretion.[15]

Owing to criticism as to the indeterminacy of discretion when compared to rules, jurists have tended to focus on the ways in which discretion can be expressly fettered or restricted.[16] For example, the central thesis of Davis in *Discretionary Justice* is that there needs to be a development of 'legal methods of confining, structuring, and controlling discretion'.[17] So a focus for jurists and legal philosophers has become the drive to provide a structure to discretion and to analyse how that structuring can occur, for example, whether through subsequent review of a discretionary decision by a court higher up in the judicial hierarchy or through the simultaneous use of guidelines when exercising discretion. Drawing a contrast to confining discretion which involves the need to 'keep discretionary power within designated boundaries', Davis argued that structuring discretion involved the 'control [of] the manner of the exercise of discretionary power within the[se] boundaries, and this can be accomplished through statutory enactments, through administrative rules, and by others means'.[18] This viewpoint is potentially instructive in light of the research question of this thesis. It can be questioned how far this endeavour to structure discretion manifests itself in the context of property law which has traditionally valued certainty, security of proprietary interests and protection for third parties.[19]

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[14] ibid 366.
[15] Dworkin (n 9) in particular the sections on the Model of Rules and 'Hard Cases'.
[16] cf S Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120, 124 who argued that 'we do not and cannot very often use rules in a way that eliminates discretion. We ought, therefore, to broaden our notion of law to take account of subjective discretionary processes which our traditional theory sees as political or personal rather than legal'.
[17] Lacey (n 13) 362 noting Davis (n 8). See also Lord Bingham, 'The Discretion of the Judge' [1990] 5 *Denning Law Journal* 27, 27 who noted attempts by judges from as early as the 16th century to limit the exercise of judicial discretion.
[18] This forms part of Davis' thesis noting the prevalence of discretion within the administrative law context where its use far exceeds the use of discretion within the courts. See Davis (n 8) 215.
[19] See, for example, P Birks, 'Before We Begin: Five Keys to Land Law' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 457, AJ van der Walt, *Property in the Margins* (Hart 2009) and C Rose, 'Crystals and Mud in Property Law' [1987-1988] 40 *Stanford Law Review* 577.

In contrast, Hawkins has noted that social scientists and sociologists tend not to analyse the interface between discretion and rules like jurists or situate their analysis within theoretical understandings of law like legal philosophers.[20] Rather, they explore discretion as the embodiment of 'decision-making' whereby law and the social objectives underpinning law are translated into action. Galligan's work is of key significance as his approach emphasised the need to recognise that discretion, broadly construed, 'denotes an area of autonomy within which one's decisions are to some extent a matter of personal judgment and autonomy'.[21] The consequence of this approach focusing on the autonomy of the decision-maker is to emphasise the experiential elements underpinning the exercise of discretion. This shifts the focus of study onto the ways that social mores, political persuasions or sympathies are absorbed into a particular exercise of discretion. Feldman has developed this focus further through looking at the influence of the social background of the decision-maker upon their exercise of discretion.[22] In a way, social scientists appear to focus on the ultimate outcome of the use of discretion and whether it advances the goals of society, whereas jurists tend to focus on an earlier stage in this process i.e. whether, and also how, a court has been granted discretion.[23] Another way of viewing these differing methodologies could be that jurists are analysing explicit exercises of discretion whilst social scientists are evaluating the implicit manner in which discretion is exercised.

Whilst the work of social scientists and sociologists gained momentum after jurists and legal philosophers began analysing discretion, their contribution in various fields such as public law and administrative law has nevertheless been extensive. As a consequence, the work of social scientists and sociologists has highlighted the need to look across these sources and approaches when viewing discretion. For example, Bell's work has advocated that lawyers should borrow the literature of social scientists to learn about the nature of discretion rather than merely focusing on legal taxonomy questions.[24] Thus, an important contribution of social scientists to the study of discretion is to caution against 'looking at particular powers without consideration of their essential nature or their

[20] Hawkins (n 13) 13-14.
[21] Galligan (n 10) 8.
[22] M Feldman, 'Social Limits to Discretion: An Organizational Perspective' in K Hawkins, *The Uses of Discretion* (OUP 1991) 163, 174-182.
[23] cf Lacey (n 13) 364 who argued that social scientists do focus on the prevalence of discretion at every stage of the adjudicative process.
[24] J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 90.

broader context'.[25] Applying this methodology to modern scholarship on trusts of the family home, it is apparent that there has been no systematic analysis of judicial discretion specific to this area. Consideration of the exercise of discretion is present in some of the academic literature but the focus in this scholarship is generally quite specific.[26] For example, academics have explored discretion in the context of proprietary estoppel[27] or in the application of a remedial constructive trust.[28]

## DEFINING DISCRETION

Post claimed that 'discretion is pervasive in our legal system, and yet we scarcely know what it is'.[29] Providing a comprehensive definition of discretion is an inherently difficult task, particularly owing to the diverse nature of discretion.[30] It is clear that discretion is not a purely legal phenomenon thereby restricted to the confines of a court. Academics in this area are keen to stress that discretion operates at various levels and in a wealth of different forums.[31] To give a very broad example, it can be argued that the ability for the legislature to pass laws can be viewed as a conferral of discretion by society.[32] Similarly, there are other forums where discretion can be seen such as where a government official 'screens' public access to information along with other forms of entitlement or where police officers exercise discretion to influence the pursuit of a prosecution. Lempert has further extended the reach of what can be termed an exercise of discretion noting that, outside the realm of law and the administration of the state, 'people exercise discretion, and individuals contemplating or reflecting on action may feel as if their actions are or were discretionary'.[33] These varied examples influence how discretion is conceptualised and support the view that the exercise of discretion must be viewed carefully depending

[25] R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 599.
[26] An exception would be S Juss, *Judicial Discretion and the Right to Property* (Pinter 1998).
[27] See R Walker, 'Which Side "Ought to Win": Discretion and Certainty in Property Law' (2008) 6 *Trust Quarterly Review* 5 and S Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 *Law Quarterly Review* 438.
[28] See, generally, S Gardner, 'The Element of Discretion' in P Birks, *The Frontiers of Liability* (OUP 1994) 186.
[29] RC Post, 'The Management of Speech: Discretion and Rights' (1984) *Supreme Court Review* 169, 169.
[30] See, generally, B Hoffmaster, 'Understanding Judicial Discretion' (1982) 1(1) *Law and Philosophy* 21.
[31] See Hawkins (n 13) 11 and Davis (n 8) 215. Noted also in CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47, 50-56.
[32] See also H Somsen, 'Discretion in European Community Environmental Law: An Analysis of ECJ Case Law [2003] 40 *Common Market Law Review* 1413 demonstrating that discretion is conferred on Member States when incorporating EU law into domestic law.
[33] R Lempert, 'Discretion in a Behavioural Perspective: The Case of a Public Housing Eviction Board' in K Hawkins, *The Use of Discretion* (OUP 1991) 185, 185.

on the context in which it arises. As Lacey has argued, the work of social scientists and sociologists underline the need to recognise the context-specific nature of discretionary power and the fact that discretion operates differently depending on the forum in which is it used. In short, context influences definition and a 'one size fits all' definition may not be possible. This viewpoint has resonance for the research questions of this thesis as it will consider how far the specific context of the home influences the exercise of judicial discretion.

In contrast to Lempert's expansive view of discretion, Dworkin has cautioned against overly-generalised views of discretion owing to their potential to confuse.[34] Therefore, Dworkin might challenge Lempert's broad characterisation and would arguably agree with Baldwin and Hawkins who cautioned against broad definitions for their ability to underemphasise 'variations in the nature and context of discretionary powers'.[35] Dworkin has argued that, whilst discretion is sensitive to context, it only operates in certain contexts. He used an analogy of a home-buyer's decision to purchase a property[36] to argue that it would be odd to talk of this individual having 'a discretion' yet simultaneously noted that it would be 'equally misleading' to say that they have no discretion at all.[37] Therefore, for Dworkin:

> 'The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority'.[38]

Following Dworkin's analysis and similar to an umpire applying the rules of a particular game, discretion therefore operates within a framework of rules or standards, represents a 'relative concept' and also is context-specific.[39] Thus, having located the context for the operation of discretion, the question then shifts to finding a definition.

Identifying what is meant by discretion is problematic as definitions of discretion are plentiful in the academic literature so much so that Isaacs has identified at least seven definitions of discretion.[40] As a result of the proliferation of variable 'definitions', sometimes it has been found easier to use a negative analysis to define discretion i.e.

[34] Dworkin (n 9) 31.
[35] Baldwin and Hawkins (n 25) 572.
[36] Dworkin (n 9) 31.
[37] ibid.
[38] ibid.
[39] ibid.
[40] N Isaacs 'The Limits of Judicial Discretion' (1922-1923) 32 *Yale Law Journal* 339, 339.

determining what is *not* to be viewed as discretion rather than proffering a definition of discretion itself. This perhaps explains the extensive discussion of 'rules' in the literature, further explored below, as they are frequently utilised as a counterpart to discretion in the formation of a definition. The primary purpose of this section is to analyse the key definitions of discretion which will then provide a foundation in subsequent chapters for analysing the use of judicial discretion in ownership disputes over the home.

### (i) Positive Definitions of Discretion

With a view to generating a definition of discretion, a particular distinction has been generated between what can be termed 'positive definitions' and 'negative definitions'. Positive definitions of discretion emphasise, first and foremost, the 'choice' or 'autonomy' of the decision-maker involved in the adjudicative process.[41] For example, Barak believed that judicial discretion was 'the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful'.[42] Likewise, Greenawalt defined judicial discretion as 'cases as to which a judge, who has consulted all relevant legal materials, is left free by the law to decide one way or another'.[43] A more elaborate definition of discretion, not limited to judicial discretion alone, has been advanced by Goodin who noted that:

> 'an official can be said to have discretion if and only if he is empowered to pursue some social goal(s) in the context of individual cases in such a way as he judges to be best calculated, in the circumstances, to promote those goals'.[44]

These definitions illustrate choice on the part of the decision-maker and arguably this choice is also multifaceted. It may involve a choice as to whether to intervene in the first place, for example, to grant a remedy or even to endorse a case going to trial but could also involve the decision-maker choosing to be influenced by a range of different considerations when reaching their decision. Thus Davis takes this concept of choice

[41] See Bell (n 24) 93. Davis used a definition of discretion that is premised on the notion of 'choice' in Davis (n 8) 4.
[42] Barak (n 11) 7.
[43] K Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia Law Review* 359, 365. See also Hawkins (n 13) 11 noting that discretion 'might be regarded as the space, as it were, between legal rules in which legal actors may exercise choice'.
[44] RE Goodin, 'Welfare, Rights and Discretion' (1986) 6(2) *Oxford Journal of Legal Studies* 232, 233.

further by noting that it is not just a substantive choice as to a legal result, but also involves the decision-maker choosing 'procedures, methods, forms, timing, degrees of emphasis and many other subsidiary factors'.[45]

Even within the positive definition school of thought there is undoubtedly a spectrum regarding the extent of that choice and autonomy. For example, within this realm of autonomy, must the decision-maker be guided solely by legal norms or texts (intimated by Greenawalt's definition above) or are they able to draw upon extra-legal factors when exercising discretion (suggested by Goodin's definition through his mentioning of 'a way he judges to be best calculated')? Black would perhaps align himself with this latter view, on the grounds that when legal officials exercise discretion they act on the basis of 'their own judgment and conscience, uncontrolled by the judgment and conscience of others'.[46] However, Schneider would take a more limited viewpoint as he noted that 'even a judge with broad discretion is expected to consult only 'legal' sources, doctrines and policies' and he 'should not rely on his personal preferences or political allegiances'.[47] As noted above, it is clear that contributions from social scientists and sociologists have revealed that 'a judge's judicial philosophy, which is the product of his experience and worldview' is likely to come into play when exercising choice.[48] These observations undoubtedly generate parallels to trusts of the family home cases where a key current debate is the appropriateness of a range of factors that a court can consult when 'divining' the parties' common intention.[49] The presence of these factors has created a discourse surrounding both the assumptions made by the courts regarding interpersonal relationships[50] and also whether factors such as 'the nature of the parties' relationship'[51] or 'the parties individual characters and personalities'[52] assist in identifying their intentions as to ownership.[53]

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[45] Davis (n 8) 4.
[46] HC Black, *Black's Law Dictionary* (West Publishing Company 1968) 553 noted by MP Baumgartner, 'The Myth of Discretion' in K Hawkins, *The Use of Discretion* (OUP 1991) 129, 129.
[47] Schneider (n 31) 63.
[48] Barak (n 11) x. See also J Frank, 'Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings' (1931) 80(1) *University of Pennsylvania Law Review* 17, 43-45.
[49] See *Stack v Dowden* (n 1) [69] (Baroness Hale).
[50] See Lord Neuberger of Abbotsbury 'The Conspirators, The Tax Man, The Bill of Rights and a Bit about The Lovers' (Chancery Bar Association Annual Lecture 10th March 2008) [13].
[51] *Stack v Dowden* (n 1) [69] (Baroness Hale).
[52] ibid.
[53] On this point see G Douglas, J Pearce and H Woodward, 'Money, Property, Cohabitation and Separation: Patterns and Indications' in R Probert and J Miles, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009).

The second element to the choice definition is the notion of 'authorisation to choose' as seen by the use of 'empowered' in Goodin's definition noted above. Richardson, Ogus and Burrows point out that, whilst discretion undoubtedly involves choice, it is not an unchecked or illegitimate choice.[54] For the authors, the choice must be legitimated by the restrictions or framework in which that choice has been made. This authorisation or lack of authorisation has various consequences for defining discretion and, in particular, the way it is conceptualised by judges and academics. Lempert has argued that where the legal system has denied a judge the ability to choose but nevertheless that individual exercises discretion they are 'not exercising discretion but instead flouting the law'.[55] Thus for Lempert where there are no constraints on the ability for a judge to choose, the judge is 'acting in a realm where law does not apply'.[56] This viewpoint provides a foundation for a pejorative view of assumed discretion (i.e. where the rule maker has not been granted discretion by Parliament) or unchecked discretion (i.e. where there are no constraints) as being 'lawless'.[57] Again, these observations map onto the modern academic discourse on trusts of the family home cases particularly in relation to the democratic legitimacy of the courts exercising an assumed discretion when determining beneficial ownership.[58] As will be demonstrated in subsequent chapters, there are clear indications that, owing to the absence of statutory reform in this area, the courts are using discretion to ameliorate the implied trusts framework.

Ultimately, what this reveals is that whilst discretion can be viewed positively i.e. it permits action by the decision-maker, commentators note that an important precursor for conduct being classified as discretionary choice is that it must be authorised or legitimated. As will be noted below, this viewpoint works most effectively in the realm of express grants of discretion where Parliament has conferred discretion upon a decision-maker, but it encounters difficulty when judges exercise discretion when interpreting common law rules. To state that individuals in the latter context are not exercising discretion because a mandate has not been directly conferred upon them appears inappropriate and arguably fails to recognise the interpretative, open-texture of the common law and the role of the judge. Naturally, where discretion is assumed by the

[54] G Richardson, A Ogus and P Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Oxford 1983) Ch 20, 1.
[55] Lempert (n 33) 186.
[56] ibid.
[57] This viewpoint was identified by Post (n 29) 169 and further developed as a component of a thesis in J Brand-Ballard, *The Limits of Legality: The Ethics of Lawless Judging* (OUP 2010).
[58] See J Mee, 'Burns v Burns: The Villain of the Piece' in S Gilmore, J Herring and R Probert, *Landmark Cases in Family Law* (Hart 2010) 175, 187 regarding democratic legitimacy in the judicial reform of trusts and also Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006) paras 5.98-5.101.

judiciary, there may be issues regarding democratic legitimacy and this may explain another approach to defining discretion which emphasises the restricted and limited nature of discretion.

### (ii) Negative Definitions of Discretion

In contrast to positive definitions, there are negative definitions of discretion. Whereas positive definitions emphasise the autonomy and choice of the individual decision-maker, negative definitions focus more on the presence of 'restraints' or 'fetters' imposed on the individual's exercise of discretion. One of the most well-known definitions is Dworkin's 'doughnut' analogy which evinces this idea. For Dworkin, 'discretion is like the hole in the doughnut, which does not exist except as an area left open by a surrounding belt of restriction'.[59] This belt of restriction is a key aspect of Dworkin's work, as along with being highly sceptical as to the use of discretion per se, he views the rules embodied by this belt of restriction as severely curtailing outcomes and decision-making. For Dworkin, this belt of restriction is law (as embodied by rules) and it plays an important role in what he terms 'weak' and 'strong' discretion.[60]

Dworkin provided three forms of discretion that operate within that 'belt of restriction'; namely two forms of 'weak' discretion and one form that he terms 'strong'. For the first type of weak discretion, a standard must be applied by an individual but for some reason it cannot be applied mechanically. In order to overcome this obstacle, the individual can use their own judgment. Here, Dworkin was envisaging a vague or ambiguous rule the application of which is resolved through the use of weak discretion by the decision-maker. This would involve, as Goodin notes, a rule permitting an official to provide treatment to individuals in certain circumstances but permits that official 'some latitude' as to who will benefit and how.[61] This reveals that the official is bounded by standards or rules conferred by a legitimate authority but when deciding can make a judgement call. In short, the decision-maker 'has discretion to make [a] judgement'.[62]

The other form of weak discretion involves an official being able to judge a case in accordance with standards but he has the final authority. As Lucy notes, the judge has a

[59] Dworkin (n 9) 31.
[60] ibid.
[61] Goodin (n 44) 235.
[62] Greenawalt (n 43) 365.

'non-reviewable power to make a decision'.[63] In essence, the decision-maker cannot be overruled by a superior and this gives the suggestion of them having a strong discretion, explored below. However, Dworkin notes that there are various structures where hierarchies exist and key decisions are ultimately reviewed by someone higher up. Weak discretion operates by allowing someone lower down to make a determination – an example Dworkin provides is a second base umpire in baseball.[64] He alone will be the best person to decide authoritatively whether the runner reached second base and, thus, has a weak discretion, albeit with an ultimate final say in the matter.

In contrast to his two forms of weak discretion, Dworkin argues that there is 'strong' discretion and this is where the decision-maker is not bound by any set of standards:

> 'We use 'discretion' sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question'.[65]

It is frequently viewed as a discretion deployed in light of the 'the absence of any rule'.[66] Dworkin provides a helpful example to illustrate 'strong discretion'. If an officer is told by a superior to choose five experienced men that would be a conferral of weak discretion, as in the first category of weak discretion outlined above. The reason being that the 'order purports to govern the decision' i.e. experienced men as a criterion fetters the use of discretion.[67] If the order says that the officer can chose any five men he chooses that is strong discretion as the discretion is not being limited.

The significance of weak and strong discretion in the conceptualisation of judicial discretion cannot be understated. Indeed, Dworkin's analysis has often formed the foundation for subsequent theoretical considerations of discretion.[68] Space precludes a detailed analysis of the ensuing debate concerning Dworkin's thesis but various key points can be made. Firstly, this model has been applied to matrimonial ownership disputes by Zuckerman and therefore it will be considered whether this formulation can

[63] W Lucy, 'Adjudication' in J Coleman and S Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 206, 215.
[64] Dworkin (n 9) 32.
[65] ibid.
[66] Goodin (n 44) 234.
[67] Dworkin (n 9) 32.
[68] Such as N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) and J Raz, *The Authority of Law* (Clarendon Press 1979).

be carried forward as a useful methodology for the modern case law.[69] Secondly, positive and negative definitions of discretion illustrate the standpoint of the authors as to the permissible use of judicial discretion. Whereas Barak and Greenawalt accept the use of judicial discretion as a legitimate exercise, Dworkin is far more critical of its use which is reflected in his view that discretion is restricted and fettered. Whilst Dworkin recognised that courts will use the two weak forms of discretion, the significance of such use he even labelled as 'trivial', Dworkin believed that the latter strong form of discretion was impermissible.[70] This represented a departure from legal positivists, such as HLA Hart, who accepted the use of strong law-making discretion in both 'easy' and 'hard' cases.[71] Dworkin, in contrast, argued that in hard cases the courts called upon 'principles' for the resolution of disputes and therefore denied the use of judicial discretion.

Thirdly, in both positive and negative definitions of discretion, there are limitations and restrictions on the use of discretion. For example, where weak discretion is being exercised by a decision-maker they can use their judgment in the interpretation of a particular rule but ultimately will be 'controlled by the standard furnished by the particular authority'.[72] This perhaps explains why Dworkin is untroubled by this form of discretion seeing as there will be parameters for the exercise of discretion. Dworkin even argues that strong discretion is bounded and that 'certain standards of rationality, fairness and effectiveness' fetter a judge's exercise of this type of discretion.[73] Thus with reference to both positive and negative definitions of discretion it becomes apparent that the desire to structure discretion is a key theme running through the academic literature in this area and, as a result, may explain the focus on the relationship between rules and discretion. The conceptualisation of weak and strong discretion is potentially instructive in light of the research questions in this thesis with regard to the use of discretion in ownership disputes. As subsequent chapters will demonstrate, the exercise of discretion has been a prominent feature in ownership disputes over the matrimonial home. It is therefore of imperative importance to classify this exercise of discretion and to

[69] AAS Zuckerman, 'Ownership of the Matrimonial Home-Common Sense or Reformist Nonsense' [1978] 94 *Law Quarterly Review* 37, 38-39. See also N Hopkins N 'Conscience, Discretion and the Creation of Property Rights' (2006) 26(4) *Legal Studies* 475, 478-479.
[70] Dworkin (n 9) 38.
[71] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 132. On 'easy' and 'hard' cases see R Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057 and LB Solum, 'The Unity of Interpretation' (2010) 90 *Boston University Law Review* 551.
[72] Dworkin (n 9) 33.
[73] ibid.

understand whether, despite frequent appearances otherwise, this discretion was structured.

## THE RELATIONSHIP BETWEEN RULES AND DISCRETION

Rather than focusing solely on discretion as a subject of study and then seeking to construct a definition, another methodology used is to create a definition of discretion by way of contrasting it to rules. Thus a key counterpart to Dworkin's analysis of discretion is the conceptualisation of rules.[74] However, defining a rule may present the same problems as defining discretion. Drawing upon the work of Schauer, Schneider defined a rule as 'an authoritative, mandatory, binding, specific and precise direction to a judge which instructs him how to decide a case or to resolve a legal issue'.[75] Similarly Dworkin asserted that:

> 'rules are applicable in an all or nothing fashion. If the facts a rule stipulates are given then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'.[76]

The key emphasis derived from Dworkin's work is the exclusive, action-guiding nature of rules which provide readily identifiable solutions to particular facts. This particular route of contrasting discretion with rules is arguably circular, and furthermore, it also goes against the conventional trend in the academic literature of viewing rules and discretion as inextricably linked entities, as explored below. In the context of trusts of the family home, the discourse on rules is more complex seeing as the rules applicable derive from equity and not statute. As Cooke notes, the development of this framework in this area has:

> 'proceeded gradually and has reflected the instincts of succeeding generations of judges about what is fair between the litigants before them, about what is legitimate within the doctrine of precedent, and about what is the appropriate balance between the courts and Parliament'.[77]

[74] For the highly influential categorisation of rules into 'primary' and 'secondary' see HLA Hart, *The Concept of Law* (2nd edn, OUP 1994).
[75] Schneider (n 31) 50.
[76] Dworkin (n 9) 24.
[77] E Cooke, *Land Law* (OUP 2012) 84.

This observation is important as it will be considered in this thesis how far the specific context of domestic property permits judicial modification of rules through the exercise of judicial discretion. Similarly, the role of fact-finding is particularly important in this area. Baroness Hale stated in *Stack v Dowden* that '[e]ach case will turn on its own facts' and sanctioned close fact-sensitivity[78] and this thesis will therefore question whether the specific nature of ownership disputes frustrates the 'all or nothing application of rules'.[79]

Dworkin's conceptualisation of discretion generated through comparison to rules has stimulated extensive academic debate and a prevailing criticism has been how it creates a polarisation between rules and discretion. In particular, the 'doughnut analogy' is often recognised as an analytical starting point but then criticised for its failure to recognise that discretion and rules have a close symbiotic relationship.[80] Although Dworkin arguably recognised this relationship, particularly through weak discretion modifying the application of rules, his work has nevertheless generated polarisation. Hawkins has argued that rules and discretion often are viewed as 'opposing entities'.[81] Post has also advanced this viewpoint noting that by viewing discretion as 'binary opposites' it is as if 'we can have law or discretion, but not both'.[82] He draws support for this argument from the work of Weber,[83] and even earlier support from Dicey.[84] Others such as Atiyah view discretion as a 'qualification' to the application of rules and this particular viewpoint illustrates a more nuanced approach and a shift away from polarisation of rules and discretion.[85] This polarisation of rules and discretion has various consequences. In particular, it creates a view that discretion is individualised subjective justice that is doled out without rigorous legal analysis. This, in turn, means that the area of discretion carved out in Dworkin's doughnut analogy is ultimately characterised as 'dead analytic space'.[86] As will be explored in subsequent chapters, this polarisation has often resulted in a distinction being made in trusts of the family home scholarship between the utility of clear rules and the fears of 'palm tree justice'.

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[78] *Stack v Dowden* (n 1) [69].
[79] Dworkin (n 9) 24.
[80] In Hawkin's *The Uses of Discretion*, Dworkin's framework is frequently cited as a starting point in the academic scholarship exploring discretion.
[81] Hawkins (n 13) 35.
[82] Post (n 29) 169.
[83] M Weber, 'The Three Types of Legitimate Rule' (1958) 4(1) *Berkeley Publications in Society and Institution* 1-11.
[84] AV Dicey, *The Law of the Constitution* (1885) 215.
[85] Atiyah (n 6) 1255.
[86] Post (n 29) 169.

Commentators have frequently departed from Dworkin's distinction between rules and discretion and this departure is evidenced in various ways. Firstly, academics have argued that the distinction is really 'a matter of degree' and that involves 'the adjudicative process being more or less constrained, but never totally constrained or unconstrained'.[87] Therefore, Davis' assertion, which also aligns with Dworkin's viewpoint, that 'where the law ends, discretion begins' is a clear simplification which advances an unnecessary antagonism between rules and discretion.[88] A rule by its very nature can never truly envisage all possible factual scenarios as to when that rule may be engaged. Thus the use of discretion may assist in the ultimate deployment of that rule. In short, an exercise of discretion buttresses the rule, assists in its interpretation and this further reveals a mutual coexistence between rules and discretion. This viewpoint has become so entrenched that Schneider even doubts whether lawyers themselves view a bright-line distinction between rules and discretion, previously envisaged by Dworkin.[89]

Secondly, the relationship between rules and discretion, in particular the qualities often cited as belonging to rules and discretion, is sometimes misunderstood. For example, discretion arguably offers flexibility regarding factors to consider in judicial reasoning, the ultimate remedy or final outcome of a case, yet there is evidence to suggest that the judiciary often structure their use of discretion or use avowedly rule-like 'decision routines'.[90] Thus the idea of discretion permitting members of the judiciary to become 'loose cannons' may fail to recognise the potential for discretion to become relatively structured.[91] Indeed, the former view was clearly adopted by some academics reviewing the contribution of Lord Denning to the development of trusts of the family home in this area.[92] It also fails to recognise that, in practice, a legal system rarely adopts unbridled, unfettered judicial discretion that leaves little scope for discretion in their interpretation.[93] The converse applies for rules – evidence suggests that a rule, exemplifying all the benefits of a rule such as certainty, predictability or democratic legitimacy, may be worded in a manner sanctioning the exercise of discretion. This particular argument has been developed further by the work of Harlow and Rawlings[94]

[87] Gardner (n 28) 193.
[88] Davis (n 8) 3.
[89] Schneider (n 31) 49.
[90] Hawkins (n 13) 45.
[91] Gardner (n 28) 193.
[92] See J Brady, 'Trusts, Law Reform, and the Emancipation of Women' (1984) *Dublin University Law Journal* 1 and MDA Freeman, 'Family Matters' in JL Jowell and JPWB McAuslan, *Lord Denning: The Judge, the Law* (Sweet and Maxwell, 1984).
[93] Barak (n 11) 19 and A Barak, *Purposive Interpretation in Law* (Princeton University Press 2007) 210.
[94] C Harlow and R Rawlings, *Law and Administration* (Weidenfeld and Nicolson 1984).

who observed that within a rule 'we find constant allusion to standards: 'necessary', 'essential', 'exceptional', or 'reasonable'' and the presence of these standards provide 'significant freedom of manoeuvre'.[95] Indeed, Harlow and Rawlings even term this 'embedded discretion' i.e. discretion embedded within a rule, further illustrating the connection between the two.[96] This, again, further underlines the close relationship between discretion and rules. It also generates a connection to trusts of the family home where, in the context of quantification of a beneficial interest, the court now has the ability to award a party a share in the beneficial ownership on the basis of 'fairness'.[97]

Recognising this close relationship between rules and discretion has various consequences for the conceptualisation of trusts of the family home but of key importance is how that relationship may also facilitate the gradual development of the law. In this area Cohen observed that:

> '…legal history shows, if not alternating periods of justice according to law and justice without law, at least periodic waves of reform during which the sense of justice, natural law, or equity introduces life and flexibility into the law and makes it adjustable to its work. In course of time, however, under the social demand for certainty, equity gets hardened and reduced to rigid rules, so that, after a while, a new reform wave is necessary'.[98]

This perspective further underlines the need to avoid polarising rules and discretion. For Cohen, both rules and discretion should be viewed as equally necessary within a constantly developing legal order that is governing an ever-changing society. Echoing this cyclical process are the views of Rose[99] arguing that this self-perpetuating reform process also occurs within private law which, as Gardner notes, is an area 'whose natural currency is rules'.[100] Rose argues that legal development involves an oscillation between periods typified by rules or 'crystals' which are then softened, 'muddied' or 'made fuzzy by the courts'.[101] This ebb and flow process is the natural development of law and resonates with the aforementioned relationship between rules and discretion. Furthermore, it has clear parallels to the development of trusts of the family home which

[95] ibid 617.
[96] ibid.
[97] *Jones v Kernott* (n 1) [51] (Lady Hale and Lord Walker).
[98] MR Cohen, *Law and Social Order* (1933) 261 noted in Davis (n 8) 19.
[99] Rose (n 19).
[100] Gardner (n 28) 196. Echoed in R Pound, 'The Theory of Judicial Decisions' (1923) 36 *Harvard Law Review* 940, 951.
[101] Rose (n 19) 585.

has a developmental pattern similar to that depicted by Cohen and Rose. A key aspect of understanding this development is how discretion is conferred upon a decision-maker which will now be explored.

## THE CONFERRAL OF DISCRETION

A traditional viewpoint in the academic literature is that discretion results as a conferral of power to a decision-maker. In the area of family law, examples of this can be seen through the conferral of discretion by Parliament upon the judiciary through section 1 of the Children Act 1989 introducing the 'welfare principle' or through section 25 of the Matrimonial Causes Act 1973 providing statutory factors guiding the courts exercise of discretion in the division of assets upon divorce. These are examples of the archetypal express grants of judicial discretion that clearly align with a Dworkinian view of a realm of discretion to decide what would be in the child's best interests or what would be a fair division of assets, respectively, which is bounded by legal restriction.[102] As Chapter Two will note, section 17 of the Married Women's Property Act 1882 enabling a judge to decide any question as to title or possession of property between spouses as he thinks fit is a clear example of an express conferral of discretion.

On top of this express conferment idea, Goodin adds to this debate by drawing a distinction between 'formal discretion' where discretion is expressly envisaged by the rule-maker and 'informal discretion' where it is implicit or assumed by the rule-maker.[103] For example, Goodin notes that a rule may expressly stipulate that an official may use discretion when determining a particular outcome and this would correlate with 'formal discretion'. Alternatively, the rule may be silent in relation to enabling the official to use discretion but may refer to terms such as 'suitable' or 'appropriate' which by the open-texture of those terms, implicitly sanctions discretion. This echoes the finding of Harlow and Rawlings, noted above, and can be termed 'embedded discretion'. This section will analyse the various forms of express grant of discretion and also demonstrate that discretion can invariably arise which is not explicitly sanctioned by a rule or envisaged by the rule-maker. These implicit forms of discretion will be

[102] However, it should be noted that many have doubted the coherence of these particular express grants of discretion. In relation to financial orders following divorce, see Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) para 1.18, E Cooke, 'Miller/McFarlane: Law in Search of Discrimination' [2007] 19(1) *Child and Family Law Quarterly* 98 and J Eekelaar, 'Miller v Miller, the descent into chaos' [2005] *Family Law* 870. For criticisms of the scope of judicial discretion in the application of the welfare principle see J Eekelaar, 'Beyond the Welfare Principle' (2002) 12 *Child and Family Law Quarterly* 237.
[103] Goodin (n 44) 234.

delineated, particularly as they have key significance for the implied trusts which as an area is characterised by the absence of statutory intervention. Thus, the judiciary often assume or infer judicial discretion in the absence of an express mandate.

### (i) Express Conferral of Discretion

Discretion can be expressly conferred upon a decision-maker. Schneider provides a useful exposition of the various types of deliberately and directly created discretionary authority and notes that they are not mutually exclusive.[104] In particular, he emphasises the motivations behind deploying discretion in different ways and this further supports the view of discretion as a malleable and also desirable tool when rule-makers are trying to translate objectives into actionable law.[105] Three are of direct relevance when considering trusts of the family home.[106] The first form of directly created discretion is what Schneider terms 'rule-failure discretion'.[107] The conferral of this type of discretion is motivated by the fact that as the terrain in which relevant decisions take place is 'so varied, so complex and so unpredictable', strict rules would fail. As a result, the formulation of adequate rules that would satisfactorily respond to all legal scenarios presented to the court would be impossible. In essence, discretion in this instance is conferred owing to the failure of rules to provide an answer. For Schneider, discretion is permissible here as it enables the judge to draw upon a range of factors to guide a decision: 'he should look as much as possible to the law for norms and should not rely on his personal preferences or political allegiances'.[108]

The second form of directly created discretion is 'rule-building discretion'.[109] Here, discretion is selected even though the rule-maker could achieve their objectives through the formulation of rules. The rationale for using discretion in this context is that it is felt that decision-makers could better develop the legal framework through incremental, case-by-case pronouncements. The motivation behind the conferral of discretion is the idea that over time, a body of jurisprudence will form and that 'cases will gradually sort

[104] Schneider (n 31) 61-65.
[105] Hawkins (n 13) 11.
[106] Schneider (n 31) 61 also identified a fourth type of discretion called 'Khadi-discretion', which involved ad hoc, discretionary dispensation of justice often by a religious leader. This form of discretion was analysed in the context of matrimonial ownership disputes in RE Megarry, 'Rimmer v Rimmer' (1953) 69 *Law Quarterly Review* 11.
[107] Schneider (n 31) 62.
[108] ibid 63.
[109] ibid 64.

themselves into patterns' and 'principles for solving them will eventually emerge'.[110] Interestingly, Schneider notes that the benefits of this process of refinement through the use of discretion may eventually feed back into legal development as the rule-maker, like a legislature, may legislate using the developed findings of the decision-maker. Schneider also situates the use of discretion within particular contexts. For example, he noted the utility of 'rule-building' discretion in times of 'rapid or great social change' seeing as it allowed 'courts to adjust incrementally to changing social ideas instead of being confined to legislative standards that are not readily altered'.[111]

The last form of discretion identified by Schneider is 'rule-compromise discretion'.[112] This discretion is conferred in instances where the body responsible for instructing the decision-maker cannot agree on the rules and thus they 'deliberately pass responsibility to the decision-maker'.[113] In a way, this aligns with Hawkin's observation that sometimes 'awards of discretion to legal bureaucracies allow legislatures to duck or to fudge hard issues'.[114] Granting discretion to the courts can be viewed as a compromise and, interestingly in relation to current developments in trusts of the family home, Schneider has noted that 'legislative inaction may have the effect of tacitly giving courts authority to decide cases without legislative direction'.[115]

These conferrals of discretion illustrate the potential for discretion to be used creatively by decision-makers. Similarly, they emphasise the relationship between discretion and rules in the development of the law. Schneider's work also acts as a useful primer for consideration of discretion in the context of trusts of the family home. As subsequent chapters will show, the courts interpreted a statutory provision applicable to married couples in a manner that created an expansive discretion. The motivations behind this were varied but resonate with many of Schneider's observations such as modernisation of the law, the need for sensitivity to the facts and also to generate a response to a perceived failure by Parliament to produce reform regulating ownership of property between spouses.[116] Whilst the legitimacy of interpreting this provision in an expansive manner is questionable, nevertheless, the process reveals a potential for an analysis of discretion in this context. Express conferrals of discretion can be contrasted to instances

[110] ibid.
[111] ibid 64.
[112] ibid 65
[113] ibid.
[114] Hawkins (n 13) 12.
[115] Schneider (n 31) 65.
[116] See Home Office, *Report of the Royal Commission on Marriage and Divorce* (Cmd. 9678, 1951-56) where the prospect of community of property was considered but, ultimately, rejected.

where discretion is not directly conferred but instead 'assumed' or merely exercised in a somewhat routine manner by the decision-maker.

### (ii) Informal Discretion

These express conferrals of discretion resonate with widely held views as to what discretion is and how it is normally characterised. For example, this discretion is viewed as legitimate, permissible as it is limited in scope and has an application that is structured by rules. However, in the absence of an express conferral of discretion, academics also assert that when faced with a legal dispute, discretion is often a factor or indeed an option considered by a judge. At a general level, Rosenberg has suggested that 'whatever the court, wherever it sits, the judge soon finds himself talking, wondering and, at times, thinking about discretion and its implications'.[117]

There is an extensive body of literature supporting the view that discretion can be exercised implicitly. As Schneider notes, the normal process of reviewing a decision via appeal illustrates discretionary authority on the part of the appellate court and this authority has been conferred by the state.[118] Yet, it is arguable that the first instance court in that case may implicitly possess discretion in numerous ways. Firstly, the first instance judge is engaged in a process of fact-finding and is presented with the fullest array of information concerning the dispute at hand. They will be able to interview witnesses, hear statements from the parties and formulate opinions regarding the materials presented to them. As Gardner has noted, this means that 'even the apparently routine application of settled rules depends on the finding of particular facts, and fact-finding will reflect the individual approach of the fact-finder'.[119] Similarly, Barak has also noted that 'deciding the facts' can be viewed as the gateway for discretion or 'first area of judicial discretion'.[120] This viewpoint demonstrates the relationship between discretion and rules but it is not universally held. Lord Bingham claimed that a judge 'has no discretion in making his findings of fact'[121] and argued that asserting that a judge used discretion when finding facts would be 'libellous'.[122] Whilst this latter viewpoint

[117] Rosenberg (n 5) 635.
[118] Schneider (n 31) 54-55.
[119] Gardner (n 28) 193.
[120] Barak (n 11) 13.
[121] Bingham (n 17) 28.
[122] ibid 30.

has some force, it does expose a slightly naïve viewpoint regarding the well-documented influences (whether explicit or implicit) that steer judicial reasoning.[123]

Secondly, the first instance judge will have an important role in the formation of the dispute, that is, they will identify which rules are applicable and, as Schneider notes, this influences how the parties themselves conceptualise their dispute.[124] Identification of the relevant rules also necessitates the use of discretion seeing as this can be an individualised matter of interpretation on the part of the judge. Where those rules are ambiguous, the degree of discretion would invariably increase[125] and as Bell notes, discretion often arises 'as the result of some absence or indeterminacy of the legal materials'.[126] Rules and discretion are closely intertwined as discretion is used to clarify, interpret and construct the intended meaning of rules. The purpose and meaning of a particular rule will be open to interpretation and facts will be analysed by the decision-maker with a view to determining whether a particular rule is engaged or relevant. So in-built within a rule is the inherent scope for the application of judicial discretion and also the ability for discretion to fill in the gaps surrounding the application of a particular rule. Therefore, discretion can help resolve ambiguity through the interpretive role of the decision-maker. As Hawkins has noted, these benefits may reveal why discretion has become an 'inevitable' feature of legal systems dependent upon individuals interpreting rules.[127] In essence, this interpretation is premised on informal discretion as a tool to overcome the fact that rules are 'blunt instruments'.[128]

Thirdly, it is clear that a judge must apply the law to the facts at hand which, as a process, represents another layer of discretion. Thus it is apparent that discretion is exercisable in the absence of a Parliamentary mandate and can operate in a far more implicit or informal manner. This observation is particularly relevant for this thesis seeing as the courts have been required to deploy rules in this context which have been

[123] See, for example, K Llewellyn, *Jurisprudence* (University of Chicago Press 1962), and NEH Hull, R Pound and K Llewellyn, *Searching for an American Jurisprudence* (University of Chicago Press 1997) in relation to the development of legal realism.
[124] Schneider (n 31) 54-55.
[125] Finlay terms this 'adjectival discretion' that involves 'a purely "fact finding" exercise such as may be entrusted to a jury, or it may include a finding of law, or of mixed fact and law' in HA Finlay, 'Judicial Discretion in Family and other Litigation' (1975-1976) 2 *Monash University Law Review* 219, 226.
[126] Bell (n 24) 97.
[127] Hawkins (n 13) 11.
[128] K Hawkins, *The Uses of Discretion* (OUP 1991) 8.

frequently criticised for their ambiguity and practical limitations when applied in the domestic context.[129]

## THE UTILITY AND 'TYRANNY' OF DISCRETION

The following section provides a broad overview of some of the academic viewpoints on discretion. These viewpoints often reveal a polarisation between rules and discretion and thus it should be borne in mind the more moderate viewpoint, identified above, that of discretion and rules operate simultaneously; it is not the case of 'one or the other'. The perceived benefits of discretion are numerous and these can be seen in express grants of discretion to a decision-maker but can equally be seen when courts, perhaps appreciative of the virtues of discretion, exercise discretion informally in their particular determinations. The arguments in favour of the exercise of discretion by the courts can be briefly summarised and it is arguable that they can be divided into two perspectives. One perspective relates to the terrain of legal disputes, which the exercise of discretion can help decipher, and the other perspective relates to the influence that discretion can have in the interpretation of a specific rule. In a sense, the former concerns the application of a rule to a specific set of facts whereas the latter concerns the interpretation of the wording contained within the rule itself.

The terrain of disputes often necessitates the use of discretion and there are three contexts where discretion is said to be particularly useful. The first is where a decision-maker is dealing with socially sensitive issues or matters of far-reaching social policy. Schneider notes that in this context it would be hard to generate rules that could effectively carry out the rule-maker's purpose without them being highly controversial. Furthermore, there may be reluctance on the part of the legislature or rule-maker to generate a set of rules owing to diverse and perhaps intensely held opinions regarding an issue. As Hawkins notes, 'sometimes…law makers want to remain as silent as possible on controversial or complex matters of social policy'.[130] Whilst the conferral of discretion in this context can be viewed as 'passing the buck' from the rule-maker to the decision-maker, the latter may arguably be in a better position to dissect the particular facts and thereby potentially create a more bespoke resolution of a dispute. After all, benefits of discretion noted by academics in the context of matrimonial property were

[129] See *Pettitt v Pettitt* [1970] AC 777 (HL) and *Gissing v Gissing* [1971] AC 886 (HL) analysed in Chapter Four.
[130] Hawkins (n 13) 12.

'simplicity, informality and a consideration of particulars'.[131] Yet where discretion has been conferred upon the judiciary, it is clear that restraints are often present and as Klatt notes, even legal positivists who would accept a broad use of discretion are likely to accept that 'judges do not have the power to introduce large-scale reforms or new codes as do legislators'.[132]

A second and related context where the exercise of discretion may be useful is where societal change or legal development is fast-paced. As Marsh notes, 'there are situations where the changing nature of the subject-matter and the delicate social issues involved make it desirable to leave the decision to the judge's discretion, flexibility being purchased at the price of some uncertainty'.[133] Express grants of discretion in this context enable the decision-maker to modernise and update the legal framework through the creation of a jurisprudence that reflects these developments. This helps avoid the risk of 'time lag' in the law seeing as 'social necessities and social opinion are always in advance of the law'.[134]

This exercise of discretion resonates with Schneider's 'rule-guiding' conferral of discretion, explored above. Owing to an area of regulation rapidly changing, the benefit of discretion here is the fact that the courts can revise, update and resultantly keep abreast of changes in society. The reason that this can occur is through the influence of the judge as a decision-maker who can inject creativity into the law and also generate innovation.[135] Without that ability, as McKean notes, 'judges would be reduced to automatons or robots…while law itself would petrify into a system of inflexible dogmas and cease to be a social science'.[136]

The last context where discretion is peculiarly helpful is where it can be used to grapple with highly technical or complex fact scenarios. By providing the decision-maker a degree of latitude in the process of adjudication, the rule-maker is conferring upon the decision-maker an ability to use their judgment. Having the ability to use discretion to

[131] HK Bevan and FW Taylor, 'Spouses as Co-Owners' [1966] 30 *The Conveyancer* 355, 456.
[132] M Klatt, 'Taking Rights less Seriously. A Structural Analysis of Judicial Discretion' (2007) 20(4) *Ratio Juris* 506, 509.
[133] NS Marsh, 'Principle and Discretion in Judicial Process' (1952) 68 *Law Quarterly Review* 226, 236.
[134] O Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33(6) *Modern Law Review* 601 quoting from F Pollock, *Introduction and Notes to Sir Henry Maine's "Ancient law"* (Murray 1914) 29.
[135] See, for example, Schneider (n 31) 64, I Kaufman, 'The Anatomy of Decision Making' [1984] 53 *Fordham Law Review* 1, 12 and CE Clarke and D Trubek, 'The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition' [1961-1962] 71 *Yale Law Journal* 255.
[136] F McKean, 'Some Aspects of Judicial Discretion' (1936) 40 *Dickinson Law Review* 163, 163.

interpret and decipher this type of evidence is regarded as necessary in highly complex fact scenarios. A related issue is that a rule is unlikely to envisage the vast array of fact patterns it may ultimately apply to and so discretion assists a decision-maker when confronted with a previously non-envisaged fact pattern. This idea is far from new and the inability for rules to envisage all scenarios was identified in Christopher St German's *Doctor and Student* that explored the relationship between common law and equity.[137]

All three contexts appear present in the area of trusts of the family home. The courts have been identified as engaging in a process of judicial reform[138] and there is a clear drive in this area to align the legal framework, particularly in the context of quantification, with prevailing societal views on cohabitation and home-sharing.[139]

Despite the aforementioned benefits of discretion, it has been criticised by judges and the academic community from a variety of different perspectives. An often quoted view, albeit one that may be viewed as becoming rapidly out of date, is that '[t]he discretion of a judge is the law of tyrants; it is different in different men; it is casual and depends upon constitution, temper, and passion'.[140] This sentiment has been expressed in a variety of different ways but, at its furthest extreme, discretion is viewed as 'a corrupting force, a nasty growth that constantly erodes the basis of "justice"'.[141] These views on discretion require further analysis particularly in light of the view that even an expansive exercise of discretion may in fact be structured. The problems with the use of discretion can be approached from three perspectives.

Firstly, a recurring criticism of the use of discretion is that it exists outside the framework of law and, as Post remarked, it exists 'in the interstices of the law'.[142] By existing outside the law, when a judge exercises discretion they are exercising their own highly individualised and idiosyncratic personal opinion.[143] It is therefore an exercise that is extra-legal and, unlike rules that epitomise objectivity, discretion is subjective and 'outside the legal process'.[144] In the same manner, there is also evidence of members of the judiciary feeling a sense of relief that a particular issue falls to be determined

[137] See W Muchall, *Christopher St German's Doctor and Student* (17th edn, A Strahan 1787) 45.
[138] K Gray and S Gray, *Elements of Land Law* (5th edn, OUP 2009) 903.
[139] *Stack v Dowden* (n 1) [3] (Lord Hope).
[140] *Doe v Kersey* (1765) (CP) (Unreported) noted in Post (n 29) 208.
[141] R Baldwin and K Hawkins, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570, 571.
[142] Post (n 29) 169.
[143] On the notion of individualised justice see Davis (n 8) 5-9.
[144] Wexler (n 16) 121.

through judicial discretion. Writing extra-judicially, Lord Bingham stated that he knew of a judge who 'would sink back in his chair with relief' when told by counsel that he had a discretion to decide a matter, particularly as he knew that it meant any decision he made would be 'immune from successful challenge on appeal'.[145] This behaviour conflicts not only with the formalism of law but, more importantly, generates pejorative viewpoints that judges have in fact become legislators.[146] These objections to the use of discretion are most prominent with broad uses of discretion such as 'khadi discretion' or Dworkin's 'strong discretion'. In the former, the decision-maker is often a village elder who by virtue of their wisdom, status and age determines disputes drawing upon a variety of legal and non-legal materials.[147] In the latter, the decision-maker decides disputes without 'applicable rules or standards'.[148] Both conjure up the image of an arbiter handing down isolated judgments and of an individual providing 'palm tree justice'. Although Hopkins[149] and Lucy[150] have noted that even with 'strong discretion' the degree of discretion exercised by the decision-maker may in fact be restrained,[151] the breadth and potential scope of discretion has generated cause for concern. Thus expansive uses of discretion generate difficulties in relation to the legitimate role of the judge in the legal system and observance of the rule of law. These views are evident in the academic commentary on trusts of the family home.

Secondly, the individualised nature of discretionary resolution has also generated criticism. Wexler identified a view in the academic commentary that the presence of discretion within a decision renders it 'personal, idiosyncratic, irrational, tyrannical, unstable, and chaotic'.[152] Whereas some have viewed the fact that discretion can be used to tailor a response to the facts at hand and therefore generate 'individualised justice',[153] others see this as a major problem as treating each case alike directly impacts upon a system of judicial precedent. This in turn creates unpredictability with individuals being

[145] Bingham (n 17) 27. See also Rosenberg (n 5) 666 who noted that 'the more reasons for his [the judge's] discretionary ruling, the more vulnerable it becomes'.
[146] See, generally, R Sartorius, 'Social Policy and Judicial Legislation (1971) 8 *American Philosophical Quarterly* 151.
[147] Also known as 'Cadi' or 'Kadi' discretion. For an overview of Khadi discretion see CE Schneider, 'Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard' (1991) 89(8) *Michigan Law Review* 2215, 2242.
[148] Lucy (n 63) 215.
[149] Hopkins (n 69) 479.
[150] Lucy (n 63) 215.
[151] According to Rosen even Khadi discretion possessed 'definite regularities'. See L Rosen, 'Equity and Discretion in a Modern Islamic Legal System' (1980-1981) 15 *Law and Society Review* 217, 217.
[152] Wexler (n 16) 123.
[153] See Davis (n 8) 5-9.

unable to predict outcomes in cases or 'bargain in the shadow of the law'.[154] With each discretionary pronouncement being unique and inextricably linked to the facts at hand, the scope for a judge to distinguish an authority is increased. Indeed, these observations can be found in the implied trust framework where academics have suggested that quantification of a beneficial interest has become a matter of 'judicial hunch',[155] which in turn generates unnecessary litigation and spiralling costs.[156]

Thirdly, another criticism of discretion is that the use of discretion may enable a decision-maker to take into account improper considerations. There is a fear that the presence of gaps surrounding a framework of rules enables a court to 'absorb into the legal system every moral or social norm it deems worthy of official recognition'.[157] This is especially problematic in contested areas where particular views of a decision-maker should not triumph over others and the judge must 'respect divergent beliefs without permitting one to tyrannize others'.[158] It is generally thought that when using judicial discretion, a judge would solely draw upon legal provisions such as statute and case law when making a particular determination. Yet, there is an extensive array of literature illustrating that judges may draw upon personal viewpoints and sympathies that may therefore represent extra-legal and potentially improper considerations.[159] Schneider has argued that linked to this idea of improper considerations is the fact that personal standards, influenced by the mores of the decision-maker may therefore drive a legal decision rather than legal standards. Both of these concerns create a difficulty for judicial reasoning and have provided support for praising the benefits of rules. On the one hand, discretion may invite improper considerations to be brought into a particular adjudication but on the other hand, discretion also may cover up the fact that this has happened i.e. discretion can mask or disguise legal reasoning.[160] In an attempt to avoid this and in order to maintain the credibility of using discretion, Rosenburg has argued

[154] See, for example, RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.
[155] G Battersby, 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *Child and Family Law Quarterly* 259, 264.
[156] Neuberger (n 50) [18].
[157] E Bodenheimer, 'Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion' [1976-1977] 11 *Georgia Law Review* 1144, 1171.
[158] W Friedmann, 'Legal Philosophy and Judicial Lawmaking' [1961] 61 *Columbia Law Review* 821, 845.
[159] See, for example, BN Cardozo, *The Nature of the Judicial Process* (Yale University Press 1963) 141 and Frank (n 48).
[160] The idea of the use of discretion masking legal reasoning or the principles underpinning a particular decision is prominent in the academic discourse in family law surrounding the use of the 'welfare principle' in section 1(1) Children Act 1989. See, for example, H Reece 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267 and Eekelaar (n 102).

that judges should clearly 'place on record the circumstances and factors that were crucial to his determination'.[161] Yet, there naturally may be a hesitancy with regards a judge doing this because it opens up the potential of appeals.[162] Rules, in contrast, can be viewed more favourably. Not only are they publicly visible which has benefits for parties when knowing the law and bargaining in the shadow of the law inter se, they also have democratic legitimacy owing to their creation by Parliament.

This overview has shown that the use of discretion has both virtues and deficiencies. However, caution must be exercised when evaluating these qualities. Critics of discretion will often use examples of strong discretion to justify negative perceptions as to its use and this perspective may fail to attach sufficient weight to the fact that discretion is often structured by rules. Proponents of discretion shift the focus away from the existence of strong discretion and instead emphasise its limited scope. This produces a view that discretion is never absolute and is either fettered expressly by rules or restricted through the courts structuring their use of discretion.[163] Therefore a persuasive synthesis of the benefits and disadvantages of discretion is provided by Pound who noted that:

> '…in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case before him. Both elements are to be found in all administration of justice'.[164]

## CONCLUSIONS

The purpose of this chapter was to provide a foundation for an analysis of discretion within the family home context. This chapter has shown that, as a focus of academic study, discretion is highly variable and manifests itself in numerous ways within the legal system. Stated in its simplest terms, Hawkins believes that discretion is a specific methodology through which law is translated into action and owing to the infinite variety of legal disputes brought before the courts, unsurprisingly this means that the exercise of discretion is widespread.[165] However, this is where the simplicity ends as this chapter has shown that there are clearly differing perspectives on the use of discretion

[161] Rosenberg (n 5) 665.
[162] Bingham (n 17).
[163] Barak (n 11) 19 and Barak (n 93) 210.
[164] R Pound, *Jurisprudence* Volume 2 (1959) 355.
[165] Hawkins (n 13) 11.

and these differences are often generated depending on whether discretion is being viewed by legal philosophers or social scientists. Whereas, historically, the legal system was viewed as 'a gapless system of norms' and the judiciary viewed 'as a mouthpiece of the law',[166] more modern interpretations advanced by Hart suggest the pervasive influence of judicial discretion in the adjudication of disputes. Indeed, some would argue that the judge through an exercise of discretion is 'inevitably both an interpreter *and* a law-maker'.[167]

This chapter has shown that defining discretion is an inherently difficult process owing to the various contexts within which discretion operates and because, as Hopkins notes, 'the nature of discretion may differ between the determination of the dispute between the parties and the award of a remedy'.[168] This naturally prevents the creation of generalised definitions and underlines a need for a context-specific appraisal of discretion. However, in spite of the difficulties involved in generating definitions, this chapter demonstrated that positive and negative definitions of discretion have been created. The former emphasises 'the power to choose' between two or more permissible courses of action.[169] The latter draws attention to the presence of fetters or restrictions placed on the decision-makers. Both definitions show that 'unbridled' or 'absolute' discretion does not exist.[170] Even where a decision-maker is using Dworkin's 'strong discretion' that suggests the use of absolute discretion, the exercise of discretion is often bounded by extra-legal restraints such as notions of reasonableness and fairness. Therefore, structuring of discretion and restricting its scope through rules or decision-making patterns is common. This practice resonates with the view of Lord Scarman:

> 'Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree'.[171]

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[166] Bodenheimer (n 157) 1171 echoing Montesqieu, *The Spirit of the Laws* (Colonial Press Edition 1900) 159 noting that judges are 'no more than the mouth that pronounces the words of the law'.
[167] M Cappelletti, 'The Law-Making Power of the Judge and its Limits: A Comparative Analysis' [1981-1982] 8 *Monash University Law Review* 15, 64. See N Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175, 177 who notes that 'the courts do and should make policy decisions as part of a law-making role'.
[168] Hopkins (n 69) 479.
[169] H Hart and A Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Tentative Edition 1958) 162.
[170] Barak (n 11) 19.
[171] *Duport Steels Ltd and others v Sirs and others* [1980] 1 All ER 529, 551.

In formulating definitions, comparisons to rules are frequently present in legal scholarship. This comparison is something that academic commentators have both welcomed (as it highlights distinguishing features between the two entities) and at the same time criticised (as it often unduly polarises rules and discretion). However, for the purposes of this thesis, the prevailing trend in legal scholarship has been to recognise the connection between rules and discretion and that rules and discretion have a close symbiotic relationship. If rules inform the use of discretion and vice versa, the key issue becomes finding 'the optimum point on the rules-to-discretion scale' which takes into account the context in which discretion is being exercised.[172] Schneider's general assertion therefore has particular force, namely that when we think about optimising the way in which the policies of the state are translated into action, we should use a mix of rules and discretions with both being selected following a deliberate decision as to which would be most effective.[173]

This chapter has shown that there are various contexts where law-makers believe judicial discretion is most appropriate and this finding produces parallels to the modern trusts of the family home framework. In particular, academic commentators have easily identified the use of discretion in areas of pronounced legal complexity, where legal disputes are factually individualised or where societal views on a particular issue are changing rapidly. In short, there are 'contexts' where discretion instinctively appears more effective to use than rules. Discretion may be conferred upon the decision-makers in these contexts either expressly via a grant of discretionary power to a decision-maker or may be exercised informally by the decision-maker at various stages in the adjudicative process.

The benefits and disadvantages of discretion are numerous. Discretion facilitates close fact-sensitivity, overcomes the well-documented difficulty of rules failing to envisage every factual scenario and permits decision-makers to draw upon social factors in their reasoning, thereby modernising the law. However, discretion can be viewed as capricious or arbitrary, may be seen as masking or disguising legal reasoning and can stimulate legal uncertainty through unpredictability as to outcomes. These concerns often trigger strong and also divided opinions from the judiciary and academics as to the use of discretion, particularly as they touch upon broader issues such as the impartiality of the judiciary, the rule of law and judicial activism. Having outlined some of the theoretical perspectives on discretion it is now possible to begin analysing how the

[172] Davis (n 8) 15.
[173] Schneider (n 31) 88.

courts used discretion in the specific context of ownership disputes over the family home.

# CHAPTER TWO

# THE USE OF JUDICIAL DISCRETION IN OWNERSHIP DISPUTES OVER THE MATRIMONIAL HOME 1948-1958

## INTRODUCTION

Prior to the House of Lords' decisions in *Pettitt v Pettitt*[1] and *Gissing v Gissing*,[2] the courts in England and Wales developed a 'discretionary jurisdiction' to be used in ownership disputes over the matrimonial home.[3] With a view to understanding the use of discretion evidenced in modern case law, it is important to analyse how this early discretionary jurisdiction developed, particularly as modern authorities still reference cases decided in this early period.[4] This chapter focuses primarily on judicial developments from 1948 to 1958 where the court first started to develop this jurisdiction. Alongside interrogating the development of the use of discretion by the courts, an understanding of how discretionary resolution of disputes was conceptualised by the judiciary and academics is important. Drawing upon the theoretical literature examined in Chapter One, the purpose of this chapter is to analyse the use of discretion in matrimonial property disputes.

The chapter begins by noting the initial absence of specific rules applicable to married couples following the introduction of separate property in the Married Women's Property Act 1882. As marriage no longer had a direct consequence on property ownership between spouses, trust principles applied which included the express trust and the presumed intention resulting trust. After analysing the use of trust principles, this chapter then explores section 17 of the Married Women's Property Act 1882.[5] This

[1] *Pettitt v Pettitt* [1970] AC 777 (HL).
[2] *Gissing v Gissing* [1971] AC 886 (HL).
[3] E Cooke, *Land Law* (OUP 2012) 87.
[4] See *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 (HL) [16] (Lord Walker), [42] (Baroness Hale) and *Jones v Kernott* [2011] UKSC 53, [2011] 2 WLR 1121 (SC) [85] (Lord Wilson). For earlier cases see *Bernard v Josephs* [1982] Ch 391 (CA) 402 (Griffiths LJ), *Burns v Burns* [1984] Ch 317 (CA) 321 (Waller LJ), *Goodman v Gallant* [1986] 1 All ER 311 (CA) 314-317 (Slade LJ).
[5] 45 & 46 Vict. Ch.75 (henceforth section 17).

provision was originally interpreted by the court as 'procedural', that is, as a mechanism to bring a dispute to court and for the court to merely declare pre-existing property rights. However, as this chapter will demonstrate the Court of Appeal interpreted that provision in a substantive manner to generate an expansive discretion to reallocate property. This process suggests a shift from the exercise of discretion as to fact-finding to one where the discretion is assumed to permit reallocation of property rights. The substantive use of judicial discretion had the effect of minimising, and in some instances circumventing, the role of the presumption of resulting trust in this particular context. Through an analysis of four key Court of Appeal judgments, the history and metamorphosis of this provision from procedural to substantive will be analysed to query the process and motivations behind the judiciary manipulating section 17 to carve out for the courts a redistributive discretion.

## THE ABSENCE OF SPECIAL RULES FOR MARRIED COUPLES

Prior to the introduction of separate property through the Married Women's Property Act 1882, property relations between spouses were governed by the 'unity of person' doctrine which viewed husband and wife as one person following marriage.[6] The unity of person doctrine was rooted in the ecclesiastical concept of marriage and the effect was that, as Blackstone noted, the 'very being or legal existence of the woman is suspended…or at least is incorporated and consolidated into that of the husband'.[7] This doctrine had far-reaching consequences with regard to the ownership of property. Ownership of the wife's property, including her chattels and earnings, vested absolutely in the husband following marriage.[8] With slightly less rigidity, real property and its incumbent profits vested in the husband during the marriage and any conveyance of real property to the wife during marriage was managed by the husband. Although the rigours of some of these rules could be circumvented in equity through the doctrine of 'separate use', this mechanism was highly technical and expensive and thus most married women were subject to the common law doctrine of unity of person.[9]

[6] This was a manifestation of 'erunt animae duae in carne una'; namely 'two souls in one flesh'. See JH Baker, *An Introduction to Legal History* (Butterworths 2002) 483-484. See also G Williams, 'Legal Unity of Husband and Wife' (1947) 10(1) *Modern Law Review* 16 and *Phillips v Barnet* (1876) 1 QBD 436 for analysis of the legal consequences of unity of person.
[7] 1 Bl Comm 442.
[8] Baker (n 6) 485.
[9] ibid 486. For an analysis of the 'separate use' and marriage settlements in the Court of Chancery see AL Erickson, *Women and Property in Early Modern England* (Routledge 1993) 114-124.

After extensive lobbying by a variety of interest groups that were critical of the unity of person doctrine, separate property was achieved through a series of Acts of Parliament.[10] The Married Women's Property Act 1882 enabled married women to acquire, hold and dispose of real and personal property. This mitigated the rigours of the common law unity doctrine and, according to Gray, recognised a 'rudimentary concept of sexual equality'.[11] A key feature of the Married Women's Property Act 1882 was that through introducing separate property the Act rejected the creation of a set of principles specifically tailored to married couples cognisant of how property was in practice acquired by them. Similarly, this development also involved a rejection of community of property that in most cases would involve 'automatic sharing of property and liabilities during marriage' coupled with 'rule-based sharing of property when the community is dissolved by divorce or death'.[12] As Cooke, Barlow and Callus note: 'the rejection of any community system went hand in hand with the emancipation and proclaimed equality of women with men'.[13] This observation is important as reformers arguably focused on formal equality as to legal treatment rather than addressing in a comprehensive manner the question of 'who should own what the spouses acquired during marriage through their joint efforts'.[14] Although community of property was already widely used in civil law jurisdictions, the merits of introducing a community system in England and Wales were not canvassed.[15] The ethos of separate property was that the law treated married couples as though they were strangers. Marriage became 'an irrelevant factor' and in the context of ownership of the matrimonial home the general rules of property law applied.[16] From 1882 onwards the system of separate property

[10] For the extensive literature on the Married Women's Property reform movement, see S Staves, *Married Women's Separate Property in England, 1660-1833* (Harvard University Press 1990), ML Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton University Press 1989), L Holcombe, *Wives and Property* (University of Toronto Press 1983) Chapters 8-10, SM Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 96-101 and V Ullrich, 'The Reform of Matrimonial Property Law in England during the Nineteenth Century' [1977-1978] 9 *Victoria University of Wellington Law Review* 13.

[11] K Gray, *Reallocation of Property on Divorce* (Professional Books 1997) 50. cf R Auchmuty, 'The Married Women's Property Acts: Equality was not the issue' in R Hunter, *Rethinking Equality Projects in Law: Feminist Challenges* (Hart 2008).

[12] E Cooke, A Barlow and T Callus, 'Community of Property: A Regime for England and Wales?' (Nuffield Foundation Report, London, 2006) 1. Introduction of a community of property regime was again rejected in 1956 by the Royal Commission on Marriage and Divorce. See Home Office, *Report of the Royal Commission on Marriage and Divorce* (Cmd. 9678, 1951-56).

[13] ibid 4.

[14] O Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33(6) *Modern Law Review* 601. See also L Buckley, 'Matrimonial Property and Irish Law: A Case for Community' [2002] 53 *Northern Ireland Legal Quarterly* 39, 40 who noted that '[t]he introduction of a separation of assets regime was therefore aimed at promoting justice for women, by protecting their property rights, independence and security.'

[15] ibid 602.

[16] DG Barnsley, 'His, Hers or Theirs?: Spouses' Rights in the Matrimonial Home' (Inaugural Lecture Series, Leicester University Press 1975) 6.

became firmly entrenched,[17] with the effect of further distancing England and Wales from community of property systems. However, importantly for this thesis, whilst the Married Women's Property Act 1882 recognised a regime of separate property, it did not abolish the existing trust framework.[18] This meant that a dispute as to entitlement between spouses could be initiated by the parties using either section 17 or standard civil proceedings.

## THE PRESUMED INTENTION RESULTING TRUST

Before evaluating the emergence of the presumed intention resulting trust a key device in matrimonial property disputes, it should be noted that another device used by married couples to determine beneficial ownership of the matrimonial home requires consideration. The express trust enabled parties at the time of conveyance to agree how the beneficial ownership of land was to be held. Where a legal title holder sought to benefit another, an express trust over the property concerned could be created. The Law of Property Act 1925 established the formalities that must be satisfied before an express trust of land could arise. Where a claimant asserted that the beneficial ownership did not correlate with legal title, an express trust could only arise if that intention of the parties was 'manifested and proved' in writing.[19]

The virtue of the express trust is that once the beneficial shares are specified in the conveyance, for example, whether the parties intend to hold the property as tenants in common or through a joint tenancy, it acts as a conclusive record and cannot be subsequently modified unless there is proof of fraud, mistake or execution of a new declaration of trust.[20] However, in the context of matrimonial ownership disputes prior to *Pettitt v Pettitt*, the limits of the express trust had already been identified. Firstly, early home ownership practices meant that husbands often took out conveyances of property in their sole name, thereby engaging no prospect of co-ownership.[21] Joint legal ownership was frequently the impetus for declaring the beneficial interests and cases of

[17] So entrenched that Lady Hale noted in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 (HL) [140] that '[t]he system of separate property…remains the only matrimonial property regime applicable in the law of England and Wales'.
[18] Noted in EL Johnson, *Family Law* (Sweet and Maxwell 1953) 89 and *Pettitt v Pettitt* (n 1) 820 (Lord Diplock).
[19] Law of Property Act 1925, s 53(1)(b).
[20] *Wilson v Wilson* [1969] 1 WLR 1470.
[21] See the characterisation of the problem in A Denning, *The Due Process of Law* (Butterworths 1980) 227 and Ullrich (n 10) 33.

sole legal title rarely involved a declaration of trust for another party.[22] Secondly, the practical utilisation of the express trust was limited as it required parties to consider how legal and beneficial title would be held. In an interpersonal relationship, this often did not occur, despite pleas from the courts and practitioners.[23] As Bevan and Taylor noted in 1966, '[t]here is a natural reluctance to discuss this delicate matter even as a remote possibility, but the nettle must be grasped'.[24] Despite these practical limitations, express trusts were still useful devices for demarcating beneficial entitlement in the matrimonial home. Once parties directed their minds to issues of ownership, the beneficial shares were fixed and the prospect of the use of discretion by the courts altering this allocation could not arise.[25] In the absence of an express declaration of trust, any claim to beneficial ownership of the matrimonial home prior to 1970 came through the resulting trust.

As '[e]quity attaches ultimate importance to the underlying intent of transactions and to the demands of conscionable dealing', the absence of writing was not always fatal to a claim for beneficial entitlement of the matrimonial home.[26] Section 53(2) of the Law of Property Act 1925 provides that the requirement of writing does not prejudice the operation of 'resulting, implied or constructive trusts'. Despite this ambiguous wording, a resulting trust is traditionally viewed as an implied trust that arises through operation of law[27] and through a direct financial contribution to the purchase price of property acquired in the name of another.[28] Where property is acquired in the name of someone other than the financial contributor, equity presumes that the contributor did not intend to make a gift.[29] Instead, the legal titleholder of the property becomes a trustee holding beneficial title to the property on resulting trust for the financial contributor proportionate to the amount contributed. This presumption of resulting trust is in certain

[22] See M Dixon, 'To Sell or Not to Sell: The Irony of the Trusts of Land and Appointment of Trustees Act 1996' (2011) *Cambridge Law Journal* 579, 579 contrasting the pre- and post-*Pettitt v Pettitt* approach to co-ownership.
[23] See R Fletcher, *Britain in the Sixties: The Family and Marriage* (Penguin Books 1962) 127 regarding the conceptualisation of marriage and the interaction between husband and wife.
[24] HK Bevan and FW Taylor, 'Spouses as Co-Owners' [1966] 30 *The Conveyancer* 355, 360.
[25] Contrast this position with *Hine v Hine* [1962] 1 WLR 1124 (CA) analysed in Chapter Three.
[26] K Gray and SF Gray, *Land Law* (7th Edition, OUP 2011) 326.
[27] See AJ Oakley, *Constructive Trusts* (3rd edn, Sweet and Maxwell 1997) 30 who argues that implied and resulting trust should be viewed as synonymous. For opposing views, see GP Costigan Jr, 'The Classification of Trusts as Express, Resulting and Constructive' (1914) 27(5) *Harvard Law Review* 437 and CEF Rickett, 'The Classification of Trusts' (1999) 18 *New Zealand Universities Law Review* 305.
[28] There is also an 'automatic' resulting trust which is outside the scope of this thesis. See, generally, R Chambers, *Resulting Trusts* (Clarendon Press 1997) and J Mee, '"Automatic" Resulting Trusts: Retention, Restitution, or Reposing Trust' in C Mitchell, *Constructive and Resulting Trusts* (Hart 2010) 207.
[29] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92.

specified circumstances replaced with the presumption of advancement.[30] Transfers of property in certain pre-defined relationships: from a husband to a wife or from fiancé to fiancée; do not invoke from the presumption of resulting trust. In these types of relationship, the presumption of advancement applies and equity proceeds on the basis that the financial contributor intended to make a gift to the recipient. However of key significance is that these presumptions are rebuttable by 'evidence of the actual intention of the purchaser'[31] and when searching for evidence to rebut the resulting trust or advancement, the court will consider 'all the circumstances of the case, so as to arrive at the purchaser's real intention'.[32] The derivative basis of the resulting trust is thus fundamentally different to that of the common intention constructive trust which involves giving effect to the shared intention of the parties rather than the intention of the purchaser. However, academics are divided as to the precise presumption generated following a qualifying contribution. For Chambers the contribution to the purchase generates a presumption of a lack of intention to benefit the recipient known as negative intent,[33] whereas Swadling would see that contribution as a positive intent that the contributor intended a declaration of trust in their favour.[34]

## THE PRESUMED INTENTION RESULTING TRUST AND MATRIMONIAL OWNERSHIP DISPUTES

The resulting trust was the most common device utilised by the courts when dealing with disputes over the matrimonial home.[35] Where property was purchased and conveyed to a husband as sole legal titleholder, without any financial contribution from his wife, he would be regarded as absolute owner. As there was no separation of legal and equitable title there would be no issue of co-ownership arising through a trust. When the wife contributed the entirety of the purchase money but the property was conveyed into the sole name of the husband, the presumption of resulting trust would apply to convert her husband into a trustee who would then hold the entire beneficial interest for the wife. For example, in *Mercier v Mercier*,[36] land intended for development was purchased from the joint bank account of husband and wife. The money in this account

[30] See *Bennet v Bennet* (1879) 10 ChD 474
[31] RE Megarry, *Snell's Principles of Equity* (23rd edn, Sweet and Maxwell 1947) 127.
[32] ibid 127-128.
[33] Chambers (n 28) 8.
[34] W Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72, 74.
[35] See EF George, 'Disputes over the Matrimonial Home' [1952] 16 *The Conveyancer* 27 and AG Guest, 'The Beneficial Ownership of the Matrimonial Home' [1956] 20 *The Conveyancer* 467 for overviews of the legal framework. See also W Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72 for a historical analysis of early resulting trust authorities.
[36] [1903] 2 Ch 98 (CA).

was generated from the wife's income but the husband had contributed some nominal sums into the account. The land was conveyed into the husband's name alone. As the husband died intestate, the heir-at-law claimed ownership of the property over the wife. The Court of Appeal found that, as there was no contrary intention suggesting that the wife made a gift of the land to the husband, the property belonged to her beneficially under a resulting trust.

If the property was purchased in the sole name of the wife, but the husband provided the entirety of the purchase price, the presumption of advancement would apply. Unless a contrary intention could be adduced, the property would be owned beneficially by the wife.[37] *Moate v Moate* illustrated this point in relation to parties who were engaged to marry.[38] The fiancé purchased property in the name of the fiancée and paid a deposit of £207 along with the subsequent mortgage repayments. The parties married shortly after the conveyance and the husband paid the mortgage repayments. The marriage broke down and the wife sought divorce on the grounds of cruelty. In determining ownership of the property, Jenkins J stated that the fact that the marriage had not been solemnised at the time of purchase of the property had no bearing on the application of the presumption of advancement. As the husband failed to rebut the presumption of advancement, the wife was beneficially entitled to the property. The court also stated that, even had the presumption of resulting trust applied, the facts surrounding the purchase enabled the court to presume a gift to the wife.

These two cases illustrated that the presumptions of resulting trust and advancement operated in a relatively formulaic manner and focussed on the moment of acquisition of the property. However, a small degree of flexibility can be discerned from the fact that they operated on the basis of rebuttable presumptions. This fact does not represent an expansive form of judicial discretion but it does show that the court was dealing with presumptions, as opposed to strict rules. The particular factual matrix of each case would be relevant for the court, particularly where one party is seeking to rebut the presumptions, but arguably this would generate no more than fact-finding discretion.[39]

Purchase in joint names but using money originating from one spouse alone generated a beneficial joint tenancy.[40] If the wife provided the entirety of the purchase money and

[37] *Re Eykyn's Trust* (1877) 6 ChD 115, 118.
[38] [1948] 2 All ER 486 (Ch).
[39] See A Barak, *Judicial Discretion* (Yale University Press 1989) 12-14 and Chapter One on fact-finding discretion.
[40] *Pettitt v Pettitt* (n 1) 815 (Lord Upjohn).

the property was conveyed in joint names, then in the absence of other evidence, a beneficial joint tenancy was intended. Conversely, the same would apply where the husband provided the purchase money and the property was conveyed into joint names. Thus transactions where the entirety of the purchase price came from one contributor followed relatively rigid rules. However, as the financial affairs and practices of husband and wife gradually became more intertwined from the post-World War II period onwards, the application of these legal principles became more complex.[41] Difficulties arose where there was joint financial contribution but sole legal title. This scenario historically generated different outcomes depending on whether a resulting trust or advancement applied.[42] Where both husband and wife contributed to the purchase price but the conveyance was in the husband's name alone, he would become a trustee holding for himself and his wife in a tenancy in common in shares proportionate to their financial contributions. This was very different from where the conveyance was in the wife's name, with financial contribution from both husband and wife, as the presumption of advancement would apply. This meant that, irrespective of the size of the financial contribution by the husband, it was presumed that the wife would be the absolute owner of the matrimonial home. In the absence of contrary intention, he would be presumed to have advanced his share to the wife. However, by 1969, this perspective was even doubted with Lord Upjohn believing that, in the absence of contrary evidence, 'where both spouses contribute to the acquisition of property…they intended to be joint beneficial owners and this is so whether the purchase be in joint names or in the name of one'.[43]

This overview reveals that the resulting trust framework was characterised by the prioritisation of the 'unexpressed but presumed intentions of the true purchaser'.[44] The consequence of this was that in some instances a focus on the intent of the individual purchaser was unlikely to sit well within the context of some marriages where joint acquisition and economic pooling were present. As a result, separate property and prioritising 'a system based on the external relations of independent individuals' may not have completely suited 'the internal relations of a family'.[45] Although conceptualising marriage as a partnership of equals probably occurred in the second half

[41] See *Pettitt v Pettitt* [1968] 1 All ER 1053 (CA) 1056 (Willmer LJ) commenting upon the economic pooling between husband and wife.
[42] *Wray v Steele* (1814) 2 V&B 388.
[43] *Pettitt v Pettitt* (n 1) 815.
[44] Megarry (n 31) 126.
[45] W Müller-Freienfels, 'Equality of Husband and Wife in Family Law' [1959] *International and Comparative Law Quarterly* 249, 258.

of the twentieth century,[46] in the immediate post-World War II period there was limited potential for the presumptions to recognise that some marriages could be regarded as joint ventures or partnerships.[47] This viewpoint suggested that the application of the presumption of resulting trust or, more specifically, the presumption of advancement, unchanged from when they were first developed in the 18th century, created the need for modification to bring it into line with modern practices between husband and wife.

As will be analysed below, a process used by the courts to modify what parties received through the application of a resulting trust or advancement was the exercise of judicial discretion. According to Mee, judicial developments that sought to introduce discretion in this area were instigated due to a 'feeling amongst the English judiciary' that applying resulting trust and advancement principles to domestic relationships would cause injustice.[48] Indeed, Goddard LJ recognised the limitations of these principles in 1945 and stated, '[a]s everybody knows, it is often difficult to decide questions of property between husband and wife according to their strict rights'.[49] Whilst this inclination towards enhancing the use of discretion may have numerous motivating factors,[50] explored further below, it is arguable that a key objective was to manoeuvre away from the primary focus on resulting trusts and advancement. This chapter will now assess one particular statutory provision, namely section 17 of the Married Women's Property Act 1882, which was interpreted in a way that jettisoned the 'strict equitable rules previously applied to matrimonial property' and substituted them with 'a wider discretionary power based on the fact of the husband and wife relationship'.[51]

[46] Note the view of the Royal Commission on Marriage and Divorce that marriage 'should be regarded as a partnership in which husband and wife work together as equals'. See Home Office, *Report of the Royal Commission on Marriage and Divorce* (Cmd. 9678, 1951-56) 644. See also A Milner, 'Beneficial Ownership of the Matrimonial Home Again' (1958) 21 *Modern Law Review* 419, 422 noting that it was not until well into the twentieth century that a wife was viewed as 'a partner in marriage'.

[47] See CJ Frantz and H Dagan, 'Properties of Marriage' (2004) 104(1) *Columbia Law Review* 75, BA Smith, 'The Partnership Theory of Marriage: A Borrowed Solution Fails' [1989-1990] 68(4) *Texas Law Review* 689 and H Dagan, *Property: Values and Institutions* (OUP 2011) Chapter Nine for analysis of the theoretical underpinnings of partnership between husband and wife.

[48] J Mee, *The Property Rights of Cohabitees* (Hart 1999) 16.

[49] *Hichens v Hichens* [1945] P 23 (CA) 25.

[50] For example, Miller noted that it was 'probably inspired by the limitations of the other powers of the court' in matrimonial disputes in G Miller, 'Maintenance and Property' (1971) 87 *Law Quarterly Review* 66, 67 fn 12.

[51] Guest (n 35) 467.

## JUDICIAL DISCRETION AND THE MARRIED WOMEN'S PROPERTY ACT 1882

The use of discretion in matrimonial property disputes gained visibility through the varying judicial interpretation of section 17 of the Married Women's Property Act 1882. The relevant content of the provision was as follows:

> In any question between husband and wife as to the title to or possession of property, either party…may apply…in a summary way to any judge of the High Court of Justice in England or in Ireland…and the judge…may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit.

The purpose of section 17 was to provide a method by which parties to a marriage, or third parties, could resolve disputes regarding title or possession of property in a summary manner, often by a judge sitting in private. The broad terminology of 'any question' enabled either party to initiate a dispute concerning not only ownership but also occupation of the property. It also enabled actions to be brought by one spouse against the other for recovery of land, thus sidestepping the rule that husband and wife could not proceed against each other in tort.[52] As will be shown below, the key significance of this departure for this thesis was the changing judicial interpretation regarding the extent of discretion conferred by this provision.

Drawing upon the framework set out in Chapter One, section 17 can be described as an express statutory conferral of discretion. Interestingly, the 'very wide language'[53] of the provision suggested a Dworkinian 'strong discretion' whereby a judge could decide a case as he thought fit and in 'the absence of any rule'.[54] The discretion did not appear to be 'bounded' nor were there guidelines as to how it was to be used. However, despite a literal interpretation of the text of the provision suggesting otherwise, section 17 was originally regarded by academics[55] and the judiciary as a procedural, administrative tool enabling 'certain simple questions' arising from a dispute between husband and wife to

[52] Section 12 of the Married Women's Property Act 1882 provided that a husband and wife could not sue each other in tort, as shown in *Gottliffe v Edelston* [1930] 2 KB 378 and *Bramwell v Bramwell* [1942] 1 KB 370, so section 17 was the only remedy. The ability for husband and wife to sue each other in tort came through the Law Reform (Husband and Wife) Act 1962.
[53] *Rawlings v Rawlings* [1964] P 398 (CA) 417 (Salmon LJ).
[54] RE Goodin, 'Welfare, Rights and Discretion' (1986) 6(2) *Oxford Journal of Legal Studies* 232, 234.
[55] M Lush, *The Law of Husband and Wife within the Jurisdiction of the Queen's Bench and Chancery Division* (Steven and Sons 1884) 428-429.

be dealt with in a summary manner.[56] Its key purpose was to achieve the realisation of separate property between husband and wife. It was used as a mechanism for getting a claim into court and enabled the judge to pinpoint property ownership giving full effect to pre-existing legal or equitable entitlements of the parties concerned. In the period that immediately followed the commencement of the Married Women's Property Act 1882, it was not envisaged that property rights could be varied or extinguished by a High Court judge in a discretionary manner.

Whilst Murphy and Clarke noted that the 'history of the section is regrettably obscure',[57] they surmised that, up until World War II, section 17 was likely to have been used for routine administrative applications rather than for expansive reallocation of assets. Much of this is conjecture due to the scarcity of reported cases and the absence of disputes over ownership of the matrimonial home.[58] There are various possible explanations for this initially restrictive interpretation of section 17.

Firstly, Cretney has argued that the procedural interpretation of section 17 was derived from its predecessor; namely section 9 of the Married Women's Property Act 1870.[59] This earlier Act provided for separate property for the wife of her earnings, gifts or inheritance received during marriage. The Act created a category of assets that were ring-fenced from the husband. Section 9 provided a summary mechanism for the judge to decide questions over whether the property in dispute fell within the ambit of the 1870 Act. Thus, it had the purpose of identifying separate property and was very much rooted in the technical application of the 1870 Act. With section 17 mirroring the wording of section 9, albeit conferring a judicial discretion over all property, judges who were already accustomed to applying section 9 may have carried over that interpretation to section 17.[60]

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[56] *Larner v Larner* [1905] 2 KB 539, 542 (Jelf J). The term 'simple' resonates with *Tasker v Tasker and Lowe* [1895] P 1 where the husband used section 17 as a means of recovering valuable jewellery given to the wife. See also *Butler v Butler* (1884-85) QBD 831, 837 where Wills J viewed section 17 as providing 'a summary remedy in case of certain classes of disputes as to property between husband and wife'.

[57] WT Murphy and H Clarke, *The Family Home* (Sweet and Maxwell 1983) 75 fn 29.

[58] ibid noting that during the interwar period there were hardly any reported cases using section 17.

[59] The relevant content of section 9 stated: 'In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply…to the Court of Chancery in England and Ireland…and thereupon the judge may make such order…as he shall think fit'.

[60] This connection is made by Lord Morris in *Pettitt v Pettitt* (n 1) 798 (Lord Morris) and 807 (Lord Hodson). Echoed in Ullrich (n 10) 27 who stated '"separate property" in 1882 was not necessarily understood in the sense in which we would use it today'. This restrictive approach resonates with Andre van der Walt's thesis concerning doctrinal conservatism whereby courts

Secondly, the restrictive, procedural interpretation of section 17 may be inextricably linked to societal attitudes of the married women's property reforms. The campaigners for separate property claimed victory after the passage of the Married Women's Property Act 1882 and, in the subsequent years, the judiciary clarified and developed the integral concept of 'separate property' introduced by that Act. It is arguable that, once the concept of separate property was fully conceptualised, the judicial focus shifted onto whether the separate property ethos of the Married Women's Property Act 1882 correlated to the developing line of public opinion which started to view marriage as a partnership and as an economic joint venture with, quite often, considerable pooling of assets. This recognition only became noticeable at a later stage in the mid-twentieth century following changes in societal views on marriage.

The scarce early case law on section 17 of the Married Women's Property Act 1882 showed that married couples used the provision as a vehicle to bring a dispute into the court. The courts recognised that it conferred a discretion as to the types of orders at the court's disposal but that this was not an extensive substantive discretion. However, from the late 1940s, several cases demonstrated a change in judicial opinion as to the scope of section 17.

## *RE ROGERS' QUESTION*

The decision in *Re Rogers' Question* is instructive for analysis of the relationship between resulting trusts and the use of judicial discretion.[61] In this case, the matrimonial home was conveyed into the husband's name. The purchase was financed using a 10% financial contribution provided by the wife at the time of purchase. A mortgage securing the surplus was obtained from a building society in the husband's sole name. The husband paid all the instalments and interest due under the mortgage. The marriage broke down and both the husband and wife applied to court using section 17 for an order to recognise that each owned the property exclusively. The wife argued that it was their intention that she would have the entire beneficial interest. The husband stated that her 10% contribution was merely a loan which he was obliged to repay and also that it was never envisaged by the parties that the wife would contribute financially to the

adopt restrictive interpretations, despite reforming legislation, owing to the need for security and stability in transactions concerning real property. See AJ van der Walt, *Property in the Margins* (Hart 2009).

[61] [1948] 1 All ER 328 (CA).

repayment of the mortgage. Roxburgh J held that the intention of the parties at the time of transaction was that both intended to contribute to the property in the proportion of nine-tenths from the husband and one-tenth from the wife.

Whilst both parties made financial contributions capable of triggering a resulting trust, the key issue for the Court of Appeal was the interpretation of the parties' intentions in relation to the mortgage. To resolve this issue Evershed LJ stated that the task for the court was to determine what the parties intended at the time the matrimonial home was acquired and this involved an exploration of their conduct in relation to the property and towards each other. He articulated the judicial approach as follows:

> 'What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed circumstances, now fairly gives effect in law to what the parties, in the judge's finding must be taken to have intended at the time of the transaction itself'.[62]

Based on this course of action, the 'proper'[63] or 'reasonable'[64] inference from their conduct was that the wife contributed as much as she could with the 10% financial contribution and did not intend to contribute further to the mortgage repayments. Conversely, the court made the reasonable inference that the 10% financial contribution advanced by the wife was not intended as a loan to the husband as he had previously contended. As the court found that it was reasonable to infer that their respective initial contributions to the purchase of the property reflected the division of the beneficial interest, the husband was ordered to hold the property on trust for sale and divide the proceeds of sale in the ratio of 90% to the husband and 10% to the wife.

Examining the use of discretion in *Re Rogers' Question* to consider whether the case represented a departure from the traditional use of resulting trusts, various observations can be made. *Re Rogers' Question* provides little evidence of an expansive discretionary methodology being used by the court. Section 17 was used procedurally by the parties to bring the dispute to court and, unlike the analysis of section 17 adopted in later decisions, the Court of Appeal in *Re Rogers' Question* did not engage in any discussion of whether that section conferred a substantive discretion. Similarly, when viewing the

[62] ibid 328-329.
[63] ibid 329 (Evershed LJ).
[64] ibid 330 (Evershed LJ).

Court of Appeal's methodology in this dispute there is evidence of a procedural interpretation of section 17. The ultimate division of the proceeds of sale in *Re Rogers' Question* aligned precisely with what would have been obtained using a resulting trust. This fact suggests that section 17 was not being interpreted by the court to permit discretionary judicial adjustment of how the proceeds of sale would be divided between the parties. It merely provided a forum for the court to ascertain pre-existing proprietary entitlements.

Another issue raised by *Re Rogers' Question* is whether the court adopted a new approach through the search for 'what at the time was in the parties' minds' regarding beneficial ownership of the home.[65] This reference to the minds of both parties raised a question as to whether the court was searching for a shared intention of the husband and wife as to beneficial ownership, which would have represented a significant departure from a resulting trust analysis which focuses on the intention of the contributor.[66] It is arguable that the court's approach was not, in fact, searching for a bilateral agreement between the individuals to share beneficial ownership but was instead looking at the intention of each party as financial contributor to the acquisition of the property. For example, evidence of this latter approach can be found in the judgment of Asquith LJ when he focused solely on the wife as a contributor and concluded that she 'never intended in any circumstances to be saddled with any liability in respect of nine-tenths of the purchase price'.[67] Indeed, all members of the Court of Appeal were focused on the contributions of both parties to the acquisition of the property separately and not searching for shared agreements as to ownership. This approach resonated with an orthodox interpretation of a resulting trust as outlined above[68] and was consistent with contemporaneous academic views of the case.[69] Thus from *Re Rogers' Question* it appears that the court merely applied resulting trust analysis to the facts and, as Milner noted 'rather formal judicial thinking',[70] with the only new development that the parties were able to bring this dispute using section 17 rather than through standard civil proceedings.

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[65] ibid 328 (Evershed LJ).
[66] See Megarry (n 31).
[67] *Re Rogers' Question* (n 61) 330 (Evershed LJ). The same methodology was used by Lord Greene MR at 330.
[68] See H Lesser, 'The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot' (1973) 23 *University of Toronto Law Journal* 148.
[69] A Milner, 'Policy Orientation in Matrimonial Property Law' (1959) 22 *Modern Law Review* 207, 209. cf Bevan and Taylor (n 24) 439 suggesting that the court was not finding rights via a resulting trust but 'attributed to them [the parties] an intention to share proportionately'.
[70] A Milner, 'Beneficial Ownership of the Matrimonial Home: Modern Trends in the British Commonwealth' (1959) 37 *Canadian Bar Review* 473, 480.

While this analysis reveals that the court did not develop a new substantive discretion in *Re Rogers' Question*, it is interesting to note that the case has been viewed by the House of Lords as representing a development to 'this branch of the law of property'[71] and a starting point for a new approach to matrimonial property disputes.[72] It is arguable that various *obiter* comments by the Court of Appeal may provide some support for this view and, whilst the decision in itself does not reveal much about the use of discretion in ownership disputes, it may have laid the foundations for a more discretionary approach to determining these disputes in subsequent cases.

One basis on which it may be suggested that *Re Rogers' Question* demonstrated a shift in judicial approach is that whilst the outcome of the case mirrored what would have been achieved under a resulting trust, trust terminology was not mentioned.[73] From this viewpoint the significance of the decision was a movement away from the language of resulting trusts and advancement; the use of 'reasonable inferences' as to contributions could be viewed as a departure from the traditional approach to ownership disputes and a shift from fact-finding discretion inherent within judicial reasoning. Whilst not explicitly evidencing a new substantive discretionary approach, proceeding on the basis of inferences allows for a greater degree of fact-sensitivity, which as Chapter One demonstrated, can also operate as a vehicle for the exercise of discretion. However, it is probably a step too far to argue that this process indicated the Court of Appeal viewing resulting trust principles as unsuitable in a domestic setting and that they needed replacing through an expansive use of judicial discretion. A more convincing interpretation would be that the court in *Re Rogers' Question* adopted a resulting trust result but at the same time highlighted the evidential difficulties faced by a court determining ownership of the matrimonial home. For example, the court recognised that married couples often did not interact with each other in a way similar to commercial parties and this caused problems when trying to interpret the contributor's intention when making a financial contribution. As Evershed LJ stated:

> 'When two people are about to be married and are negotiating for a matrimonial home, it does not naturally enter the head of either to enquire carefully, still less to agree, what should happen to the house if the marriage comes to grief'.[74]

[71] Lord Diplock regards this case as the starting point for the development of matrimonial property in *Pettitt v Pettitt* (n 1) 819.
[72] See also *Stack v Dowden* (n 4) [42] (Baroness Hale).
[73] RE Poole, 'Resulting Trusts and the Legal Estate' [1967] 31 *The Conveyancer* 259, 259 noting the absence of discussion in the Court of Appeal of Roxburgh J's finding of a trust for sale.
[74] *Re Rogers' Question* (n 61) 328.

The Court of Appeal did not go so far as accepting that the status of husband and wife required a different set of principles or, for example, that automatic sharing of beneficial ownership should occur by virtue of it being the matrimonial home. Nevertheless, the decision illustrated the court's recognition of the practical difficulties involved in these disputes. These included the fact that the parties rarely thought about the legal consequences of the property transaction, either at the point in which it was executed or at the time of the dispute once the marriage had broken down. This failure of parties to direct their minds to the legal technicalities of the transaction generated, firstly, a lack of detailed evidence from which intention as to contribution could be discovered and, secondly, a tendency by parties to reinterpret the past in their own favour[75] or to advance 'extreme claims'.[76] In particular, the Court of Appeal was cognisant of contested evidence by parties and that the parties in this dispute were 'extremely hostile to each other'.[77]

*Re Rogers' Question* was extensively cited in subsequent cases including decisions in the modern implied trust framework.[78] However, when analysing the development of the use of discretion in ownership disputes *Re Rogers' Question* provides little guidance. Other than the presence of implicit judicial discretion in the finding of facts, this case does not involve the court using section 17 as the source of substantive discretion to reallocate beneficial ownership. Arguably the key contribution of the case is the degree of openness and candour from the judiciary in relation to the evidential difficulties involved in matrimonial ownership disputes. It was arguably this feature that laid the foundation for greater sensitivity to the interpersonal dimension in these disputes and an appreciation of the relationship dynamics involved in the acquisition of property by married couples.[79] As Chapter One noted, areas typified by complex or contested facts often necessitate an engagement with the use of discretion, and in this sense *Re Rogers' Question* set the scene for the subsequent decision in *Rimmer v Rimmer*.

[75] This echoes similar statements made by Baroness Hale in *Stack v Dowden* (n 4) [68].
[76] *Re Rogers' Question* (n 61) 329.
[77] ibid 328 (Evershed LJ).
[78] *Stack v Dowden* (n 4) [42] (Baroness Hale).
[79] This fact-sensitive inquiry has parallels with 'functionality' in family law which utilises internal analysis of relationship dynamics to determine whether a unit 'functions' as a family. See Notes, 'Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family' (1990-1991) 104 *Harvard Law Review* 1640.

## *RIMMER v RIMMER*

When conceptualising the use of judicial discretion under section 17, a key development was the Court of Appeal decision of *Rimmer v Rimmer.*[80] In *Rimmer,* the matrimonial home was purchased with a £29 contribution to the purchase price by the wife. The remaining balance of £460 was secured by a mortgage payable by the husband. The property was conveyed into sole name of the husband. After the husband joined the Merchant Service, the mortgage instalments were met through an allowance provided by the husband along with the wife's own earnings. Following the increase in property prices in the post-World War II period, the house had quadrupled in value. The husband deserted his wife and sold the matrimonial home enjoying a windfall in the proceeds of sale. Section 17 was used by the wife to claim a share of the windfall. The County Court judge used an arithmetical approach to divide the proceeds of sale proportionately to the financial contributions made to the purchase price.

Sir Raymond Evershed MR gave the lead judgment in the Court of Appeal and recognised that the wife's appeal would represent 'another illustration of the difficulties with which a court is confronted in trying to do justice' under section 17.[81] In light of cases concerning occupation of the matrimonial home where expansive interpretations of section 17 had been provided,[82] Evershed MR acknowledged the confusion over the scope and correct interpretation of that provision. Furthermore, he hoped that the judgment of the Court of Appeal would provide guidance.[83] Firstly, Evershed MR endorsed the interpretation provided by Bucknill LJ in *Newgrosh v Newgrosh*[84] stating that section 17:

> '…gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one

[80] [1952] 2 All ER 863 (CA).
[81] ibid 864.
[82] See *Hutchinson v Hutchinson* [1947] 2 All ER 792 and *Stewart v Stewart* [1948] 1 KB 507.
[83] cf *Jones v Maynard* [1951] 1 All ER 802, 803 where Vaisey J noted that when searching for the correct approach to ascertaining ownership of a joint bank account the dicta of Evershed LJ in *Re Rogers' Question* 'gives guidance, which, though not very helpful, is the best, so far as I know, available to me'. Bucknill LJ in *Hoddinott v Hoddinott* [1949] 2 KB 406 (CA) affirmed the dicta of Evershed LJ in *Re Rogers' Question* as the starting point for these cases.
[84] Note that *Newgrosh* is an unreported decision and where partial reporting is available the words 'palm tree justice' are omitted. See *Newgrosh v Newgrosh* (1950) 1 CLC 4557 where the words 'unfettered discretion' are used and *Newgrosh v Newgrosh* (1950) 100 LJ 525 where the words 'wide power' are used.

> time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as "palm tree justice." I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case'.[85]

Evershed MR proceeded to assess what would be 'fair and just' in light of the conduct of husband and wife when purchasing the property and held that equal division of the proceeds of sale was deemed an appropriate award under section 17.[86] Whilst title was vested in the husband, the wife had made a financial contribution triggering a substantial beneficial interest via resulting trust. However this case also involved the pooling of funds between husband and wife which were used to meet the necessary outgoings. As a result, it did not matter for the court whether the wife paid the mortgage or the household expenses. The money was 'saved by their joint effort'[87] and 'applied for their common benefit'.[88] Cumulatively, the 'proper presumption' was that the beneficial ownership was to be shared jointly.[89] The Court of Appeal therefore formulated an approach whereby if the intention of the contributor was identifiable, then that would prove determinative. However, in default, the Court of Appeal thought 'equality…almost necessarily follows'.[90] Thus, in reliance on the earlier High Court decision of *Jones v Maynard,* and with reference to the equitable maxim that 'equity delighteth in equality', the Court of Appeal held that equal division of the proceeds of sale was appropriate.

The use of discretion in *Rimmer* is significant for a variety of reasons. In terms of how the use of discretion was conceptualised by the court, Evershed MR expressed it in an expansive manner by calling it 'palm tree justice'[91] and, writing extra-judicially, Denning LJ acknowledged this was a novel approach and a break from *Re Rogers' Question.*[92] The academic community responded with criticisms of such a broad discretion.[93] A key criticism was the use of authorities cited by Evershed MR to justify his shift towards 'palm tree justice'. Evershed MR applied what he viewed as 'palm tree

[85] *Rimmer v Rimmer* (n 80) 865.
[86] ibid 866.
[87] ibid 868-869 (Denning LJ).
[88] ibid 869 (Denning LJ).
[89] ibid 869 (Denning LJ).
[90] ibid 867 (Evershed MR).
[91] ibid 865 (Evershed MR).
[92] See Denning (n 21) 228 where Denning stated '[b]ut in this case of Rimmer v Rimmer we struck out on a new line. We were quite conscious of it'.
[93] See, for example, O Stone, 'Matrimonial Property-The Scope of Section 17' (1957) 20 *Modern Law Review* 281.

justice' to determine the parties' interests in the proceeds of sale by analogising the facts of *Rimmer* with cases that involved personal property, where it is arguable that there may be a greater willingness for the court to use discretion to award a 'fair' division or equal division of the assets. Thus the principles arising from *Newgrosh*, namely that the judge had 'a wide power to do what he thought in the circumstances was fair and just' were applied to furniture in that case and resulted in deeming the furniture the joint property of husband and wife.[94] Nevertheless, Evershed MR in *Rimmer* 'venture[d] to take as [his] guide or test' these particular principles emanating from *Newgrosh*. Similarly, Evershed MR found further support for this approach using *Jones v Maynard* concerning money in a bank account and *Re Dickens* concerning ownership of monies following sale of a copyright to a manuscript.[95]

It is arguable that *Rimmer* was not appropriately identified as a 'palm tree' approach to discretion, as originally thought. As Chapter One illustrated the use of discretion is often either structured or becomes structured through judicial refinement, and there is some limited evidence of this occurring in *Rimmer*. For example, a restriction on the use of judicial discretion to give effect to equal division was the fact that there must be an initial substantial beneficial interest acquired through a resulting trust. This would mean that a court would use resulting trust analysis as a starting point and then could use the discretion conferred by section 17 to manipulate the ultimate outcome. This approach was clearly evident in the formulation given by Evershed MR:

> 'Where the court is satisfied that both the parties have a beneficial interest, and a substantial beneficial interest, and where it is not possible *or right* to assume some more precise calculation of their shares, equality, I think, almost necessarily follows'.[96]

This clearly precluded a court awarding a beneficial interest in the matrimonial home when fairness or justice demands if that party had not previously acquired an interest via a trust. However, once that requirement was satisfied, the problems with this approach were the level of judicial scrutiny involved in each case, particularly as Evershed MR used the ambiguous phrase 'a fit order' to justify the outcome in *Rimmer*.[97]

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[94] *Newgrosh v Newgrosh* [1950] 100 LJ 525, 525.
[95] *Re Dickens* [1935] Ch 267. Denning LJ cites *Hoddinott v Hoddinott* (n 83) concerning furniture.
[96] *Rimmer v Rimmer* (n 80) 867 (Evershed MR) (emphasis added).
[97] ibid 865 (Evershed MR).

The use of 'or right' in the judgment was also problematic because it would naturally permit some degree of judicial subjectivity which, as noted in Chapter One, is often a criticism of an expansive use of discretion. Stone recognised this point and queried the 'mental calculations [that] might be covered by this reservation'.[98] Similarly Megarry drew a comparison between these principles and Cadi discretion, namely the dispensing of justice on the facts of a particular case in an ad hoc unstructured manner noting 'quot palmae, tot sententiae'.[99] In short, there were fears that this approach could result in subjective and highly unpredictable results.

Other factors may add to this subjectivity and unpredictability. For example Evershed MR did not focus exclusively on the moment of acquisition when discerning the intention of the contributor, but instead on the whole course of conduct of the parties in the matrimonial home. Their 'general behaviour' was deemed relevant where it was ascertainable.[100] This was echoed by Romer LJ, who noted that, when the court was considering section 17, it must take into account the 'whole of the circumstances' of the case.[101] According to Evershed MR, over-emphasis on the 'accident of the precise figures which they happened to contribute' and ignorance of party conduct would not generate a fair division of the windfall proceeds.[102]

This clearly revealed an inclination towards a more fact-sensitive form of judicial analysis, particularly as Evershed MR noted that 'in all cases of this kind the result must always depend on the particular facts in the particular case'.[103] *Rimmer* demonstrated the importance of factual sensitivity but, as it was a case decided on its own unique facts, this caused problems with it as a precedent as judges could easily distinguish cases on this basis. For example, it could be argued that *Rimmer* could be distinguished on the grounds that court was concerned with distributing a windfall based on the boom in property prices post-World War II.[104] Evershed MR even recognised that this scenario had arisen 'by the accident of things'[105] and 'in future years' a court may 'place greater emphasis than I have thought it right to do on the actual contributions which, in

[98] Stone (n 93) 282
282.
[99] RE Megarry, 'Rimmer v Rimmer' [1953] 69 *Law Quarterly Review* 11, 13 roughly translated as 'there will be as many opinions as there are palm trees'.
[100] Stone (n 93) 218.
[101] *Rimmer v Rimmer* (n 80) 869 (Denning LJ).
[102] ibid 867 (Evershed MR).
[103] ibid 864 (Evershed MR).
[104] See Bevan and Taylor (n 24) 442 and A Mellows, 'The Mother and the Windfall' [1966] 110 *Solicitors Journal* 683 who analysed a later decision of *Loades Carter v Loades Carter* [1966] 197 EG 361 which also concerned a 'windfall'.
[105] *Rimmer v Rimmer* (n 80) 867.

otherwise similar circumstances, a husband and wife might have made towards the acquisition of property'.[106] However, whilst the use of the term 'palm tree justice' was unfortunate,[107] there was evidence of some limited structuring to the use of discretion and the willingness of the court to use equal division.

Resonating with Schneider's concept of rule-building discretion,[108] Denning LJ reasoned that, as 'Parliament laid down no principles for the guidance of the court' when using section 17, the court was 'left to work out the principles themselves'.[109] He even noted that this structuring process was 'being done' by the courts using their discretion, firstly by giving effect to clear and ascertainable intentions as to ownership and, in default, to give effect to equal division.[110] Megarry also subsequently refuted his comparison to Cadi discretion on the basis that in a truly Cadi discretion, the Court of Appeal would have been unable to disturb the decisions of the first instance court.[111] This naturally did not happen owing to the fact of equal division being awarded in the Court of Appeal. Thus, whilst a clearly broad formulation was advanced, the view that this discretion was truly unfettered is erroneous.

The motivations behind the use of judicial discretion also require analysis. Firstly, building upon *Re Rogers' Question*, the decision in *Rimmer* further emphasised the 'great difficulties of cases of this kind' with respect to contested evidence.[112] Evershed MR recalled his observation from *Re Rogers' Question,* where he stated that in an intimate relationship trying to conclude what the parties intended at the time of transaction was deciding a question 'on a hypothesis that does not exist'.[113] Furthermore, disputed evidence was a prevalent feature in these cases. These observations reveal a strong sense that discretion was viewed as a necessary tool for unravelling these types of disputes, consistent with the general hypothesis that discretion is often invoked or assumed in areas with complex facts.[114] Discretion enabled the court to look at the factual scenario in a holistic manner and avoided the court being unduly fettered by

[106] ibid 867.
[107] Megarry (n 99) 13.
[108] CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47, 64.
[109] *Rimmer v Rimmer* (n 80) 868.
[110] ibid 868.
[111] Megarry (n 99) 13.
[112] *Rimmer v Rimmer* (n 80) 866 (Evershed MR).
[113] cf Hodson LJ in *Fribance v Fribance* [1957] 1 All ER 357 (CA) 360 (Hodson LJ), explored below, where it was conceded that 'the court is really driven, I think…to arrive at the best conclusion that it can on the evidence'.
[114] See Chapter One.

proportionate division of the proceeds of sale stemming from an application of resulting trust principles.

Whereas, historically, the courts were wedded to the presumption of resulting trust and division of ownership based on financial contributions as shown in *Re Rogers' Question*,[115] the significance of *Rimmer v Rimmer* was that the court was willing to use discretion as a process to give effect to equal division of the proceeds of sale. The use of equal division

put pressure on maintaining the resulting trust, as the strict application of a resulting trust in this case would not be 'fair and just in the special circumstances of the case', particularly as the value of the property at the time of sale had quadrupled owing to the effect of World War II on property prices.[116] Whilst counsel for the husband thought that recourse to equal division was not a true exercise of judicial discretion as it may merely 'shirk more difficult computations', the availability of equal division as a pragmatic option to the judge was clearly appealing.[117] Counsel for the husband also argued that such a division could be regarded as a 'Solomonesque judgment' referring to the biblical idiom where King Solomon threatened to split a child in two after two women claimed to be the mother.[118] Evershed MR rejected this viewpoint stating that equal division lay within the court's field of discretion under section 17.

Similarly, the predisposition towards equal division may have correlated with trends regarding the perception of marriage at the time.[119] The Court of Appeal was keen to stress that, whilst the county court judge applied 'perfectly right and accurate' legal principles, these required modification when the dispute was between husband and wife.[120] There was a frank judicial concession that where the facts were lacking in detail, 'the old established doctrine that equity leans towards equality was peculiarly applicable to disputes between husband and wife'.[121] Instead of recognising equal division as a new

[115] As Stone noted, 'the presumption in favour of the owner of the purchase price had gained such an ascendency as virtually to oust from consideration the presumption of advancement of a wife by her husband' in Stone (n 93) 282.
[116] *Rimmer v Rimmer* (n 80) 865 (Evershed MR).
[117] ibid 867 (Evershed MR).
[118] ibid 867 (Evershed MR).
[119] For Friedmann, the Court of Appeal decision was significant because 'it meant that a high law court in post-war Britain was prepared to acknowledge elementary considerations of equity, social conditions, and a great measure of equality in the relations between husband and wife, if necessary in disregard of established systematic distinctions' in W Friedmann, 'Some Jurisprudential Reflections on Four Recent Decisions of the House of Lords' in RH Code Holland and G Schwarzenberger, *Law, Justice and Equity* (Pitman 1967) 9, 18.
[120] *Rimmer v Rimmer* (n 80) 869 (Romer LJ).
[121] ibid 870.

analytical principle for determining beneficial ownership of the matrimonial home, Romer LJ justified the outcome based on an 'old' equitable maxim, which could be viewed as a strategic technique to gain acceptance of discretionary equal division without advancing a new analytical principle that could subsequently be criticised as judicial legislation.[122]

When analysing the use of discretion in matrimonial ownership disputes, *Rimmer* is an important authority and was regarded as such by both academics[123] and also by Romer LJ sitting in the Court of Appeal in that case who noted that the case would be of 'very considerable importance to the people of this country'.[124] The Court of Appeal in *Rimmer* adopted an expansive interpretation of the discretion conferred by section 17 and this was motivated by the evidential deficiencies in matrimonial ownership disputes coupled with a recognition that legal principles applicable to disputes between strangers were impractical in disputes between married couples. Whilst there was discussion of 'palm tree justice' by Evershed MR, the case did not proceed on that basis and there was limited evidence of structuring the use of discretion. This perhaps lends support to the view of Hawkins and Barak explored in Chapter One that, even where discretion is framed expansively, there often is some degree of restriction imposed.[125] Emphasising the restrictions on the use of discretion, subsequent cases arguably sought to structure the use of judicial discretion in matrimonial ownership disputes.

### *COBB v COBB*

The Court of Appeal decision in *Cobb v Cobb* provided a restrained interpretation of the use of discretion in *Rimmer*.[126] The case concerned a jointly owned matrimonial home financed through equal financial contributions by the husband and wife. The husband agreed to be responsible for the mortgage whilst the wife paid for the household expenses out of her own earnings. The marriage broke down and the husband applied under section 17 for an order that the house belonged to him entirely. The basis for this

[122] See, for example, *Stack v Dowden* (n 4) [33] (Lord Walker), [54] (Baroness Hale) using 'equity follows the law' to justify the creation of a beneficial joint tenancy. Note DR Klinck, '"This Other Eden": Lord Denning's Pastoral Vision' (1994) 14 *Oxford Journal of Legal Studies* 25, 35 regarding Denning's 'common sense' approach to complex legal questions.
[122] *Rimmer v Rimmer* (n 80) 869 (Romer LJ).
[123] See W Friedmann, *Matrimonial Property* (Stevens and Sons Ltd 1955).
[124] *Rimmer v Rimmer* (n 80) 869 (Romer LJ).
[125] See Barak (n 39) 19 and K Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins, *The Uses of Discretion* (OUP 1991) 11.
[126] [1955] 2 All ER 696 (CA).

argument was that his subsequent financial contributions to the property exceeded those of the wife.

The Court of Appeal held that the wife was entitled to an equal share in the property. All members of the court were agreed that the primary role of the court was to ascertain party intention as to beneficial ownership. Where this was not expressed definitively in an express declaration of trust, Romer LJ outlined this exercise as requiring the court to analyse 'the course of conduct of husband and wife (including their respective contributions towards the purchase price) at the time when the house was purchased and subsequently'.[127] For Romer LJ, the fact that there was often 'no direct evidence of intention' did not allow the court to abdicate their search for intention.[128] Based on this approach and through the Court of Appeal's acceptance of the County Court judge's findings, equal division was deemed appropriate.

With a view to understanding the use of discretion by the court in this dispute and to query whether discretion was being structured by the courts as suggested by Denning LJ in *Rimmer*, various observations can be made. Firstly, equal division was reached using two routes. The first approach involved an orthodox application of resulting trust principles that resonated with the methodology used by Evershed LJ in *Re Rogers' Question*. Equal sharing was appropriate as the wife was legal co-owner of the matrimonial home and had made equal financial contributions. Thus for Romer LJ, the parties intended the property to be owned jointly, placed the property in joint names and made equal financial contributions to its acquisition. As a result, equal sharing of the property was 'perfectly reconcilable with orthodox resulting trust theory'.[129] Section 17 was also interpreted as a procedural tool that enabled the parties to make an application to court and did not generate a substantive discretion to reallocate assets. Giving effect to clearly ascertainable property rights was key. Indeed, the Court of Appeal stated that the judicial discretion incumbent within section 17 could not be used to 'downgrade' the wife's legal rights and Romer LJ rejected the argument of the husband that section 17 could extinguish the wife's legal title based on his subsequent mortgage repayments.[130] Crucially for the subsequent conceptualisation of section 17, Romer LJ provided an interpretation of that provision which was frequently cited in subsequent cases and, as Rosen noted, was 'purely procedural':[131]

[127] ibid 699.
[128] ibid.
[129] Mee (48) 152.
[130] cf *Stewart v Stewart* (n 82).
[131] L Rosen, 'Palm Tree Justice' [1966] 110 *The Solicitors' Journal* 239, 239.

> 'I know of no power that the court has under s.17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under s.17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair'.[132]

Without an expansive discretion, all members of the Court of Appeal in *Cobb* stated that giving effect to intentions as to ownership was necessary and the court could not use section 17 to override that intention. Where such intention was not discernible, according to Denning LJ and Birkett LJ, the beneficial ownership would be equally divided. In relation to the preliminary enquiry of determining intention, Romer LJ provided more guidance and stated that:

> '…the court has to attribute an intention from the course of conduct of husband and wife (including their respective contributions towards the purchase price) at the time when the home was purchased and subsequently'.[133]

However, there appeared to be an expansive list of the types of conduct that could be used to assist in attributing party intention. In *Re Rogers' Question*, the party intention emanated from the conduct of the parties at the point of acquisition of the property, whereas Romer LJ intimated in *Cobb* that post-acquisition conduct could be relevant when ascertaining intention. This appeared more consistent with the approach undertaken in *Rimmer*. Broadening the time frame for this investigation helped the court find conduct upon which to subsequently base their determination. It also enables a greater potential for the exercise of discretion when fact-finding seeing as more factors are deemed relevant.

A second route for achieving equal division of the property can also be detected which was the approach adopted by Denning LJ and Birkett LJ. Building upon *Rimmer*,

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[132] *Cobb v Cobb* (n 126) 700. This echoed *Samson v Samson* [1960] 1 All ER 653 (CA) 655, a section 17 dispute regarding ownership of wedding presents, where Hodson LJ reiterated that 'respect must be paid to principles of law'.

[133] ibid 699. See *Fribance* (n 137) 359 where Denning LJ echoed the dicta of Romer LJ in *Cobb* and stated '[i]n many cases, however, the intention of the parties is not clear, for the simple reason that they never formed an intention: so the court has to attribute an intention to them'.

another justification for equal sharing was that the property in this case was viewed as a 'family asset'. As a result of this characterisation, Denning LJ and Birkett LJ believed that the court could resort to ordering equal division of the asset. In *Cobb* Denning LJ provided the first definition of 'family assets':

> '…in the case of the family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares'.[134]

Whilst this was the first formulation of 'family assets', the principles underpinning it were not entirely new seeing as they appeared similar to the application of 'equality is equity' used in *Rimmer v Rimmer*. As Denning LJ stated '[t]he first question in this case is, to whom does the house belong'.[135] Thus a predisposition towards equal division of the asset would be prevented if the property concerned owned absolutely to one of the parties or it was clear that the parties intended to hold the beneficial ownership in particular shares, for example, through an express declaration of trust. Without an express declaration of trust, a substantial interest acquired through a resulting trust was required. These principles mapped onto those laid down in *Rimmer* which may be unsurprising as whilst Denning LJ did not explicitly refer to 'family assets' in *Rimmer*, he later claimed extra-judicially that he had introduced the concept of family assets in that case.[136] It is arguable that seeing as these principles had some heritage, this approach can be viewed as an attempt to structure the use of discretion by the Court of Appeal.

When analysing the use of judicial discretion in matrimonial property disputes, *Rimmer* and *Cobb* illustrate some structuring of the use of discretion conferred by section 17. However, there was some debate as to expansive and restrictive interpretations of this

[134] ibid 698.
[135] ibid 698.
[136] Denning stated in Denning (n 21) 232 that he first used the term family assets in *Rimmer* but it was actually not used until the later case of *Cobb*. See MDA Freeman, 'Family Matters' in GG Jowell and JPW McAuslan, *Lord Denning: The Judge and the Law* (Sweet and Maxwell 1984) 109, 139.

provision which, as Chapter One revealed, is a feature consistent with common law development dependent on a continual process of judicial interpretation. Whereas the views of Romer LJ in *Cobb* demonstrated that section 17 was merely a mechanism through which a husband or wife could bring a claim to court over ownership of the matrimonial home, the approach of Denning LJ and Birkett LJ in *Cobb* built upon *Rimmer* suggesting that section 17 was not merely procedural. Indeed, these decisions showed that section 17 had the potential to operate twice; namely, procedurally, by initially allowing the parties to bring a claim; and substantively, at the time of judgment where no evidence of discernible intention was available and equal division applied. Whilst intention of the contributor to the purchase price was being analysed in these later cases, the standard reference to resulting trusts was absent in *Cobb* as it was in *Re Rogers' Question* and *Rimmer*. However, unlike these earlier authorities, in *Cobb*, the Court of Appeal did not fully articulate the motivations behind this use of discretion or an appreciation of the domestic nature of these disputes. This approach was more visible in *Fribance v Fribance*, the final key case in this period.

## *FRIBANCE v FRIBANCE*

In *Fribance* Denning LJ further developed the concept of 'family assets'.[137] In this case a lease was purchased in the husband's name alone. Both husband and wife contributed to the deposit with the husband providing £130 to the £150 deposit and the wife contributing £20. A mortgage of £800 was obtained to secure the remainder. The parties lived in the ground floor of the flat with their children. They let out the top two floors of the property and the rent from the tenants was used to cover outgoings. After the marriage broke down, the wife's solicitors claimed for the return of the £20 used for the deposit. The parties were unable to reach an amicable solution concerning the ownership of the property. The wife applied to the court using section 17 for an order determining title to the property.

The Court of Appeal held that the lease was acquired for the future use by husband and wife and, as no precise calculation of shares was available, the house belonged beneficially to the parties in equal shares. This was based on the previous interpretation in *Rimmer* of the discretion conferred on to the court. The result was also justified on the basis of the nature of the parties' relationship. As Denning LJ noted,[138] the relationship had been one of mutually dependant partnership for over twenty years with each being

[137] [1957] 1 All ER 357 (CA).
[138] ibid 358. See, generally, Klinck (n 122) on Denning's depictions of facts in his judgments.

employed and striving towards the maintenance of the future welfare of the family.[139] Equal division was appropriate because in 'these cases' as Denning LJ referred to them, a different, more fact-sensitive set of principles applied, cognisant of the interpersonal dimension.[140] Denning LJ cited Romer LJ in *Rimmer,* who had stated that disputes between husbands and wives were not to be decided by the 'same strict considerations' applied to strangers.[141] Denning LJ also further described what he meant by the term 'family assets'. He stated that family assets were:

> 'things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it. When these are acquired by their joint efforts during the marriage, the parties do not give a thought to future separation…. They buy the house and furniture out of their available resources without worrying too much as to whom it belongs. The reason is plain. So long as they are living together, it does not matter which of them does the saving and which does the paying, or which of them goes out to work or which looks after the home, so long as the things they buy are used for their joint benefit...The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets—and the product should belong to them jointly. It belongs to them in equal shares'.[142]

This approach posited that, in the absence of expressed intention as to beneficial ownership, cases concerning family assets would be dealt with differently to cases of property held by commercial parties. The reason for this was that as parties do not form enforceable contracts in the domestic sphere, the court must simply 'arrive at the best conclusion it can on the evidence';[143] in this case, that was equal division. In contrast to Denning LJ and Hodson LJ, Morris LJ was more hesitant about the use of family assets and despite agreeing to equal division emphasised that this case had 'troubled' him and

[139] ibid 358.
[140] ibid 359. It can be queried whether this represented an early attempt at creating a 'context of home'; an idea that represents a key modern debate in light of *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 (HL). See N Hopkins 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175.
[141] ibid 359.
[142] ibid 359-360.
[143] ibid 360.

that it was only 'after much hesitation' that he came to the decision.[144] Morris LJ was keen to stress that, in these types of cases, equal division was only possible if both husband and wife had a beneficial interest in the property. Rather than grounding his judgment in the concept of family assets, he based his finding on the inferences he could draw based on the wife's financial contribution to the acquisition of the property. As the wife had made a contribution capable of triggering a resulting trust, Morris LJ believed that this then permitted 'the application of what is laid down in *Rimmer v Rimmer*'.[145]

When conceptualising the use of discretion, *Fribance* is a significant decision for several reasons. Firstly, and again building on the concept of 'rule building discretion' coined by Schneider, *Fribance* provided evidence of further structuring of section 17 discretion.[146] Mention of the controversial term 'palm tree justice', previously used in the opinion of Evershed MR in *Rimmer,* was absent from the Court of Appeal's judgment. Similarly, there were no references to orders being granted when 'fair and just', as in *Rimmer.* Instead a methodology was emerging that commenced with a search for intention as to ownership, and where that search failed the attribution of equal division of the family asset. Thus, as Stone noted, *Fribance* 'added some precision to the limits of the discretion' conferred by section 17.[147] It is true that the labelling of the property as 'family assets' was largely promoted by Denning LJ through his own judgment.[148] However, whilst Hodson LJ and Morris LJ did not use that phrase, they both agreed with the result reached by Denning LJ of equal shares. It is apparent that the development of the 'family assets' approach through the court's use of discretion was tentative but nevertheless *Fribance* involved some further structuring of how the principles applied in practice. It is arguable that through this process, Denning LJ endeavoured to clarify the meaning of family assets, perhaps with a view to gradually producing clearer principles to be applied in subsequent cases.

Secondly, *Fribance* is illuminating in relation to observations made by the court as to the interaction between husband and wife. The nature of the parties' relationship was explored with the court noting that 'it was a happy marriage'[149] with 'the whole of their

[144] ibid 361.
[145] ibid 362.
[146] Schneider (n 108) 64.
[147] Stone (n 93) 281.
[148] See *Gissing v Gissing* [1969] 1 All ER 1043 (CA) 1046 where Lord Denning MR stated that he tried to define 'family assets' in *Fribance* but felt that Diplock LJ had stated it more comprehensively 11 years later in *Ulrich v Ulrich and Fenton* [1968] 1 All ER 67 (CA).
[149] *Fribance v Fribance* (n 137) 361 (Morris LJ).

resources' being used for their 'joint benefit'.[150] Morris LJ noted that neither of the parties thought that their interaction would be 'subject to critical examination in the court of law' and emphasised that the husband was:

> '…a careful man, doing his best to save, and he thought of his wife and his family and of the future. That is the very setting that makes it difficult for a court at a much later period to be able to decide what was the legal effect of what then took place'.[151]

The depiction of the facts by the court showed that both spouses contributed financially over a period of time and this finding buttressed the use of equal division. Therefore, if the court were to determine the parties shares on a 'strict accounting' via a resulting trust, the wife would have been credited the relatively small contribution of £20 that she contributed towards the purchase price.[152] In contrast, sensitivity to the facts in the case enabled an analysis of what could be characterised as a joint venture involving a range of different contributions being made by both parties. Coupled with this sensitivity was a sense that the use of discretion was required to overcome the 'almost insoluble' evidential difficulties.[153]

The significance of *Rimmer*, *Cobb* and *Fribance* is that, through the judiciary's assumption of discretion, these cases suggested that England and Wales was gradually beginning to recognise some limited claim to ownership of matrimonial property based on a set of relatively precise rules operating within the discretion of section 17. By 1956, there was some suggestion that this amounted to recognition of community of property principles in this jurisdiction and, as Guest noted when referring to the scope of section 17, the courts were 'feeling their way towards a limited form of community of property between husband and wife'.[154] It was, however, a tentative conclusion, as other academics at the time characterised the system differently. For example, in 1957, Barlow stated that whenever a court was deciding a matrimonial property ownership dispute, the court would decide the issue 'upon evidence similar to that which would guide it if an action were between two parties not being spouses, subject, nevertheless, to a leaning in

[150] ibid 360 (Denning LJ).
[151] ibid 361 (Morris LJ).
[152] G Taylor, 'Fribance v Fribance' [1958] 1 *Osgoode Hall Law Journal* 79, 80.
[153] *Fribance v Fribance* (n 137) 360 (Hodson LJ).
[154] Guest (n 35) 476. Denning did not regard this as the creation of a community of property but stated, extra-judicially, that these decisions formed 'a silent revolution' enabling a wife to claim a share in the matrimonial home where the legal title was in the name of the husband. See Denning (n 21) 227.

favour of equality'.[155] Irrespective of the source of the legal principle and whether it stemmed from an exercise of judicial discretion or an application of an equitable maxim, the developing 'family assets' approach softened the strict application of property law in this context.

## CONCLUSIONS

As this critique of the case law has demonstrated, Court of Appeal decisions in the 1950s illustrate the courts gradually increasing their use of judicial discretion in matrimonial ownership disputes. This period saw variable interpretations of what Megarry termed the 'expanding universe of section 17'.[156] Various observations can be made as to the exercise of discretion and the motivations underpinning its use.

The Court of Appeal decision in *Re Rogers' Question* demonstrated that section 17 was a mechanism for bringing a dispute to court. As evidenced by the division of the proceeds of sale in that case, the court produced an outcome that would have been reached had a resulting trust been used. Milner noted that this decision revealed that the courts were 'invariably content to accept a minute division of beneficial ownership in terms of pounds and shillings as representing a satisfactory and domestically accurate state of affairs'.[157] It also showed that one approach to section 17 was that it merely gave the parties a different application route for the determination of their dispute.

From *Rimmer* onwards the courts started to query whether the discretion conferred by section 17 allowed them to generate results that could be viewed as departures from what the parties would have received under the presumptions of resulting trust or advancement. As demonstrated in *Rimmer* and *Fribance*, the claimants initially acquired a resulting trust interest, however the Court of Appeal in both cases departed from this basis of division by awarding equal division through their expansive use of discretion. At the time numerous academics regarded this as a movement away from the presumptions of resulting trust and advancement to instead 'a form of community property more in keeping with contemporary realities'.[158] More importantly others

[155] ACH Barlow, 'Gifts and Other Transfers Inter Vivos and the Matrimonial Home' in RH Graveson and FR Crane, *A Century of Family Law 1857-1957* (Sweet and Maxwell 1957) 218.
[156] RE Megarry 'Tunstall v Tunstall' (1953) 69 *Law Quarterly Review* 308, 308.
[157] Milner (n 70) 478.
[158] AF Wootton, 'Judicial Discretion in the Division of Matrimonial Assets' (1959-1963) 1 *University of British Columbia Law Review* 452, 452. See also Guest (n 35) 476.

praised the 'judicial initiative' involved in these developments[159] with Friedmann even going so far as to term the effect of these cases as a 'momentous development in matrimonial property law'.[160]

When analysing the developments from the perspective of judicial discretion, they arguably provide evidence of a system of rules based on the resulting trust being modified through the use of discretion. However, it is important to note that this process also involved a clear arrogation of discretion by the courts. Whilst there were some who believed the wording of section 17 permitted the 'wide use of discretion',[161] it is clear that the provision was never intended to be a redistributive discretion. A broad interpretation of the section did not coalesce with prevailing views at the time on statutory interpretation which were based on a literal interpretation of statutes which was an approach that deterred judicial law-making.[162] Similarly, as noted in Chapter One, the individualised nature of the judgments also exposed difficulty with the use of discretion as certain members of the judiciary used broad interpretations of section 17 thereby pushing forward the development of matrimonial property whilst other members of the judiciary sought to restrict development in this manner.[163] Nevertheless and in spite of the doubtful legitimacy of interpreting section 17 in an expansive manner, there are various reasons why this use of discretion was, in fact, beneficial and appropriate.

Firstly, the use of discretion by the courts in this period was structured: in all four cases considered in this chapter, the claimants had made a contribution capable of triggering a resulting trust. Whereas the court in *Re Rogers' Question* did not depart from the allocation of ownership generated by the resulting trust, in *Rimmer*, *Cobb* and *Fribance* the court departed from this allocation albeit through the use of a structured methodology. This process began with the ascertainment of the intention of the contributor and, as Denning LJ noted, the question of 'to whom does this house belong?'[164] In the case of domestic property and when evidence precluded a precise determination of this intention, the courts used equal division. This revealed that 'the exclusive emphasis on individual property rights [was] gone'[165] and was now supplemented by a discretionary response giving effect to equal division. Furthermore,

[159] Guest (n 35) 467.
[160] Friedmann (n 123) 297.
[161] Wootton (n 158) 452.
[162] On statutory interpretation, see M Zander, *The Law Making Process* (6th edn, CUP 2004) Chapter 3
[163] For example, see the views of Romer LJ in *Cobb v Cobb* (n 126).
[164] *Cobb v Cobb* (n 126) 698.
[165] Milner (n 70) 480.

this structuring also put pressure on maintaining the view that courts were dispensing Cadi-discretion or 'some variety of "palm tree justice"'.[166] As Guest noted the operation of section 17 was 'by no means as arbitrary as that phrase would suggest'.[167]

Secondly, as noted in *Rimmer*, an increase in applications using section 17 prompted the judiciary to confront evidential difficulties when determining ownership of matrimonial property. This exposure triggered a judicial recognition of the difficulties of applying resulting trust analysis to interpersonal relationships. It was clear from *Re Rogers' Question* that the courts were starting to appreciate the interpersonal dimension of dealings between married couples and how that was reflected in the law at that time. *Rimmer* further recognised the evidential difficulties surrounding the purchase of the matrimonial home. The court appreciated the problem of searching for evidence of party intention as to ownership, when in reality this often did not exist. This fact called into question the efficacy of using resulting trusts based on presumed party intention and more broadly separate property between married couples. Thus, one of the motivations behind developing the use of discretion under section 17 was pragmatic; judicial discretion represented a means of overcoming the endemic evidential difficulties in this context.

However, a more important development was the fact that these cases illustrated the need for 'greater cognizance of the realities of family life and the workings of the lay mind' when directed to the ownership of property.[168] This was occurring through the courts' exposure to the relationship dynamics between husband and wife and the specific nature of the relationship. For example, the Court of Appeal in *Rimmer* called for the courts to cast their investigative nets further afield than the point of acquisition when determining intention and instead scrutinise the parties' course of dealings associated with the matrimonial home. Sensitivity to the facts of the case became key, which may have reaffirmed the judiciary's desire to use judicial discretion to cope with 'an almost unending variety of fact patterns'.[169] Thus using discretion as a process may then have offered an opportunity for the courts to acknowledge and accommodate the 'modern ways of young married couples'.[170] By shifting the focus away from direct financial contributions and, as a consequence, jettisoning what one judge termed the 'antediluvian conception of the relationship of a husband with regard his wife', the courts were able to

[166] ibid 474.
[167] Guest (n 35) 476.
[168] Wootton (n 158) 456.
[169] ibid 460.
[170] Denning (n 21) 227.

explore through their judgments the changes that were taking place in the marriage partnership.[171] The change also began a process of accommodating the domestic relationship context of these disputes which, through the ongoing use of judicial discretion, continued in the period of 1958 to 1969. This period will now be analysed in Chapter Three.

[171] Friedmann (n 123) 297.

# CHAPTER THREE

## THE USE OF JUDICIAL DISCRETION IN OWNERSHIP DISPUTES OVER THE MATRIMONIAL HOME 1958-1969

### INTRODUCTION

Chapter Two revealed that the courts used judicial discretion as a process to achieve various results. Using section 17, the courts exercised discretion in some cases to give effect to intentions as to beneficial ownership and this approach could be seen in *Re Rogers' Question*[1] and *Cobb v Cobb* where the Court of Appeal reached a result similar to that produced by a resulting trust.[2] In other cases such as *Rimmer v Rimmer*[3] and *Fribance v Fribance*,[4] the exercise of discretion enabled the courts to modify what the parties would have obtained under a resulting trust and instead give effect to equal division. Drawing upon the work of Davis,[5] the last decision in that period, namely *Fribance*, suggested that the exercise of discretion was becoming both 'confined' and 'structured'.[6] It was confined owing to its specific application to matrimonial ownership disputes and structured through the Court of Appeal developing a methodology to be applied in cases concerning 'family assets'.[7]

The purpose of this chapter is to analyse how discretion was exercised by the courts from 1958 to the House of Lords' decision in *Pettitt v Pettitt*.[8] This period has been selected as from 1958 there is evidence of the Court of Appeal using the presumptions of resulting trust and advancement to determine cases rather than substantive discretion. This approach is then departed from in the early 1960s with the discretionary jurisdiction

[1] [1948] 1 All ER 328 (CA).
[2] [1955] 2 All ER 696 (CA).
[3] [1952] 2 All ER 863 (CA).
[4] [1957] 1 All ER 357 (CA).
[5] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977).
[6] ibid Chapters Three and Four respectively.
[7] In the 1950s, 'family assets' was referred to as a 'concept' or 'principle' in the academic scholarship. Towards the end of the 1960s, 'family assets' was referred to as a 'doctrine' or as Miller has noted a 'presumption'. See G Miller, 'Family Assets' (1970) 86 *Law Quarterly Review* 98. This thesis terms family assets an 'approach' that courts used to determine beneficial ownership.
[8] [1970] AC 777 (HL).

created by section 17 continuing to develop again until the House of Lords' decision in *Pettitt* in 1969. With regard to the key research questions in this thesis, Chapter Three seeks to understand whether the use of discretion could be characterised as 'palm tree justice' or was in fact structured and, more importantly, whether it facilitated greater appreciation of the domestic context. The motivations behind the use of discretion and how its use was perceived by the judiciary and academic community will also be analysed.

The chapter begins with an analysis of cases that demonstrate the continued use of the presumptions of resulting trust and advancement albeit following a section 17 application by the claimant (as opposed to standard civil proceedings). These cases and those considered in Chapter Two will then be compared to the Court of Appeal decisions in *Hine v Hine*[9] and *Appleton v Appleton,*[10] both of which provided expansive interpretations of section 17; the former viewing the jurisdiction of the court as 'entirely discretionary'[11] and the latter stating that section 17 allowed the court to do 'what is fair and reasonable in the circumstances'.[12] Both decisions saw the Court of Appeal 'assume a jurisdiction of wide-ranging discretion to do justice between the spouses'.[13] They represented a departure from the court merely using discretion when fact-finding or interpreting rules to instead a position whereby a court had a very broad discretion when reaching an outcome.[14] This chapter will then query whether from 1965 onwards the courts began to adopt a more restrained interpretation of the discretion conferred by section 17 that demonstrated its structured nature.

## DELIMITING THE SCOPE OF JUDICIAL DISCRETION CONFERRED BY SECTION 17

Mee argues that the 'perceived harshness' of the presumptions of resulting trust and advancement 'prompted attempts by the English courts in the 1950s and 1960s to step entirely outside the existing framework of legal doctrine in the particular area of marital breakdown'.[15] Chapter Two demonstrated how this process was effected in the case law through the gradual arrogation of expansive discretion by the courts that went further

[9] [1962] 3 All ER 345 (CA).
[10] [1965] 1 All ER 44 (CA).
[11] *Hine v Hine* (n 9) 347 (Lord Denning MR).
[12] *Appleton v Appleton* (n 10) 46 (Lord Denning MR).
[13] Lord Justice Gibson, 'A Wife's Rights in the Matrimonial Home' [1976] 27 *Northern Ireland Legal Quarterly* 333, 339.
[14] On the forms of discretion see Chapter One.
[15] J Mee, *The Property Rights of Cohabitees* (Hart 1999) 15.

than informal discretion through fact-finding or interpretation of rules. Yet, while Mee characterised the process as stepping outside the existing framework, this view must be qualified – or arguably countered – by evidence that cases into the late 1950s continued to apply the presumptions of resulting trust and advancement. These cases pursued a different, competing direction of travel compared to the principles previously developed in *Rimmer* and *Fribance.* This issue was directly addressed in *Silver v Silver.*[16]

In *Silver,* a husband and wife were involved in the successive acquisition of a series of properties which they used as the matrimonial home. Each transaction involved a purchase in the name of the wife with the husband repaying the mortgage instalments. The wife did not make a direct financial contribution to the property and had no income to meet the mortgage repayments. Each time a property was sold, the profit generated through the extensive renovations made by the parties coupled with rising house prices, helped finance in the next property, which was vested again in the wife's name. After the purchase of the fourth property, the husband left the wife and used section 17 to seek an order that their current property was held on trust by the wife for them both jointly. In the County Court, the judge held that the presumption of advancement applied and that there was no evidence to rebut the husband's intention to make an advancement in favour of his wife.

The Court of Appeal agreed with the findings of the County Court judge and rejected the appeal. The court upheld the conclusion that the presumption of advancement applied and the repayment of the mortgage instalments were presumed to be a gift by the husband to the wife, so that the property belonged to the wife absolutely. Lord Evershed MR stated that, while it was 'obviously tempting to say that equity delighteth in equality'[17] as Parliament had not provided a means for the courts to achieve a 'fair solution',[18] the traditional rules of equity applied: namely, in the absence of a contrary intention, a disposition by a husband in favour of a wife must be regarded as a gift. Lord Evershed MR noted that 'there is an obvious temptation to hold that a fair result would be to say that it was a joint enterprise and the two should be jointly entitled; but, if we so concluded in this case, I have come to the conclusion that we should be in effect inventing a case'.[19] For Parker LJ, the presumptions of resulting trust and advancement were 'too well established to be disregarded'.[20] Despite 'a certain air of unreality in

[16] *Silver v Silver* [1958] 1 All ER 523 (CA).
[17] ibid 525.
[18] ibid 525.
[19] ibid 526.
[20] ibid 525.

these cases in trying to discern an intention in acts and circumstances which occurred when the present events were quite outside contemplation',[21] Lord Evershed MR applied a resulting trust approach. *Rimmer* was distinguished, as in that case there was a degree of sharing between husband and wife, as both were wage earners, and it was 'too artificial a result' to mathematically quantify shares in the proceeds of sale.[22] Contrastingly, in *Silver* the wife was not a wage earner, made no financial contribution and was unable to become a wage earner owing to ill health.

The decision in *Silver* is helpful in revealing how the courts used and conceptualised the exercise of discretion for several reasons. Firstly, the members of the court claimed a broad discretion to decide the case,[23] subject to the prohibition from making an order which was 'contrary to any well-established principle of law'.[24] In this instance the principle of law engaged was the presumption of advancement. As will be further explored below, it is arguable that owing to the husband's failure to rebut this presumption, he was subsequently unable to demonstrate 'a substantial beneficial interest' capable of triggering the application of the 'family assets' approach. Therefore, it was the court's observance of a well-established principle of law which led it to deny the husband a beneficial interest. This methodology resonates with the approach adopted *Re Rogers' Question,* which predated the development of the 'family assets' approach, that saw section 17 used procedurally as a forum for the dispute within which a resulting trust was applied.

However, to say that this result demonstrated an acceptance by the judiciary of the determinative effect of the presumptions of resulting trust and advancement may be a step too far. It is likely that, whilst the court accepted the continued applicability of the presumption of advancement, the motivation behind retaining its use was not a preference for its underlying principles, but rather the need to generate in this particular case a 'sympathetic decision' to a wife who had been deserted by her husband after a relatively long marriage.[25] For example, the Court of Appeal noted the fact that Mrs Silver was 'crippled by arthritis' and that 'she was not a wage-earner and unfortunately

[21] ibid 527.
[22] ibid 528.
[23] ibid 523 where Parker LJ noted that 's. 17 of the Act of 1882 leaves a very wide discretion in the court'.
[24] ibid 527 (Parker LJ) echoing *Rimmer v Rimmer* (n 3) 865 (Evershed MR).
[25] A Milner, 'Beneficial Ownership of the Matrimonial Home Again' (1958) 21 *Modern Law Review* 419, 420.

now [was] obviously incapable of being one'.[26] Lord Evershed MR also acknowledged the 'peculiar tragedy of this case' as the couple had 'lived together for more than a quarter of a century'.[27] Thus, whilst the Court of Appeal stated that they came to their decision with 'anxious consideration,'[28] 'considerable reluctance'[29] and 'no feeling of satisfaction',[30] it is arguable that the case represented a results-led decision which was clearly motivated by providing residential security to a 'deserted, arthritis-crippled, near-penniless wife'.[31] Had the facts been reversed and title to the property placed in the name of the husband rather than the wife, it is arguable that the principles from *Rimmer* and *Fribance* would have been used. This suggests, as Megarry noted at the time, that 'the presumption of advancement still lives, but it has got only a precarious future existence'.[32]

Secondly, it is interesting to note the Court of Appeal's treatment of the 'family assets' approach that was visible in *Rimmer* but more so in *Fribance*. As noted in Chapter Two, this developing approach was based on property being characterised as a family asset and enabled, in certain circumstances, equal division of the property.[33] In order for this to occur the claimant needed to demonstrate a substantial beneficial interest in the property. Where that requirement was satisfied and, in the absence of contrary intention, the court was able to award equal division. With regard to classifying the matrimonial home as a 'family asset', Parker LJ in *Silver* remarked that 'in the present age, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary'.[34] He argued that characterisation of real or personal property as a family asset would enable the presumption of advancement to be 'easily rebutted'[35] and that the facts in *Silver* were 'consistent with a joint endeavour'.[36] Nevertheless, the husband was unable to rebut the presumption of advancement on the facts. Sellers LJ also showed some support for the 'family assets' approach in *Rimmer* and *Fribance* believing that when applied to the facts in *Silver* they may have 'resulted

[26] *Silver v Silver* (n 16) 526. Lord Evershed MR also remarked, at 526, that the first instance judge showed a 'clear preference for the wife's evidence'.
[27] ibid 524.
[28] ibid 525 (Lord Evershed MR).
[29] ibid 527 (Parker LJ).
[30] ibid 528 (Sellers LJ).
[31] A Milner, 'Beneficial Ownership of the Matrimonial Home: Modern Trends in the British Commonwealth' (1959) 37 *Canadian Bar Review* 473, 477.
[32] RE Megarry 'Silver v Silver' (1958) 74 *Law Quarterly Review* 165, 166.
[33] See Miller (n 7).
[34] *Silver v Silver* (n 16) 527 (Parker LJ).
[35] ibid 528.
[36] ibid 528.

in a decision that there was a joint holding of this property'.[37] Despite support for the 'family assets' approach by Parker LJ and Sellers LJ, Lord Evershed MR was more restrained and merely noted the temptation of 'matrimonial joint stock' particularly in light of the 'scanty evidence' in this case[38] and the 'air of unreality' involved in the search for intentions.[39]

*Silver* is a difficult decision particularly as there was some support for the 'family assets' approach but, ultimately, the Court of Appeal decided against its application. For Miller this fact was not overly problematic as '[t]he recognition by a unanimous court of the most desirable approach to these problems - though they did not use it themselves - creates elation'.[40] However, the result of the case, as distinct from the sentiments of the court, instigated further calls for the judiciary, and also law reform bodies, to consider developing principles that appreciated the practices of husbands and wives when purchasing property.[41] For example, as a further development on the 'family assets' approach, Milner noted:

> 'What is there standing in the way of a presumption that the beneficial title to all "matrimonial joint stock" is held equally between husband and wife? It will be a broad and general view, but surely it will only be giving formal recognition to the fact that in most modern marriages, "nature, driven out with the pitch fork, comes back. Despite the separation of property of husband and wife, the merger of many of their worldly possessions is and remains a fact"'.[42]

Milner advocated that the court should look to see if there was any intention between the parties that indicated that the property should be held separately. If no evidence existed, a default presumption of joint beneficial ownership would come into play. This could apply where indirect financial contributions were present, which was quite progressive, as the previous authorities all indicated that before the 'family assets' approach applied, both parties needed a substantial beneficial interest. Quite radically for the time, Milner even suggested that the wife's contribution could be non-financial and that the

[37] ibid 528 (Sellers LJ).
[38] ibid 523.
[39] ibid 525.
[40] Milner (n 25) 419-420.
[41] For example, see A Milner, 'A Homestead Act for England' (1959) 22 *Modern Law Review* 458 arguing for a comparative approach to be adopted by law reformers in this area.
[42] ibid 420 quoting from O Kahn-Freund, 'Inconsistencies and Injustices in the Law of Husband and Wife' (1952) 15 *Modern Law Review* 133, 136. For similar observations on the prevalence of sharing between married couples, see J Simon, 'With all my worldly goods…' (Presidential Address to the Holdsworth Club, Birmingham 1963-1964) 18.

presumption of joint beneficial ownership would operate to prevent 'insult to England's womenfolk' when their contribution to the home was being ignored.[43] The Court of Appeal decision in *Silver* and the debate it subsequently generated indicated that there was some support for the courts' use of structured discretion under section 17 through the 'family assets' approach.[44] This even led academics like Milner to take this model further and, controversially, suggest a presumption of joint beneficial ownership of matrimonial property.

Despite being a dispute between cohabitants, *Diwell v Farnes* saw the Court of Appeal again analysed the case law development stemming from *Rimmer*.[45] In *Diwell v Farnes*, two unmarried cohabitants moved into rented accommodation with their child. Mr Diwell, who remained married to his wife, was the tenant of the property. Both Mr Diwell and his cohabitant, Miss Farnes, contributed to the upkeep of the property, with the latter paying the rent. As a current tenant, Mr Diwell was able to purchase the property at a reduced price and a mortgage was secured to finance the acquisition. Miss Farnes paid the instalments under the mortgage up until Mr Diwell sold the property at a profit and then purchased another. Mr Diwell died intestate and his widow became administratix of his estate. The widow claimed possession of the property and contended that Miss Farnes was not beneficially entitled to the property. Miss Farnes claimed that Mrs Diwell held a proportion of the property on resulting trust for her and, at first instance, the judge found that the widow held the property on trust for sale for herself and Miss Farnes in equal shares. The reason given was that Mr Diwell and Miss Farnes intended a joint transaction. On appeal, the widow argued that the Miss Farnes had only a licence in the property and that, even if she did have an interest in the property, it was to be quantified proportionately to her contribution to the purchase price. In particular, the widow argued that the judge should not have applied the equitable maxim of 'equity delighteth in equality' following an analogy to cases decided between husband and wife.

The majority in the Court of Appeal stated that, with regard to the relationship between Miss Farnes and Mr Diwell, 'no contract or joint enterprise between them can be spelled out of their relationship as man and mistress'.[46] The relationship status of the parties

[43] Milner (n 25) 422.
[44] The support, however, was not universal. See *Thomas v Thomas* (1960) 3 WIR 1, 3, where Justice Vaughn AG, in the Supreme Court of Barbados, commented that *Rimmer v Rimmer* and Denning LJ's dissent in *Hoddinott v Hoddinott* [1949] 2 KB 406 (CA) created a new approach but that 'these dicta do not yet seem to have been so unequivocally applied and so definitely received as to have become undoubtedly the law'.
[45] *Diwell v Farnes* [1959] 2 All ER 379 (CA).
[46] ibid 381.

proved highly informative, as Ormerod LJ stated that, even if there was a contract or joint venture between the parties, this would be unenforceable as it was based on 'immoral consideration'.[47] As the dispute did not concern a matrimonial home, it was to be decided as though the deceased (or rather his administratix) and Miss Farnes were strangers in law. The Court of Appeal, therefore, shifted the focus onto the contributions made by Miss Farnes and the presumption of resulting trust. In particular, Miss Farnes' contributions to the building society mortgage were recognised as 'contributions towards the purchase of the house' generating an equitable interest in the proceeds 'limited to the proportion which her contributions bear to the purchase price of the house'.[48] These were increased to reflect the installation of a new boiler but Hodson LJ stated that they could not be increased through the use of judicial discretion conferred by section 17.

Willmer LJ dissented in *Diwell v Farnes,* deploying reasoning focused on the historical development of the resulting trust.[49] The well-known authority of *Dyer v Dyer*[50] was cited to emphasise the foundational basis of the resulting trust that 'the trust of a legal estate…results to the man who advances the purchase money'.[51] Whilst recognising the utility of the resulting trust in these disputes, Willmer LJ explored the interpersonal dimension of the relationship concerned and analogised the facts in *Diwell v Farnes* to a scenario that involved a husband and wife. The presumption of resulting trust was not always suitable in this family context and that was irrespective of whether the dispute was between married couples or cohabitants.

*Diwell v Farnes* casts light on the interface between resulting trusts and line of principles developing from *Rimmer.* The court was unable to use the discretion conferred by section 17 of the Married Women's Property Act 1882 and thus the language used in the judgment demonstrated familiar trust law terminology. Naturally, this was a contrast to the various cases concerning married couples, which often failed to frame the dispute in the language of trusts such as *Re Rogers' Question* and *Rimmer.* What is significant from *Diwell v Farnes* is that, although a resulting trust solution was applied to the particular dispute at hand, all members of the Court of Appeal contrasted that result with the approach adopted in *Rimmer.* The Court of Appeal accepted that, within a section 17 ownership dispute between married couples, the operation of resulting trusts could be displaced by the more family-centric principles emanating from

[47] ibid 384. See also *Fender v St John-Milday* [1938] AC 1 (HL).
[48] ibid 383 (Hodson LJ).
[49] ibid 389-390.
[50] (1788) 2 Cox Eq Cas 92.
[51] *Diwell v Farnes* (n 45) 389-390.

*Rimmer*. However, and further supporting the argument that this use of discretion was structured, the claimant needed to satisfy various requirements. These were a substantial beneficial interest acquired through a resulting trust (*Rimmer*) which took place within the context of acquisition of a matrimonial home (*Fribance*). Where these elements were satisfied and in the absence of contrary intention, the court was able to award 'equal division' of the asset.

The court also provided insight as to why this use of discretion was viewed to be acceptable. Echoing observations made in *Rimmer* and *Fribance*, Hodson LJ claimed that disputes between husbands and wives were 'in a class by themselves'[52] and this special treatment was understandable owing to the privileged legal treatment of married couples which was at the time regarded as legitimate.[53] Willmer LJ also engaged with the other motivation behind the use of discretion under section 17 which was simplicity of application. The Court of Appeal in *Diwell v Farnes* emphasised that the principles from *Rimmer* were beneficial as they avoided the 'extreme difficulty' involved in mathematical calculation of interests.[54] Hodson LJ believed that this approach was acceptable because the courts have 'found it impracticable if not impossible to distinguish between the respective rights of the parties or assess the amount of their respective contributions to some piece of property which they have acquired and enjoyed together'.[55]

More radical for the time was the dissent of Willmer LJ where he was willing to apply the approach in *Rimmer* to cohabitants yet only in exceptional circumstances. Whilst the discretion conferred under section 17 of the Married Women's Property Act 1882 was regarded as capable of permitting equal division of the property for married couples in some circumstances, for Willmer LJ this outcome was not precluded where the dispute was between parties other than husband and wife. Cohabitants could invoke equal division in exceptional cases, such as *Diwell v Farnes*, and 'any other case where it [was] equitable to do so'.[56] Willmer LJ found support for this assertion from the fact that Lord Evershed MR in *Rimmer* did not restrict the possibility of equal division to married couples, provided the claimant could demonstrate a substantial beneficial interest.

[52] ibid 382.
[53] See also *Gammans v Ekins* [1950] 2 KB 328 (CA) and *Hawes v Evenden* [1953] 2 All ER 737 (CA) on the judicial attitude towards cohabitation during this period. Note also that Ormerod LJ in *Diwell v Farnes* at 383 referred to Mr Diwell's child as 'the child of the association'; [1959] 2 All ER 379 (CA) 385.
[54] *Diwell v Farnes* (n 45) 388 (Willmer LJ).
[55] ibid 382.
[56] ibid 382.

Furthermore, other cases existed where equal division was ordered in non-marital relationships.[57] Here Willmer LJ was adopting a similar approach to that of Romer LJ in *Rimmer,* who justified equal division less on the basis of judicial discretion and more through the general equitable maxim of 'equality is equity'.[58]

Another case to adopt the presumptions of resulting trust and advancement was *Allen v Allen* which, like *Silver* and *Diwell v Farnes*, provided some judicial support for the structured use of discretion while owing to the specific facts of the case, favouring a resulting trust approach.[59] In *Allen* a husband purchased what would become the matrimonial home from his mother. He purchased the property in his sole name and took over the building society mortgage. After the parties divorced, the husband brought an action for possession of the property. The wife claimed that the parties had agreed, prior to the marriage, that she would find work to help finance the acquisition of the property. Post-acquisition, she contributed to the household expenses in the property. The County Court judge found the wife's evidence appeared accurate and, as this was a matrimonial asset, the wife had some beneficial interest, with the result that the husband's claim for possession failed.

In the Court of Appeal, Lord Evershed MR held that the County Court judge had misinterpreted the decisions in *Cobb* and *Fribance.*[60] Applying those decisions, the court held that it was inaccurate to state that, simply because the husband purchased the property and the wife agreed to contribute towards living expenses, the property was acquired jointly. Echoing the words of Morris LJ in *Fribance,* Lord Evershed MR stated that the approach to undertake was to consider 'on the evidence, in the first place, whether it is shown that the husband and wife were both beneficially interested in this property that the husband took'.[61] This involved evaluating the application of the resulting trust or advancement; if they revealed the intention of the contributor as to beneficial ownership, the court would give effect to that intention. For the wife, the payment of living expenses alone could not allow the court to infer an intention that the property was acquired as joint property thereby granting her a beneficial interest. The

[57] See *Re Dickens* [1935] Ch 267 where equal division was ordered between owners of the copyright of a manuscript by Charles Dickens.
[58] See *Rimmer v Rimmer* (n 3) 870 (Romer LJ).
[59] [1961] 3 All ER 385 (CA).
[60] Lord Evershed MR stated in *Allen*, at 387, that the County Court judge 'went overfar in his deduction from the citation from Denning LJ'. For an analysis of *Fribance v Fribance* [1957] 1 All ER 357 (CA) see Chapter Two.
[61] *Allen v Allen* (n 59) 386 (Lord Evershed MR).

Court of Appeal returned the case to the County Court with guidance on the correct judicial test.

*Allen* offers useful insights when conceptualising the use of discretion in matrimonial ownership disputes. The Court of Appeal's discussion of the need to identify the intention of the contributor revealed that the court's first objective was the ascertainment of 'the true intention between husband and wife'[62] and that intention was one that the judge had to 'deduce as best he can from the circumstances in the evidence given before him'.[63] The decision also revealed that indirect financial contributions were insufficient to generate a beneficial interest in the property and that a direct financial contribution to the purchase price was necessary.

By declining to apply their principles, the Court of Appeal judgments in *Silver, Diwell v Farnes* and *Allen* can be construed as questioning the structured use of discretion as previously sanctioned in *Rimmer* and *Fribance. Diwell v Farnes* can be distinguished on the basis that the use of the discretion under section 17 was obviously unavailable since the dispute involved unmarried parties. However, it could be questioned why the Court of Appeal refused to use this structured discretion in *Silver* and *Allen*. On the one hand, this could be viewed as scepticism concerning the use of discretion, but alternatively, it is also arguable that the reason for refusing to use section 17 was not necessarily scepticism of the use of discretion *per se* but rather that the litigants in both cases did not fit within the scope of the structured discretion as it was developed by *Rimmer* and *Fribance*. For example, the husband in *Silver* was unable to rebut the presumption of advancement thereby generating him a 'substantial beneficial interest' in the property. Furthermore, the Court of Appeal in *Silver* noted that unlike *Rimmer* and *Fribance* where the property was acquired in the name of the husband, legal title was vested in the wife and the husband's payment of mortgage instalments was for 'the benefit of the equity of redemption, which belonged to the wife'.[64] This suggested that the instalments were in fact gifts. Likewise in *Allen*, the wife was unable to benefit from the use of discretion developed in *Rimmer* and *Fribance* because she was unable to establish a beneficial interest as she had made only indirect contributions to the purchase of property. These were insufficient to generate a resulting trust presumption in her favour and therefore prevented the court finding a 'substantial beneficial interest'.

[62] ibid 387.
[63] ibid 387.
[64] *Silver v Silver* (n 16) 527 (Lord Eveshed MR).

Cumulatively these three cases produced results that instinctively appear at variance with the trajectory of case law development following *Fribance* but can alternatively be interpreted as authorities that reinforced the structured nature of the discretion. Under this interpretation, each case demonstrated when discretion was to be exercised under the *Rimmer* principles and the limits of such exercise. Following these cases it could be argued that coherent principles were in fact emerging, under which an application under section 17 would proceed. Firstly, the court would ascertain whether the claimant had a substantial beneficial interest obtained through a resulting trust. As noted in Chapter Two, this required a direct financial contribution to the purchase price and, as demonstrated by *Allen,* indirect financial contributions were insufficient to generate the presumption of resulting trust. Secondly, if the claimant was able to demonstrate a substantial beneficial interest, the court would search for the intention of the parties in relation to the division of the beneficial ownership. Where it was apparent that a particular division was intended by the parties, the court was required to give effect to that division. Thirdly, within the context of the matrimonial home and where the facts prevented a precise quantification of he parties' interests, applying the 'family assets' approach the courts were able to award equal division of the beneficial ownership on the basis of 'equality is equity'. This exercise was far from 'palm tree justice' as pronounced by Eversheed MR in *Rimmer* and, as Zuckerman observed, demonstrated the courts being 'conscious of the special factual circumstances of matrimonial life when they apply the general law'.[65] When viewed as a whole, this suggests some evidence of structuring of the exercise of discretion under section 17. Although *Silver, Diwell v Farnes* and *Allen* may at face value suggest a retreat to the presumptions of resulting trust and advancement, the analytical approach of the Court of Appeal in those cases did not demonstrate a rejection of a structured use of discretion conferred via section 17.

## EXPANSIVE INTERPRETATION OF THE SCOPE OF SECTION 17: *HINE v HINE*

As Chapter One revealed, it is in the nature of the development of the common law that periods characterised by adherence to rules and certainty may subsequently give way to periods characterised by flexibility or creativity.[66] The aspect does not mean the absence of rules but rather the 'point on the rules-to-discretion scale' is placed more on the side

[65] AAS Zuckerman, 'Ownership of the Matrimonial Home-Common Sense or Reformist Nonsense' [1978] 94 *Law Quarterly Review* 26, 30.
[66] See MR Cohen, *Law and Social Order* (1933) 261. See also C Rose, 'Crystals and Mud in Property Law' [1987-1988] 40 *Stanford Law Review* 577.

of discretion.[67] The developments originating from *Rimmer* suggested that in relation to matrimonial ownership disputes, England and Wales was moving away from 'superannuated traditionalism' evidenced by the old presumptions of resulting trust and advancement and instead was using a relatively structured judicial discretion.[68]

The most controversial interpretation of section 17 was that the provision created an entirely discretionary mechanism in which proprietary interests could be created, redistributed and varied as the court thought fit. This approach is illustrated by the Court of Appeal in *Hine v Hine*.[69] In *Hine v Hine*, the matrimonial home was purchased in joint names with both husband and wife financially contributing to the purchase. The wife provided £2,000 to the purchase price and the remainder was secured through a mortgage to which the husband paid the instalments. The wife stated that the conveyance into joint names was to save on estate duty. The marriage broke down and the property was sold. The wife used section 17 to seek an order determining ownership of the proceeds of sale. The County Court judge held that, following discharge of the mortgage, the proceeds of sale of the property were to be divided equally.

The Court of Appeal amended the order to declare that, after paying off the mortgage, £2,000 should be returned to the wife and the remaining proceeds of sale divided equally. Section 17 of the Married Women's Property Act 1882 enabled this division of the proceeds of sale as the court could legitimately adopt an 'unfettered discretion'.[70] Lord Denning MR articulated the section 17 discretion in the widest possible sense and stated it was:

> '…entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means, as I understand it, that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case'.[71]

For Denning LJ, this broad discretion was limited by only two factors: any ascertainable party intention would prevail over the subsequent use of judicial discretion; and where no party intention was discernible the property could be divided equally. This approach

[67] Davis (n 5) 15.
[68] MDA Freeman, 'Towards a Rational Reconstruction of Family Property Law' (1972) *Current Legal Problems* 84, 85.
[69] *Hine v Hine* (n 9).
[70] ibid 346.
[71] ibid 347.

could be applied irrespective of whether the property was in the sole name of either party or jointly. Pearson LJ reviewed the previous authorities and said that, whilst there was a conscious choice made by the parties in selecting a joint tenancy, they did not think or form 'a common intention' as to what would happen upon the breakdown of the marriage.[72] In the absence of evidence of party intention, the court should divide the proceeds of sale using section 17 which involved the court 'attributing artificially to the parties a reasonable intention at the time of the transaction in the year of 1950'.[73] For Pearson LJ, this exercise necessitated regard being had to the course of conduct between husband and wife at the time of purchase and subsequently. Pearson LJ went on to endorse the use of the equitable maxim of 'equity delighteth in equality' in disputes between husband and wife, but stated that, in this particular case, it did not 'afford a just solution such as the parties can reasonably be taken to have intended'.[74] Lord Denning MR decided that the substantial contribution made by the wife to the purchase price should be repaid to her along with the balance on the mortgage. The remaining proceeds of sale were then to be divided equally.

As noted above, the earlier cases can be understood as a process in which the courts incrementally structured their exercise of the discretion conferred by section 17. One interpretation of *Hine* would be that the court endeavoured to continue this process despite phrasing the scope of discretion in an undeniably broad manner. Evidence of this can be found in the judgment of Lord Denning MR where he suggested that section 17 formed part of a 'jurisdiction [that] was being developed'.[75] Whilst the discretion was incredibly broad, structuring of the use of discretion may have been occurring seeing as its use was 'subject to certain principles which have been laid down'.[76] Lord Denning MR noted 'two principles' that underpinned the exercise of the court's discretion.[77] The first principle was the need to give effect to any intention of the parties as to ownership and the second principle permitted the use of equal division where no intention as to ownership was discernible. Lord Denning MR cited *Rimmer* as support for the second principle. Endorsing these principles, and thereby intimating an application of what could be viewed as structured discretion, Lord Denning MR applied the first principle to the £2,000 cash contribution by the wife and the second principle to the remaining proceeds of sale. However, drawing upon the map set out in Chapter One as to the

[72] ibid 350.
[73] ibid 350.
[74] ibid 350.
[75] ibid 347.
[76] ibid 346.
[77] ibid 346.

nature of discretion, *Hine* departs from previous developments, stemming from *Rimmer*. More worryingly for the clear and consistent development of the law, *Hine* highlighted the dangers of the exercise of overly broad, unstructured discretion.

The main difficulty with *Hine* was the level of discretion that Lord Denning MR claimed section 17 conferred on the judiciary. Lord Denning MR commenced his judgment by stating the terms of section 17 and claiming that it gave 'an unfettered discretion'.[78] As Mee noted, in *Hine* the section 17 discretion was 'couched in its most extreme form'.[79] There are two problems with this clear arrogation of discretion. Firstly, the use of authorities justifying an expansive discretion was circumspect. Whilst it is apparent that section 17 provided a foundation for a variety of claims[80] and was phrased in wide language, it is arguable that the degree of discretion varied depending on the type of claim. Indeed, this observation was made by Harman LJ in *Allen v Allen* where he believed that it was 'dangerous to import the reasoning out of other cases'.[81] It is likely that Lord Denning MR engaged in this process of drawing upon interpretations from different areas of section 17 jurisprudence. For example, Lord Denning MR stated that 'more recently, the courts have been anxious, as I think rightly, not to fetter the discretion which the statute confers'.[82] As noted above, it is arguable that this observation did not fully map onto the evolving use of section 17 in ownership disputes. In addition, *Short v Short*, which was not an ownership dispute but rather a dispute as to possession, was advanced as authority for this proposition.[83] *Short* formed part of a string of cases where the Court of Appeal sought to develop 'the deserted wife's equity',[84] which involved the courts using section 17 to create an occupational licence that initially bound the deserting husband but was later deemed binding on a trustee in bankruptcy[85] and then, more controversially, all third parties.[86] Here, it is arguable that Lord Denning MR drew support from a line of authorities in which the courts were historically more willing to use section 17 expansively. Lord Denning MR also used section 17 expansively in this context, and in one case noted that section 17 conferred an

[78] ibid 346.
[79] Mee (n 15) 15.
[80] See ACH Barlow 'Gifts and Other Transfers Inter Vivos and the Matrimonial Home' in RH Graveson and FR Crane, *A Century of Family Law 1857-1957* (Sweet and Maxwell 1957) 217.
[81] *Allen v Allen* (n 59) 387.
[82] *Hine v Hine* (n 9) 347.
[83] *Short v Short* [1960] 3 All ER 6 (CA).
[84] See *Old Gate Estates LD v Alexander* [1950] 1 KB 311 (CA), *Middleton v Baldock* [1950] 1 KB 657 (CA), *Bendall v McWhirter* [1952] All ER 1307 (CA).
[85] ibid.
[86] *Jess Woodcock v Hobbs* [1955] 1 WLR 152 (CA). For further analysis of this see RE Megarry, 'The Deserted Wife's Right to Occupy the Matrimonial Home' (1952) 68 *Law Quarterly Review* 379 and HRW Wade, 'Licences and Third Parties' [1952] 68 *Law Quarterly Review* 337.

unfettered discretion and that 'in the innumerable and infinitely various disputes as to property which may occur between husband and wife the Judge should have a free hand to do what is just'.[87]

The selective use of authorities by Lord Denning MR and Pearson LJ in *Hine* also generated a second problem. Pearson LJ traced the development of the law from *Re Rogers' Question* but misinterpreted many of the structuring principles.[88] When analysing *Re Rogers' Question*, Pearson LJ did not acknowledge the use of a resulting trust analysis and instead focused on observations as to the problematic nature of searching for the intention of the contributor within the matrimonial home context. Pearson LJ cited Bucknill LJ in *Newgrosh v Newgrosh* for the principle that section 17 granted the courts the ability to mete out 'palm tree justice',[89] and also noted Lord Evershed MR's observation in *Rimmer,* sanctioning courts finding a 'fair and just answer' in matrimonial ownership disputes.[90] The use of both authorities failed to acknowledge the subsequent structuring of the use of the court's discretion placed on the court in cases such as *Cobb* and *Fribance*. This problematic use of authority saw the Court of Appeal in *Hine* conflating what in the modern framework is recognised as a key distinction between acquisition of an interest and quantification of that interest. *Hine* permitted the court to 'make such order as appears to be fair and just in all the circumstances of the case' thereby disregarding title or contributions. [91]

Further evidence of the lack of analytical rigour in the judgments can be seen in the court's terminology. The three judgments in the Court of Appeal saw all the judges use different terminology for the judicial process under section 17. They ranged from the conferral of an order that was 'fair and just'[92] or 'right'[93] to solutions that were 'reasonable'[94] or 'just'.[95] The ambiguous nature and multiple connotations of these terms illustrated the developing uncertainty surrounding expansive interpretations of section 17. Whilst Evershed MR in *Rimmer* believed that the court could reach a 'fair and just' result, that option was only possible after the claimant had acquired a substantial beneficial interest in the property. Furthermore, Denning LJ and Romer LJ were less

[87] *Hutchinson v Hutchinson* [1947] 2 All ER 792, 793.
[88] *Hine v Hine* (n 9) 348.
[89] ibid 348-349.
[90] ibid 348-349.
[91] ibid 347.
[92] ibid 347 (Lord Denning MR).
[93] ibid 348 (Lord Denning MR).
[94] ibid 351 (Pearson LJ).
[95] ibid 350 (Pearson LJ).

enthusiastic than Evershed MR about the use of 'fair and just' in *Rimmer,* and those terms were omitted in the subsequent case of *Fribance.* The ambiguity in how the court phrased the judicial process meant that any outcome could be reached under this formulation. For example, the County Court judge in *Hine v Hine* 'regrettably' found in favour of equal division after applying *Rimmer*, which meant that the husband gained from the outcome as the wife had provided over two thirds of the purchase price.[96] Lord Denning MR rejected this analysis and stated 'the judge is not bound "regrettably" to decide anything which is contrary to what fairness and justice demand'.[97] The extent of discretion envisaged by the approach in *Hine* militated towards unpredictable outcomes and was a clear departure from earlier case law.[98] The failure by the Court of Appeal to articulate the methodology used in *Hine* was also problematic. This absence of a clear methodology provides evidential support for critics of judicial discretion who see it as a process that both disguises the steps taken in legal reasoning and also masks the factors that proved persuasive in the exercise of discretion.[99]

In conceptualising the use of discretion in matrimonial ownership disputes, *Hine* was a significant decision that injected an unhelpful degree of confusion into a framework that had previously demonstrated some evidence of structure and coherence. It is, of course, consistent with the development of the common law that principles may not evolve in one clear linear trajectory. *Hine* provides ample support for the pejorative view of discretion as 'lawless'.[100] It was not what could colloquially be termed a 'hard case' and thus the shift towards further arrogating discretion to cover instances where a party need not have a substantial beneficial interest was a step too far and unnecessary on the facts.

## SECTION 17 AND IMPROVEMENT CASES

Prior to 1965, section 17 had been used in two types of ownership dispute. Firstly, it was used where there was a joint name conveyance with one or both parties making a financial contribution at the moment of acquisition. Secondly, it was used where there was a sole name conveyance but the other party had made a financial contribution to the acquisition of the matrimonial home. Difficult issues arose in the latter scenario where the basis for establishing the beneficial interest did not arise through a financial

[96] Ibid 347 (Lord Denning MR).
[97] ibid 347 (Lord Denning MR).
[98] See Mee (n 15) 15 referring to the 'rather wishful' thinking of this approach.
[99] See BN Cardozo, *The Nature of the Judicial Process* (Yale University Press 1963) 141.
[100] RC Post, 'The Management of Speech: Discretion and Rights' (1984) *Supreme Court Review* 169, 169.

contribution but instead through improvements made to the property.[101] This turning point provides helpful insights into the nature of judicial discretion and, where the court exercised discretion with a view to granting proprietary relief on the basis of improvements, it reveals how the judiciary viewed their ability to use discretion in this period.

The Court of Appeal developed its expansive use of section 17 in *Appleton v Appleton*.[102] In *Appleton*, a wife purchased a property with money devised to her by her mother and title to this property was conveyed in her name alone. The husband and wife renovated this property and, after three years, sold the property to relocate. A cottage was purchased, again in the wife's sole name, and both parties contributed to renovations. The husband was a woodcarver making coats of arms and his workshop was located on the premises. The wife subsequently initiated divorce proceedings on the basis of cruelty and used section 17 to establish her sole beneficial entitlement to the cottage, and seek an order for sale. The district registrar held that the property belonged to the wife and that, despite the renovation work carried out by the husband, this had been undertaken voluntarily without an express bargain or agreement establishing an interest in that property. The district registrar ordered sale and that the entirety of the proceeds of sale were to belong to the wife. The husband appealed and argued that, through his renovation work, he was entitled to a portion of the proceeds of sale.

Lord Denning MR gave the sole judgment, with Pearson LJ and Davies LJ agreeing. Lord Denning MR postponed sale of the property and held that when the property was eventually sold the husband would be entitled to 'a percentage of the proceeds' which was 'commensurate to the enhancement due to his work in improving the property'.[103] The court reasoned that the correct approach to adopt in section 17 cases did not involve a search for ascertainable party intention through 'any bargain in the past, or any expressed intention'.[104] Building upon similar observations made in *Hine*,[105] the court reasoned that in matrimonial ownership disputes, as evidenced by the facts of *Appleton*, 'there was no occasion for any bargain to be made as to what was to happen in case there was a separation, for it was a thing which no one contemplated at all'.[106] Instead,

[101] cf *Pettitt v Pettitt* [1968] 1 All ER 1053 (CA) 1056, where Willmer LJ warned against cross-fertilisation of principles between joint and sole legal ownership disputes.
[102] [1965] 1 All ER 44 (CA).
[103] ibid 46 (Lord Denning MR).
[104] ibid 46 (Lord Denning MR).
[105] *Hine v Hine* (n 9) 347 (Lord Denning MR).
[106] *Appleton v Appleton* (n 10) 46.

Lord Denning MR provided a broad test for determining the entitlement of the husband to a proportion of the proceeds of sale:

> 'Sometimes the test has been put in the cases: What term is to be implied? What would the parties have stipulated had they thought about it? That is one way of putting it. But, as the parties never did think about it at all, I prefer to take the simple test: What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?'[107]

Using this holistic approach, reasonableness and fairness meant that 'the husband should get something' which for Lord Denning MR was a percentage of the proceeds of sale.[108]

*Appleton* contributed to the uncertainty created in *Hine* and is a departure from the structured used of discretion seen in earlier case law. The case justifiably deserves criticism for the use of discretion by Lord Denning MR. Firstly there was a notable absence of legal principles being applied in this case. The case was brought by the husband using section 17 yet there was no discussion of developing case law principles governed by that section. In a laconic judgment, there was also little reasoning to justify the husband obtaining a percentage of the proceeds and no clear proprietary basis for the claim was discernible. Acknowledgment of the presumptions of resulting trust and advancement was absent but this may be attributable to the fact that neither device would have provided assistance to the husband, who had not made a direct financial contribution to the purchase of the property. Lord Denning MR simply deemed that the husband should obtain recognition and indeed remuneration 'commensurate to the enhancement due to his work'.[109] Mirroring his approach in *Hine*¸ Lord Denning MR collapsed the distinction between acquisition of an interest and quantification of an interest in this case and exercised judicial discretion as a technique to provide relief to someone viewed as a deserving claimant. There was clear evidence that Lord Denning MR was sympathetic towards the husband; he acknowledged the 'thirty-one years of marriage' and the fact that the 'husband himself has not much money'.[110] Similarly, as Klinck argued, Lord Denning MR may have responded to the particular situation of the litigant: the husband appeared in person which, historically led Lord Denning MR to

[107] ibid 45-46.
[108] ibid 46.
[109] ibid 46.
[110] ibid 45.

favour pleas,[111] he was engaged in a traditional craft for which Lord Denning MR had sympathy,[112] and the consequence of an order for sale of the property would affect the husband's trade on which he was 'dependent for his livelihood'.[113] Further supporting the characterisation of *Appleton* as a results-led decision involving sympathy to the husband, Lord Denning MR noted circumstances in which the wife left the husband and stated that she simply 'left a note on the table "Dog at kennels Chelmsford"'.[114] Thus, for the purpose of understanding the use of discretion in the matrimonial property context, this decision exposed the difficulty of an expansive and unstructured discretion and the risk of improper considerations being taken into account.[115]

Secondly, as in *Hine*, the use of authorities by Lord Denning MR was problematic. An initial observation is that they are notable by their absence as the only authority cited was *Rawlings v Rawlings*.[116] That case concerned possession of the matrimonial home and, drawing upon principles from *Rawlings*, Lord Denning MR articulated the use of discretion under section 17 as follows:

> 'The court has a discretion. That is the essential principle. It is not confined to proceedings under section 17. It applies whatever be the court in which proceedings are taken.'[117]

This gnomic observation seems to suggest that discretion can be exercised whenever a court is determining a dispute. Whilst this would certainly be the case with fact-finding discretion,[118] and potentially where a rule is ambiguous, it was a problematic observation and undoubtedly contributed to the academic criticism *Appleton* received.[119] Lord Denning MR accepted this source of principles when writing extra-judicially on the case

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[111] See A Denning, *The Due Process of Law* (Butterworths 1980) 233.
[112] See DR Klinck, '"This Other Eden": Lord Denning's Pastoral Vision' (1994) 14 *Oxford Journal of Legal Studies* 25, 40 who noted that '[i]t may be significant that Mr Appleton's particular craft was carving coats of arms-which would appeal to Lord Denning's nostalgia for the past, for continuity, for heritage, for "family trees"'.
[113] *Appleton v Appleton* (n 10) 45.
[114] ibid, which according to Auchmuty was a fact that 'no doubt helped to prejudice Lord Denning MR against the woman', see R Auchmuty, 'Unfair Shares to Women: The Rhetoric of Equality and the Reality of Inequality' in H Lim and A Bottomley, *Feminist Perspectives on Land Law* (Routledge Cavendish 2007) 184.
[115] On this issue see, for example, BN Cardozo (n 99) 141 and J Frank, 'Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings' (1931) 80(1) *University of Pennsylvania Law Review* 17.
[116] [1964] 2 All ER 804 (CA).
[117] *Appleton v Appleton* (n 10) 46.
[118] See A Barak, *Judicial Discretion* (Yale University Press 1989) 19.
[119] For criticism of *Appleton* see DJ Hayton, 'Equity and Trusts' in Jowell JL and McAuslan JPWB, *Lord Denning: The Judge, the Law* (Sweet and Maxwell 1984).

and stated that the approach adopted in *Appleton* was taken from 'cases about the deserted wife'.[120] However, as noted above in relation to the use of the occupation case of *Short,* in *Hine* there was a failure to appreciate the different lines of judicial development that drew distinctions depending on whether the dispute concerned occupation or ownership of the matrimonial home.

The utilisation of a broad discretion with the objective of achieving justice between the parties defined this case as one that radically expanded the law. Interestingly, Lord Denning MR later conceded – writing extra-judicially in *Due Process of Law* - that he had overstretched the scope of section 17 in *Appleton*.[121] The absence of reasoning in this case generated heavy criticism.[122] Yet, rather than typifying the period, when analysing the use of discretion in matrimonial ownership disputes *Appleton* is very much an anomalous decision. Up to this point, the court had been receptive to a broad (albeit structured) discretion in these matters but such a wide interpretation, coupled with the fact that the husband made no direct monetary contribution at the time of purchase was stretching the outer boundaries of the law. Furthermore, it highlighted the problem of judicial subjectivity when applying a statutory provision that *prima facie* conferred an 'unfettered' discretion. It was unsurprising that an expansive interpretation of section 17 was rejected by the House of Lords in *National Provincial Bank v Ainsworth*.[123] Their Lordships held that the right of the wife to remain in occupation of the matrimonial home was purely personal and that the 'deserted wife's equity' was not an overriding interest for the purposes of binding third parties under the Land Registration Act 1925. This 'equity' or 'licence' could not be regarded as a property right which had the capacity to bind successors in title.

Although *Ainsworth* was concerned with occupation of the matrimonial home, the judgment had far reaching implications for the conceptualisation of matrimonial property disputes. The House of Lords took a minimalist view of section 17, with Lord Hodson stating that it could be used to 'restrain or postpone the enforcement of legal rights but not to vary agreed or established rights in property in an endeavour to achieve a kind of palm tree justice'.[124] This opinion was echoed by Lord Upjohn, who criticised the expansive interpretations of section 17 used in *Hine* and *Appleton* as 'too wide'[125]

[120] Denning (n 111) 233.
[121] ibid, where Denning noted that he had 'put it too widely'.
[122] *Pettitt v Pettitt* [1968] 1 All ER 1053 (CA) 1062 (Russell LJ).
[123] [1965] AC 1175 (HL).
[124] ibid 1220-1221.
[125] ibid 1236.

and re-defined the provision as purely procedural. The House of Lords held that title to property must be established in fact and law according to conventional property law principles.[126] The discretion inherent in section 17 was merely to prevent property rights being enforced in instances that would 'run counter to the duties of one spouse to another'.[127]

When conceptualising the use of discretion, *Ainsworth* is a significant decision. The tenor of the judgments suggested that the societal context of property relations between husband and wife had changed with the result that the legal framework utilised cannot be the one that 'matured in the world of Victorian property owners'.[128] However, despite this observation, Lord Hodson stated that section 17 was not an appropriate vehicle through which to respond to 'the social conditions of humanity'[129] and adopting a similar construction, both Lord Cohen and Lord Upjohn called for a Royal Commission to investigate the law governing property relations between husband and wife, with a view to proposing legislative reform if appropriate. This decision arguably drew a line under expansive interpretations of section 17 in the ownership context.

Following the decision in *Ainsworth,* the House of Lords' interpretation of section 17 was explored in *Jansen v Jansen* which dealt with ownership of the matrimonial home as distinct from occupation.[130] In *Jansen,* an entrepreneurial wife purchased the leasehold and then the freehold of the matrimonial home in her own name. The husband, who was a student, embarked on an extensive project of converting various floors into self-contained flats generating considerable profit. After the wife moved out she used section 17 to apply for a declaration that she was the sole beneficial owner of the property.

The Court of Appeal stated that the primary question was the isolation of an agreement as to beneficial ownership. This requirement was emphasised in *Ainsworth* and, in particular, by the dicta of Lord Upjohn when he noted that 'the husband could have no claim on property which he knew to be his wife's by doing work on it, in the absence of some agreement.'[131] Lord Denning MR recognised the limitations of finding agreements as to beneficial ownership between husband and wife and stated that 'whilst parties are

[126] ibid 1236.
[127] ibid 1246 (Lord Wilberforce).
[128] ibid 1244 (Lord Wilberforce).
[129] ibid 1242 (Lord Wilberforce).
[130] [1965] 3 All ER 363 (CA). See also *Bedson v Bedson* [1965] 3 All ER 307 (CA).
[131] *National Provincial Bank v Ainsworth* (n 123) 1236 (Lord Upjohn).

living together in amity they do not make legal contracts enforceable in a court of law'.[132] Lord Denning MR – clearly sensitive to the context of matrimonial property disputes – endeavoured, once again, to dilute this requirement of agreement in two ways. Firstly, he cast doubt on whether Lord Upjohn 'meant that a contractual agreement was necessary in order to give the husband an interest'.[133] This, again, underlined the issue of specificity in this particular area; namely whether 'agreement' needed to encompass a legally enforceable contract or whether a less rigid understanding was sufficient. Secondly, Lord Denning MR stated that, if an agreement, or even contract, was envisaged by the courts, this requirement was unrealistic. Dicta from Atkin LJ in *Balfour v Balfour*, regarding the enforceability of contracts in the domestic sphere, was then utilised to further emphasise the evidential problems of spouses forming contracts.

For Lord Denning MR, these circumstances militated towards justifying the use of discretion. Despite contrary statements in *Ainsworth*, he argued that section 17 was not merely procedural and stated that section 17:

> 'gives rights where none before existed, and gives a remedy where before there was none. Where the existing rights can clearly be ascertained, effect must be given to them; but where it is not possible to ascertain them, the court can only do what the statute says that it should do, that is, make such order "as it thinks fit"'.[134]

As the husband and wife had no agreement as to beneficial ownership, the court proceeded on the basis of what was 'fair and just in all the circumstances'.[135] Although the husband in *Jansen* did not obtain equal division, it was clear that the court was swayed by the substantial renovations he undertook along with the fact that during this period the wife maintained the family. *Jansen* illustrated that, irrespective of *Ainsworth* and its emphasis on well-established principles of property law, Lord Denning MR continued to use discretion substantively, particularly as the contributions made by the husband would not have been recognised if a resulting trust had been argued. The approach of the Court of Appeal provided further evidence of judicial subjectivity incumbent within the application of overly broad judicial discretion, which was noted by

[132] *Jansen v Jansen* (n 130) 365-366 citing *Balfour v Balfour* [1919] 2 KB 571 (CA).
[133] ibid (n 130) 365.
[134] ibid 366.
[135] ibid 366.

Russell LJ who criticised Lord Denning MR's use of discretion as a means to 'fill in by a palm tree justice a lacuna in their [the parties] processes of thought'.[136]

The improvement cases of *Appleton* and *Jansen* did not fit within the structuring of discretion visible in the late 1950s. The claimants did not make a requisite contribution in order to fit within the developing 'family assets' approach. Shortly after *Jansen*, Lord Denning MR in the case of *Bedson v Bedson* stated that in determining ownership disputes under section 17 he had in the past advocated a 'liberal interpretation in keeping with the width of the words used by Parliament':[137]

> 'But those who are wiser than I am have declared that it does not enable the court to vary existing rights. We have always to go back to see what the rights of the parties actually are. I accept this, but I cannot help remarking that it is often impossible to find out what the rights of husband and wife really are as between themselves'.[138]

Despite this observation, *Appleton* and *Jansen* are still examples of an expansive exercise of discretion. They both typify Lord Denning MR in the Court of Appeal dispensing with 'thorough researched analysis of the authorities' with a view to generating some conception of justice between the parties.[139] As Hayton noted, both *Appleton* and the earlier decision of *Hine*, provide clear examples of the use by Lord Denning MR of 'short judgments based on general principles'.[140] For the purposes of this thesis, these developments are useful in acting as a point of contrast to the structured use of discretion seen in cases in the 1950s. *Appleton, Jansen* and *Hine* resonate with the criticisms of discretion identified in Chapter One and the view that the exercise of discretion is 'personal, idiosyncratic, irrational, tyrannical, unstable, and chaotic'.[141] Furthermore, they are also cases that have the potential to dominate the academic discourse by shifting the focus away from less controversial exercises of structured discretion.

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[136] ibid 370.
[137] *Bedson v Bedson* [1965] 3 All ER 307 (CA) 311.
[138] ibid.
[139] Hayton (n 119) 107.
[140] ibid 107.
[141] S Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120, 123.

## STRUCTURING THE EXERCISE OF JUDICIAL DISCRETION AND THE DEVELOPMENT OF THE 'FAMILY ASSETS' APPROACH

The use of discretion in disputes where the basis for a claim was improvement to property generated considerable difficulties for the court. However, despite a preeminent focus on improvement cases in the mid-1960s, it is arguable that after *Ainsworth* the Court of Appeal further developed and structured the use of discretion in disputes where prior acquisition of an interest was not in doubt. It should be noted that this development was clearly illegitimate seeing as *Ainsworth* had denied the substantive use of section 17 to vary property rights. Irrespective of the legitimacy of these developments, the fact that the courts arrogated discretion and, in some cases, structured that discretion is important for this thesis. In this process several cases continued the trend of using discretion and through that process enabling greater sensitivity to the domestic nature of matrimonial ownership disputes.

*Ulrich v Ulrich and Fenton* evidenced a movement by the Court of Appeal to recognise indirect contributions to the acquisition of property.[142] Prior to marriage, the Ulrichs purchased a bungalow. The fiancée paid the deposit and other costs for the acquisition of the property. Her fiancé covered the remainder of the cost through a mortgage payable by him alone but did not contribute financially to the deposit. The property was conveyed into the sole name of the fiancé, although it was intended by both parties to be the matrimonial home once they had married. The parties married and they moved into the property. The parties both worked and used their incomes for household expenses. After the birth of their first child, the wife stayed at home but later went back to work. When they later divorced, the matrimonial home was sold at an increased price. The judge at first instance held that the profit made on the property should be divided one-fifth to the wife and four-fifths to the husband using a resulting trust analysis. The wife appealed regarding this distribution.

Lord Denning MR refused to accept that general principles of property law applied to the parties on the basis that the property was purchased before they were married. Instead, using *Fribance*, Lord Denning MR stated that the property concerned was a family asset which following marriage became 'a joint asset belonging to both in equal shares'.[143] The conclusion was formed on the basis of both contributing to the

[142] [1968] 1 All ER 67 (CA).
[143] ibid 69.

acquisition of the property. He noted that the 'first task of the court' was to ascertain the interests of the spouses and where there was an explicit agreement between them as to ownership to give effect to it.[144] Diplock LJ then observed that this agreement can be inferred from the parties' conduct and this required the court to determine what the parties' 'common intention would have been had they put it into words before matrimonial differences arose between them'.[145] Where both parties pool their resources to meet the expenses involved in the upkeep of the matrimonial home, it can be inferred from their conduct that they had a 'common intention' that this property would be a family asset.[146] Thus on the particular facts of this case, Diplock LJ believed the correct inference was that they possessed equal shares in the family asset.

The Court of Appeal decision of *Ulrich* gave further insight into the use of discretion in matrimonial ownership disputes, particularly in relation to fact-finding.[147] Firstly, the Court of Appeal engaged with how matrimonial property was often acquired by parties. Diplock LJ queried the appropriateness of applying principles of resulting trust and advancement to the 'ordinary young couples of today',[148] especially when they did not concern themselves with the 'legalistic technicalities' of these devices.[149] This discussion provided important support to the view that it was possible to acquire an interest in a family asset through indirect financial contributions. Whereas the Court of Appeal in *Allen,* considered above, believed that indirect financial contributions were insufficient to provide a 'substantial beneficial interest' needed under the 'family assets' approach, in *Ulrich* Diplock LJ suggested the contrary view. For Diplock LJ, contributions to the acquisition of property rarely came solely from one party and a mathematical approach failed to appreciate 'the economic realities of modern mortgages of owner-occupied dwelling houses'.[150] This observation echoes the earlier, obiter, comments of Lord Denning MR in the Court of Appeal decision of *Tulley v Tulley*:[151]

> 'If the husband paid all the instalments and the wife by her earnings paid all the household expenses, she would indirectly be contributing to the acquisition of the house and the court might well say or infer that the common intention was

[144] ibid 71.
[145] ibid 72. It should be noted that, despite the use of the term 'common intention', this case was not evidencing the same approach to common intention that was later developed in *Gissing v Gissing* in relation to the common intention constructive trust. See Mee (n 15) 153.
[146] *Ulrich v Ulrich and Fenton* (n 142) 72.
[147] ibid.
[148] ibid.
[149] ibid.
[150] ibid.
[151] *Tulley v Tulley* [1965] 109 *The Solicitors' Journal* 956.

> that it should be joint property as a family asset, and that she would have a claim to be considered under section 17, whether her contribution was direct or indirect, provided it was substantial'.[152]

Although in *Tulley*, the Court of Appeal viewed that the wife's indirect contributions were not substantial enough, this observation – coupled with the views of Diplock LJ in *Ulrich* – suggest the development of the 'family assets' approach to further recognise the domestic context of the acquisition of the property.

The fullest articulation of the 'family assets' approach can be found in the Court of Appeal decision in *Gissing v Gissing.*[153] The dispute concerned beneficial ownership of the matrimonial home which was purchased in the husband's sole name alone. The wife did not contribute directly or indirectly to the acquisition of the property but utilised her own savings to purchase furniture and provide necessaries for the parties' son. The marriage broke down and the wife applied for an order regarding beneficial ownership of the property. Counsel for the wife argued that, following the family asset line of authorities, this property was acquired through a joint effort. The wife made no substantial contribution to the acquisition of the asset. Buckey J declared that the husband was the sole beneficial owner of the property.

The majority of the Court of Appeal reversed the decision of the High Court and held that the property should be regarded as a 'family asset'. Using *Rimmer*, *Fribance* and *Ulrich*, Lord Denning MR declared the property to be a family asset which applied irrespective of 'in whose name it stands: or who pays for what: or who goes out to work and who stays at home'.[154] The parties were regarded as joint beneficial owners, owing to the substantial contributions each had made to the property. Thus, using the past history of the parties and their interactions with the property, Lord Denning MR deemed equal division appropriate. Phillimore LJ came to the same conclusion, influenced by the fact that if Buckley J's order remained, the wife, who at the time of judgment was 55 years old, would be forced to leave her home. The former husband would then be able to 'pocket all the proceeds for himself'[155] which for Phillmore LJ did not 'sound like justice'.[156] He stated that a court could not do justice between husband and wife 'by

[152] ibid.
[153] [1969] 1 All ER 1043 (CA).
[154] ibid 1046.
[155] ibid 1048.
[156] ibid 1048. cf *Jones v Maynard* [1951] 1 All ER 802 for a similar statement.

applying strictly the law affecting the creation or operation of resulting, implied or constructive trusts'.[157]

Edmund Davies LJ dissented in *Gissing* and stated that the 'family assets' approach could not be used to create an entitlement to property acquired as a joint venture. Edmund Davies LJ stated '[h]owever just it may be generally considered that matrimonial homes should be regarded as jointly owned, it is not the present law'.[158] Thus, rather than being driven by sympathy for the position of the former wife, Edmund Davies LJ stated that without a direct or substantial indirect financial contribution the court could not infer that the parties intended to share the beneficial interest.[159]

The Court of Appeal's decision in *Gissing* was another significant step forward in trying to introduce greater recognition of the domestic nature of ownership disputes over the matrimonial home. Firstly, as Brady has noted, Lord Denning MR was 'affirming the elevation of the term 'family assets' to the status of a doctrine'.[160] The use of another definition of 'family assets' was arguably an attempt to further structure the 'family assets' approach. This endeavour, however, was undermined somewhat by the majority's reasoning, particularly Lord Denning MR's tentative language (he frequently stated 'I think' and towards the end of his judgment, '[i]n case I am wrong, however',[161] and 'if this house is not a family asset').[162] Similarly, Phillimore LJ's judgment utilised emotive language that emphasised the unfortunate predicament of the wife and questioned 'in view of all that this woman has done for this man, is he justified in throwing her into the street and pocketing all the proceeds of the matrimonial home?'[163] This perhaps suggests a results-led decision.

When viewing these developments from the perspective of judicial discretion, *Ulrich*, *Tulley* and *Gissing* all provide further support to the view that the 'family assets' approach, that found expression through the exercise of the courts section 17 discretion, was becoming more structured. This resulted in some academics believing that these principles could be applied with some degree of predictability. For example, Miller

[157] Stated in a different law report to *Gissing v Gissing* [1969] 1 All ER 1043 (CA); namely [1969] 2 Ch 85.
[158] ibid 1052.
[159] Edmund Davies LJ referred to his sympathy for the wife's predicament in *Gissing* at 1055 as 'cold comfort'.
[160] J Brady, 'Trusts, Law Reform and the Emancipation of Women' (1984) *Dublin University Law Journal* 1, 9.
[161] *Gissing v Gissing* (n 153) 1046.
[162] ibid.
[163] ibid 1048.

stated in 1970 that the 'family assets' approach had four elements.[164] Firstly, the doctrine only applied where there was no evidence of actual party intention; secondly, family assets operated as a presumption and the particular facts of the case may alter or even prevent its application; thirdly, both parties needed to make a contribution to the acquisition of the asset and fourthly, the determination of the dispute must be made without reference to the matrimonial differences between the parties. Miller's articulation of the doctrine suggests some degree of precision in its application and also contains many aspects that originate from *Rimmer* and *Fribance*. It also reveals some important insights. Firstly, as illustrated above, designation of a matrimonial home as a family asset would not generate an automatic claim to equal division.[165] It is arguable that statements suggesting this by Lord Denning MR in *Gissing* can perhaps be explained by his desire to merely create clear principles for the operation of 'family assets'. The court was required to find evidence of actual party intention, express or inferred, before resorting to the residual option of equal division. Similarly, mere designation of the home as a 'family asset' did not generate equal division as the claimant needed to demonstrate a substantial contribution before the 'family assets' approach was engaged.

Cumulatively, as Miller has argued the 'family assets' approach could be distinguished from automatic co-ownership and, owing to the requirement of contributions, was connected to the well-established resulting trust.[166] Whilst there is some force in this thesis, it is indisputable that Lord Denning MR in *Gissing* did, in fact, envisage automatic sharing. Thus Zuckerman was therefore accurate when he observed the problems of 'an unwarranted tendency to leap from the principle of partnership, which hinges on the facts of each case, to a general and automatic rule of community of ownership'.[167] It is arguable that *Gissing* demonstrated the Court of Appeal engaging in this process.

## CONCLUSIONS

Chapters Two and Three have analysed the use of judicial discretion in matrimonial ownership disputes prior to the House of Lords' decision of *Pettitt v Pettitt*. When surveying developments in this period, Murphy and Clarke have attributed the more

[164] Miller (n 7) 107.
[165] ibid 124.
[166] Miller (n 7) 109-110.
[167] Zuckerman (n 65) 32.

expansive interpretation of section 17 to factors such as an increase in the divorce rate and higher levels of owner-occupation.[168] The case law, discussed above, also supports this argument as in the post-World War II period divorces were more common, even prior to the changes in the law via the liberalised divorce reforms in 1969.[169] Whilst there were acute housing shortages as a result of the war, thereby suggesting more claims to occupation of the matrimonial home, the increase in owner-occupation may have triggered more ownership disputes.[170] Establishing a beneficial interest in a property became highly lucrative with rising property values.[171] With more matrimonial ownership disputes coming before the court, this may have provided an impetus for the courts to respond to the deficiencies of the resulting trust regime for married couples.[172]

When assessing the efficacy of judicial developments in this period it is indisputable that the use of discretion generated much debate amongst members of the judiciary and academic community. The text of section 17 enabling a judge to make such order 'as he shall think fit' looked 'innocent enough',[173] yet it generated extensive litigation and, as Rosen observed, 'acute judicial division of opinion' as to its correct scope.[174] It was apparent that section 17 provided a statutory express grant of discretion but the difficulty for courts was delimiting what one academic termed 'the expanding universe of section 17'.[175] In the space of twenty years, section 17 was interpreted as ranging from a 'complete discretion', a discretion as to enforcement of rights between the parties or a denial of discretion ('purely procedural').[176] Broad expansive interpretations of section 17 visible in cases such as *Hine* and *Appleton* were singled out as permitting 'palm tree justice' that produced unpredictable results.

One reaction to developments in this period would be to attribute expansive interpretations to particular members of the judiciary. Devlin LJ noted the fact that the expansive interpretation of section 17 was attributable to Lord Denning MR and Hayton

[168] WT Murphy and H Clarke, *The Family Home* (Sweet and Maxwell 1983) 75.
[169] See D Stetson, *A Woman's Issue: The Politics of Family Law Reform in England* (Greenwood Press 1982) 154 and R Chester, 'Contemporary Trends in the Stability of English Marriage' (1971) 3 *Journal of Biosocial Science* 389, 390 noting that from 1959 to 1969 the number of petitions for divorce rose by 133%.
[170] Murphy and Clarke (n 168) 75.
[171] See *Rimmer v Rimmer* (n 3) 864 where Evershed MR noted the 'great rise in value of house properties'. Also see *Hutchinson v Hutchinson* (n 87) where the husband's evidence acknowledged that in the post-war period there was a great imperative to sell the property.
[172] See *Rimmer v Rimmer* (n 3) 869 where Romer LJ noted 'a large number of these cases in recent years' coming before the courts.
[173] RE Megarry, 'Notes' (1963) 79 *Law Quarterly Review* 333, 333.
[174] L Rosen, 'Palm Tree Justice' [1966] 110 *The Solicitors' Journal* 239, 239.
[175] RE Megarry, 'Tunstall v Tunstall' (1953) 69 *Law Quarterly Review* 308, 308.
[176] Rosen (n 174) 239.

argued that Lord Denning MR 'made much' of section 17.[177] Drawing upon the literature on judicial discretion, Gardner identified this issue as part of the identity of some judges, inasmuch that:

> 'some judges appear to cultivate an image as free spirits, or innovators: perhaps because of their relationship with other members of the court, or with an eye to promotion, or to popular acclaim'.[178]

However, building on the conclusions in Chapter Two, this thesis argues that viewing developments in this period as solely attributable to the caprice of Lord Denning MR may not be entirely appropriate. Furthermore, depicting this period as one characterised by the abuse of judicial discretion is an over-simplification which fails to appreciate the body of evidence supporting the use of structured discretion in matrimonial ownership disputes. Whilst it is apparent that Lord Denning MR provided broad interpretations of section 17 in *Hine* and *Appleton* which were particular interpretations that stretched the provision too far, other members of the Court of Appeal were receptive to the use of section 17 in a manner other than procedural. For example, Lord Evershed MR gave a broad interpretation of section 17 in *Rimmer*. He also wrote, extra-judicially, of a tendency for courts to focus on 'over strict and rigid rules' when interpreting statutes, which he lamented as it went against 'the duty of the judges and the whole legal profession to look forward and constantly to remember that the law must adjust itself to the social philosophy of the day'.[179] Thus Lord Evershed MR in *Rimmer* was more willing to use discretion in a substantive manner. Similarly, Willmer LJ and Hodson LJ were both in favour of a substantive use of section 17 in *Diwell v Farnes* whereas Donovan LJ supported the view of section 17 as 'entirely discretionary'. Cumulatively, this shows that whilst Lord Denning MR played an integral role in developing matrimonial property and also may have made his contribution to this area using 'self-congratulatory law-reform rhetoric', attributing the dynamic use of discretion to him *alone* misrepresents the use of discretion in this period.[180] Commentators at the time also noted this point. Zuckerman argued that Lord Denning MR was not the only member of

[177] Hayton (n 119) 83.
[178] S Gardner, 'The Element of Discretion' in P Birks, *The Frontiers of Liability* (OUP 1994) 186, 194.
[179] Lord Evershed, 'The Judicial Process in Twentieth Century England (1961) 61 *Columbia Law Review* 761, 791. See also VW Taylor, 'The Social Purpose of Land Law' [1966] 30 *The Conveyancer* 305, 315 for an analysis of how social policy affects the incremental development of land law.
[180] Brady (n 160) 1. Echoed in A Denning, *Landmarks in the Law* (Butterworths 1984) 58 where Denning even compares himself to Thomas Wolsey and Thomas More.

the judiciary to favour the conferral of a broad, substantive discretion and he criticised the approach of some judges that went 'too far in the other direction, placing unnecessary constraints on the exercise of discretion'.[181]

Moving away from individual personalities and instead focusing on the coherence of the overall framework, reactions to developments in this period ranged from calls for Parliamentary intervention,[182] clarification by the House of Lords[183] which perhaps would involve what Bevan and Taylor called 'a return to first principles'[184] and even the production of more academic texts on the subject.[185] However, drawing upon the framework of discretion outlined in Chapter One, a different interpretation could be proffered for this period. As Chapter One noted, the work of Hawkins and Gardner both highlight the tendency of polarising 'rules' with 'discretion' and, as a result, denying the connection between the two or the fact that middle ground exists between the two. This polarisation is evident when surveying the judicial developments prior to *Pettitt* seeing as they provide evidence of a 'judicial conflict between "rule" (or presumption) and "discretion", so often manifested in this field of law'.[186] However, whilst the courts assumed a substantive discretion through an interpretation of section 17, and at times they expressed that discretion too broadly, there is evidence of the court structuring the use of discretion. Through the process of adjudication and in line with the traditional development of the common law, the courts were creating and modifying outcomes using relatively clear principles. Leaving aside *Hine* and *Appleton* which were arguably incorrectly decided owing to the fact that the Court of Appeal collapsed the distinction between acquisition and quantification of an interest, other cases in this period revealed some consistent structuring of the use of discretion. For example, it is arguable that when the courts were quantifying beneficial ownership of property, they exhibited a greater tendency to use discretion to give effect to the intentions of the parties or equal sharing of the asset. Again putting to one side the anomalous decisions of *Hine* and *Appleton*, the courts were generally slower to use discretion to permit a litigant to acquire a beneficial interest in the home where parties had not made a direct[187] or even indirect contribution to the home.[188] Based on the principles stemming from *Rimmer*

[181] Zuckerman (n 65) 37.
[182] Milner (n 41).
[183] Rosen (n 174) 241.
[184] HK Bevan and FW Taylor, 'Spouses as Co-Owners' [1966] 30 *The Conveyancer* 355, 456.
[185] OM Stone, 'Review of Bromley's Family Law 2nd Edition' [1962-1963] 7 *Journal of Society of Public Teachers of Law* 98, 98.
[186] Bevan and Taylor (n 184) 442.
[187] *Rimmer v Rimmer* (n 3).
[188] *Tulley v Tulley* (n 151).

onwards, a pre-existing beneficial interest in the home was required before the courts could use judicial discretion. The presence of these pre-requisites shows that caution must be exercised when viewing case law development in this period as militating towards 'palm tree justice'. Reactionary criticism targeted towards a few rogue cases that depart from a pattern of judicial development or that overstretch the use of discretion needs to be placed in context.

Building upon the findings of Chapter One, this chapter has also identified some of the motivations behind the use of discretion, which again illustrates a degree of support for its use in matrimonial ownership disputes. The absence of a redistributive regime for matrimonial property may have prompted the courts to assume and develop a discretionary jurisdiction under section 17. Here, there is a clear problem with the legitimacy of this approach but despite this fact, the academic community praised the courts exercising discretion in this context.[189] Discretion enabled departure from trust entitlement and 'unrealistic proportional division of assets'[190] visible in cases such as *Re Rogers' Question* towards a position in which the courts begin to recognise 'the human interests and economic needs of the parties before them'.[191] The use of discretion to accommodate the domestic nature of these disputes was also viewed as a positive development with Bevan and Taylor praising its virtues of 'simplicity, informality and a consideration of particulars'.[192] Although there were some legitimate concerns as to the expansive use of judicial discretion, Megarry viewed the structure of *Rimmer* as 'a happy example, if one may say so, of an alliance between common sense and a well-established principle of equity'.[193] Rosen even endorsed the approach laid down by Lord Denning MR as 'a very convenient way of dealing with these disputes between husband and wife'.[194] This close fact-sensitivity seen in these disputes may have responded to a societal reappraisal of the marriage partnership. Most importantly, they instigated a reappraisal of the benefits of retaining a rigid system of separate property between husband and wife.[195] Thus the structured use of discretion in this period, motivated by the endemic evidential difficulties when applying resulting trust principles to ownership

[189] W Friedmann, *Matrimonial Property Law* (Steven and Sons, 1955) 297, G Miller, 'Family Assets' (1970) 86 *Law Quarterly Review* 98, Rosen (n 174) and RE Megarry, 'Rimmer v Rimmer' [1953] 69 *Law Quarterly Review* 11, 13.
[190] A Milner, 'Wedding presents' (1960) 23(4) *Modern Law Review* 440, 445.
[191] Milner (n 31) 474.
[192] Bevan and Taylor (n 184) 456.
[193] Megarry (n 189) 12
[194] Rosen (n 174) 241.
[195] This reappraisal was well documented, see MDA Freeman, 'Towards a Rational Reconstruction of Family Property Law' (1972) *Current Legal Problems* 84 and HH Foster and DJ Freed, 'Divorce Reform: Brakes on Breakdown' [1973-1974] 13 *Journal of Family Law* 443, 481.

of the matrimonial home, produced a structured framework that was imperfect yet workable.

With a view to understanding the use of discretion in the modern implied trusts framework, the following chapter will analyse the House of Lords' decisions in *Pettitt v Pettitt* and *Gissing v Gissing* where their Lordships rejected the substantive use of section 17 and prioritised general principles of property law in ownership disputes.

# CHAPTER FOUR

# THE USE OF JUDICIAL DISCRETION AFTER *PETTITT v PETTITT* AND *GISSING v GISSING*

## INTRODUCTION

The previous chapters have shown that the use of discretion was a prominent feature in ownership disputes over the matrimonial home. Beginning in the early 1950s, case law demonstrated a movement by the courts from sole adherence to the presumptions of resulting trust and advancement to instead a position where, in some instances, the courts used discretion as a process to give effect to intentions or order equal division of the property concerned. Whilst section 17 was never intended by Parliament to be used as a mechanism to redistribute assets or as a means to create 'family assets', the Court of Appeal incrementally, and at times demonstrably, arrogated discretion. As Chapter Two noted, where the use of discretion was structured and its application flowed from the prior acquisition of an interest by the litigant, judicial developments in this area were viewed positively by academics.[1]

The reasons in support of the use of discretion were varied. The use of discretion enabled close sensitivity to the facts[2] and this permitted the courts to explore and acknowledge through their judgments the distinct nature of the process of acquiring property for married couples.[3] Similarly, the evidential challenges posed by party interaction within the home, such as contested evidence and absence of documented formality, provided a context in which the application of judicial discretion proved beneficial. However, as demonstrated in Chapter Three, the Court of Appeal in cases

[1] For positive comment see W Friedmann, *Matrimonial Property Law* (Stevens and Sons Ltd 1955) 297, G Miller, 'Family Assets' (1970) 86 *Law Quarterly Review* 98, L Rosen, 'Palm Tree Justice' [1966] 110 *The Solicitors' Journal* 239 and RE Megarry, 'Rimmer v Rimmer' [1953] 69 *Law Quarterly Review* 11, 13.

[2] See, for example, N Gennaioli and A Schleifer, 'Judicial Fact Discretion' (2008) 37(1) *The Journal of Legal Studies* 1 and I Kaufman, 'The Anatomy of Decision Making' [1984] 53 Fordham Law Review 1 on how the exercise of judicial discretion engages with the facts of a particular case.

[3] See O Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33(6) *Modern Law Review* 601 and Chapter One.

such as *Hine v Hine*[4] and *Appleton v Appleton*[5] were perceived as going too far in their exercise of discretion, particularly in instances where a claimant had not acquired an interest in the home and this necessitated calls by some members of the judiciary for clarification by the House of Lords.[6]

This chapter analyses two key House of Lords' decisions, *Pettitt v Pettitt*[7] and *Gissing v Gissing*,[8] which both rejected the substantive use of section 17 and, with that rejection, the 'family assets' approach to matrimonial ownership disputes. Replacing the substantive use of discretion conferred by statute was the statement by the House of Lords that 'the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property'.[9] Here, there is a shift from the context-specific exercise of judicial discretion to the use of general principles of property law that apply irrespective of the relationship between the parties. Whilst the presumed intention resulting trust was used in matrimonial ownership disputes, *Pettitt* and *Gissing* have been regarded as the 'starting point' for the judicial development of modern implied trust principles.[10]

With a view to understanding the use of discretion in ownership disputes over the family home, this chapter begins by analysing *Pettitt* and *Gissing* and their Lordships' treatment of section 17. It then analyses the trust framework with a view to querying whether, despite an explicit rejection of interpretations of section 17 permitting the exercise of a substantive judicial discretion, there was in fact the residual possibility of discretion being used by the courts through their interpretation of 'common intention'. Furthermore, this chapter will evaluate the extent to which the framework itself encouraged fresh movements by the courts towards the use of discretion. Noting the various forms of discretion outlined in Chapter One, it will consider the use of fact-finding discretion and discretion inherent in the interpretation of rules.

*Pettitt* and *Gissing* are repeatedly emphasised as the main points of reference for the courts when applying the resulting trust and common intention constructive trust, yet

[4] *Hine v Hine* [1962] 3 All ER 345 (CA).
[5] *Appleton v Appleton* [1965] 1 All ER 44 (CA).
[6] *Pettitt v Pettitt* [1968] 1 All ER 1053 (CA) 1063. See also *Wilson v Wilson* [1963] 2 All ER 447 (CA) 452 (Russell LJ).
[7] *Pettitt v Pettitt* [1970] AC 777 (HL).
[8] *Gissing v Gissing* [1971] AC 886 (HL).
[9] *Pettitt v Pettitt* (n 7) 813 (Lord Upjohn).
[10] C Harpum, 'Adjusting Property Rights between Unmarried Cohabitants' (1982) 2 *Oxford Journal of Legal Studies* 277, 277.

their Lordships' judgments lacked clarity in their exposition of the relevant principles and failed to provide theoretically satisfactory bases for the various trusts employed in ownership disputes. More problematically, through the prioritisation of general principles of property law, the legal framework did not accommodate the domestic context.[11] This chapter will reflect on the extent to which these factors prompted the courts to exercise discretion as a means to overcome these deficiencies.[12]

## *PETTITT v PETTITT*

*Pettitt* occurred at a pivotal time as the recently introduced Divorce Reform Act 1969 liberalised divorce law in England and Wales. It was also decided on the cusp of extensive changes being made to the judicial regulation of ownership of property held by married couples upon dissolution of marriage. Following a lengthy process of consultation by the newly established Law Commission,[13] the Matrimonial Proceedings and Property Act 1970 was passed, granting the courts 'a new armoury of powers' applicable upon the breakdown of marriage.[14] These powers enabled a court to transfer property to the other spouse, order financial provision between the parties and declare what interest was acquired by a spouse who made improvements to the property in dispute. It is important to note that *Pettitt* and also *Gissing* were decided prior to the commencement of this statute.[15]

*Pettitt* concerned an ownership dispute over a matrimonial home known as 'Tinker's Cottage'. This property was purchased by the wife, Hilda Pettitt, through a combination of an inheritance and the proceeds of sale of a previously owned property. Legal title to Tinker's Cottage was placed in the wife's name alone. Her husband, Harold Pettitt, argued that by virtue of renovations that he performed on the cottage, including the installation of wardrobes, laying a lawn and building an ornamental well, he was entitled

[11] On the process of 'familialisation of property law' see, J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 330 and A Hayward, 'Family Property and the Process of Familialization of Property Law' [2012] 23(3) *Child and Family Law Quarterly* 284.

[12] Chapter One indicated that discretion can be more readily identifiable in certain contexts; see N Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K Hawkins, *The Uses of Discretion* (OUP 1991) 361.

[13] Law Commission, *Report on Financial Provision in Matrimonial Proceedings* (Law Com No 25 1969). This Report built upon an earlier framework of limited statutory provisions, which, prior to the Matrimonial Causes Act 1963, were largely focused on maintenance of the spouse upon divorce. See SM Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) Chapter 10.

[14] K Gray, *Reallocation of Property on Divorce* (Professional Books 1977) 53.

[15] The statute came into force on the 1st January 1971.

to a proportion of the proceeds of sale of the cottage. He argued that these renovations had enhanced the value of the cottage by £1,000. The Registrar and Court of Appeal awarded the husband £300. The Court of Appeal reluctantly came to this conclusion, despite believing that it would be an 'absurd result' that 'the moment he (the husband) puts up a shelf or touches up a window-sill', the husband would acquire a proprietary interest.[16] However, as a matter of precedent, the court felt directly bound by the previous authority of *Appleton*.[17]

The House of Lords rejected the husband's claim and stated that the work performed by the husband 'did not go beyond what a reasonable husband might be expected to do'.[18] Their Lordships held that the jobs and degree of renovation undertaken by the husband were of an 'ephemeral character' and, at all times, it was recognised that ownership of the property was vested in the wife.[19] In short, proprietary entitlement could not be provided for those who 'indulge in what is now a popular hobby'.[20] The court held that there needed to be a direct financial contribution channelled towards the acquisition of the property and work of this kind performed by the husband was not sufficiently referable to the acquisition of a proprietary interest in the property itself. As a result, the husband's claim failed.

Before analysing the use of discretion in *Pettitt*, it is important to evaluate the methodology used to deny the husband a proprietary interest. Two key issues present in *Pettitt* were the application of the presumptions of resulting trust and advancement and also the role played by agreement in the conferral of proprietary entitlement. In relation to the former, their Lordships analysed the presumptions of resulting trust and advancement with varying degrees of enthusiasm. Lord Upjohn was the main proponent of the resulting trust approach.[21] Lord Upjohn stated that where property was conveyed outright into the name of one spouse at law 'that will operate to convey also the beneficial ownership'.[22] In contrast, where property was conveyed into joint names, beneficial ownership would be shared by the spouses jointly.[23] Both starting points could be modified through the application of the presumptions of resulting trust and advancement. Thus, as Lord Reid noted, despite a conveyance into the name of another

[16] *Pettitt v Pettitt* (n 6) 1057-1058 (Wilmer LJ).
[17] *Appleton v Appleton* [1965] 1 All ER 44 (CA).
[18] *Pettitt v Pettitt* (n 7) 806 (Lord Morris).
[19] ibid 796 (Lord Reid).
[20] ibid 826 (Lord Diplock).
[21] ibid 813-814 (Lord Upjohn).
[22] ibid 813-814.
[23] ibid 814, 815.

'a contributor to the purchase price will acquire a beneficial interest in the property'.[24] Likewise, a conveyance into joint names generating a beneficial joint tenancy was seldom determinative and most often the resulting trust would apply and beneficial ownership would follow the financial contributions of the parties.[25] In each instance 'property is held for those persons [contributors] in proportion to the purchase money that they have provided'.[26]

Transposed on top of these resulting trust principles was, for Lord Upjohn, the fundamental principle that 'the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition';[27] Lord Upjohn envisaged 'some lease or conveyance which shows how it [the property] was acquired'[28] which would also include 'in whom the beneficial title is to vest'.[29] However, unlike the other members of the House of Lords, Lord Upjohn did not anticipate that an agreement between the parties would generate proprietary entitlement. Similarly improvements, as distinct from contributions, did not, prima facie, give rise to a claim to the property.[30] This was a key observation in *Pettitt*, since the husband had not made a contribution triggering a resulting trust. While it appears that Lord Morris and Lord Hodson both adopted Lord Upjohn's 'traditionalist approach',[31] in contrast, Lords Reid and Diplock countenanced the possibility of agreements between the parties generating proprietary entitlement and, problematically, in the context of shared homes, this generated issues with the satisfaction of formalities affecting land.[32] As will be explored later, additional difficulties were generated by the fact that parties in a domestic setting tended not to make agreements with any expectation that they have binding legal force.[33]

The second key issue was the concept of party agreement or 'common intention' which was central to Lord Diplock's opinion in *Pettitt*, although he developed his views considerably further in *Gissing*. Where both parties had made contributions to the

[24] ibid 794 (Lord Reid).
[25] ibid 814.
[26] ibid 814.
[27] ibid 813.
[28] ibid 813.
[29] ibid 813.
[30] ibid 818. An agreement could provide the basis for a monetary claim or possibly an estoppel.
[31] J Tiley, 'Family Property Rights-Contribution and Improvement' [1969] *Cambridge Law Journal* 191, 191.
[32] In particular, section 53(1)(b) Law of Property Act 1925.
[33] *Pettitt v Pettitt* (n 7) 810 where Lord Hodson stated that to expect married couples to form solemn agreements as to property ownership was 'grotesque' echoing *Balfour v Balfour* [1919] 2 KB 571 (CA).

acquisition of property, their proprietary interests would 'depend upon their common intention as to what those interests should be'.[34] The court was permitted to use inferences based on conduct when determining this common intention. Lord Hodson and Lord Morris were persuaded by the rebuttable presumptions of advancement and resulting trust to assist in this process of inference. Yet Lord Reid and Lord Diplock went further than inference to indicate that imputation of an agreement or common intention to the parties was permissible. Lord Reid believed that the court could, in absence of an agreement, 'ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse'.[35] Here, the court would isolate an agreement between the parties based on an objective viewpoint. Similarly, Lord Diplock believed that imputation of an agreement was permissible based on an assessment of what the parties would have thought, had they directed their minds to the question of ownership of the property. However the majority stance in *Pettitt* was that the common intention had to be real and could not be invented by the court. Lord Morris stated that using general property principles, the court was required to determine where ownership lay, and despite evidential difficulties in this process, the court must 'find out exactly what was done or what was said and must then reach conclusion as to what was the legal result'.[36]

Despite the permissibility of common intentions, no conclusive answer was given on the direct enforceability of common intentions between parties or the relationship that common intention had with the actual generation of proprietary entitlement under a trust. This was because, as Lord Diplock subsequently accepted in *Gissing*, greater focus was placed on the finding of an agreement in the earlier cases as opposed to the role of agreement in the conferral of proprietary entitlement. Thus, *Pettitt* focused more on whether the common intention reached between the parties had to have actually existed, or could be inferred, or even imputed, from the parties' conduct. The endorsement of common intention in *Pettitt* will be analysed further below but for present purposes it highlighted a division within the House of Lords. Lord Upjohn, an experienced property lawyer, sought to emphasise general principles of property law as the tools for resolving these disputes. In contrast, Lord Diplock accepted this approach but was keen to highlight the limited effectiveness of property law principles premised on agreements as to proprietary entitlement, within the domestic context.

[34] ibid 822 (Lord Diplock).
[35] ibid 795 (Lord Reid).
[36] ibid 804.

In *Pettitt*, the House of Lords acknowledged the volume of case law generated by section 17. In particular, Lords Reid, Hodson and Diplock all noted the large number of section 17 applications made to the High Court in addition to, as Lord Hodson remarked, 'an unknown number in the county courts'.[37] Lord Reid remarked that the area was in an 'unsatisfactory state'.[38] For Lord Morris this state of the law made the interpretation of section 17 by the House of Lords in *Pettitt* a 'question of wide general importance'.[39] Their Lordships were united in the view that this area required reform but that this reform was not to come from the judiciary.[40] This viewpoint necessitated the dismantling by the House of Lords of the discretionary jurisdiction arrogated by the Court of Appeal under the auspices of section 17. In analysing the evolution of the use of discretion in family property cases, their Lordships' treatment of the discretion conferred by section 17 and its use in the creation of 'family assets' is important. General viewpoints emerged from the decision but unanimity and coherence between the various viewpoints was, at times, absent.

All members of the House of Lords accepted that section 17 conferred a judicial discretion.[41] The key issue for the House of Lords was the interpretation of 'as he thinks fit' which was present within the 'long and complicated' wording of section 17.[42] As Lord Reid noted:

> 'These are words normally used to confer a discretion on the court: where the discretion is limited, the limitations are generally expressed: but here no limitation is expressed'.[43]

From this perspective Lord Reid acknowledged, although without directly citing any cases, that section 17 had been interpreted to permit 'an unfettered discretion to override existing rights in the property' on the basis of what was 'just and equitable in the whole

[37] ibid 797 (Lord Reid), 806 (Lord Hodson), 819 (Lord Diplock).
[38] ibid 819 (Lord Diplock), 808 (Lord Hodson) noting the 'difficult cases' that have created inconsistent decisions within the Court of Appeal.
[39] ibid 797 (Lord Morris).
[40] Perhaps affirming the view in D Lasok, 'The Problem of Family Law Reform in England' [1966-1967] 8 *William and Mary Law Review* 589, 589 that the 'English Judiciary, unlike the United States Supreme Court, even at the level of the House of Lords, has always been rather reluctant to take policy making decisions or champion great social causes but has never been afraid of being instrumental in the adaption of the law to the needs of the changing society'.
[41] *Pettitt v Pettitt* (n 7) 792 (Lord Reid), 799 (Lord Morris), 808 (Lord Hodson).
[42] ibid 792 (Lord Reid).
[43] ibid 792 (Lord Reid).

circumstances of the case'.[44] By way of contrast he also noted that it had been interpreted in an opposite manner whereby it denied the court the ability to 'disregard any existing property right'.[45] The scope of discretion was not the only issue addressed. For example, Lord Hodson was keen to emphasise that broad and narrow interpretations of section 17 were not limited to ownership disputes but applied to other types of dispute, as section 17 formed the basis for a variety of claims used to 'protect the matrimonial relationship'.[46] Consistent with the academic scholarship on judicial discretion, it is arguable that the House of Lords is identifying that the degree of discretion conferred by section 17 varied between contexts and that expansive interpretations of the scope of section 17 can be found in occupation disputes.

When delineating the precise interpretation of section 17, Lord Reid stated that the 'meaning of the section cannot have altered since it was passed in 1882'.[47] This fidelity to original intent was echoed by Lord Morris who noted that 'the words of section 17 must be given the meaning which they had when the Act was passed'.[48] Lord Morris explored the historical context behind the passage of section 17 and highlighted the similarity of the wording to its predecessor, section 9 of the Married Women's Property Act 1870. For Lord Morris, this comparison rendered section 17 a purely procedural section that facilitated 'speedy decision' by the court.[49] This historical interpretation was further adopted by Lord Upjohn who noted that the continued use of 'as he thinks fit' in 1882 supported the continued procedural use of section 17 where, like under section 9, the court would have to address 'very difficult questions' of entitlement.[50] Thus one interpretation for section 17 stemmed from its connection to an earlier procedural section. Another interpretation leading to the view of section 17 as procedural was the fact that other claims could be made between spouses outside of a section 17 application. For Lord Diplock, if section 17 was the only means of bringing a dispute to court for married couples, a wider discretion would be 'tenable' but, as it was not, 'it can hardly be supposed that Parliament intended that the title of spouses to property should be different if one procedure for determining it were adopted instead of another'.[51]

[44] ibid 792 (Lord Reid).
[45] ibid 792 (Lord Reid). Lord Reid also noted intermediate views at 793.
[46] ibid 808 (Lord Hodson).
[47] ibid 793 (Lord Reid).
[48] ibid 797 (Lord Morris).
[49] ibid 798 (Lord Morris) and echoed at 807 by Lord Hodson.
[50] ibid 811 (Lord Upjohn), 821 (Lord Diplock).
[51] ibid 820.

The original intention of Parliament was also divined through reference to the social and political climate at the time section 17 was passed. In an era where 'certainty and security of rights of property were still generally regarded as of paramount importance', Lord Reid found it 'incredible that any Parliament of that era could have intended to put a husband's property at the hazard of the unfettered discretion of a judge'.[52] A similar view was taken by Lord Upjohn believing it to be 'inconceivable' that the courts would decide entitlement otherwise than in accordance with 'establish principles of law and equity'.[53] Therefore it was 'perfectly possible to construe the words as having a much more restricted meaning'.[54] Also by adopting an interpretative approach that focused on 1882, Lord Morris was able to reject the use of discretion in the development of 'family assets' which were never envisaged at the time. He stated:

> 'One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property'.[55]

This textual construction was also adopted by Lord Morris who opined that the phrase 'any question between husband and wife as to the title or possession of property' suggested a mechanism for clarification rather than 'taking title away from the party who had it'.[56] This argument resonated with the views of Megarry writing in 1963 who noted that litigants were sometimes 'questioning the unquestionable', that is raising a 'question' as per the wording of section 17 to open the court's discretion when in reality title was clear and unquestionable.[57] This approach is instructive when conceptualising the way discretion can modernise a legal framework. Here, the House of Lords is taking an interpretative approach focusing on original intent of Parliament. Whilst an acceptable model of statutory interpretation at the time, it instinctively appears unduly conservative in light of the previous case law developments in the Court of Appeal.

By restricting the interpretation of section 17, this cast doubt on the earlier development of the 'family assets' approach through the use of discretion, which for Lord Reid

[52] ibid 793 (Lord Reid).
[53] ibid 813 (Lord Upjohn).
[54] ibid 793 (Lord Reid).
[55] ibid 798 (Lord Morris).
[56] ibid 798 (Lord Morris).
[57] RE Megarry, 'Notes' (1963) 79 *Law Quarterly Review* 333, 335.

involved the impermissible introduction of a 'new conception into English law'[58] and, according to Lord Hodson, 'a new field involving change in the law of property'.[59] Lord Morris opined that 'however benevolently motivated'[60] and even if 'current social conditions pointed to the desirability of endowing some court with wider powers', section 17 was not to be used to 'grant to a spouse a beneficial interest in property which he or she did not previously have'.[61] Lord Morris also echoed this view by noting the evidential difficulties of a broad interpretation and the implicit subjectivity involved in:

> '…endowing a judge with the power to pass the property of one spouse over to the other or assessing the deserts of the one or the other in light of their work, activities and conduct'.[62]

Their Lordships rejected the use of 'family assets' as a basis for obtaining a proprietary interest. Despite this viewpoint, Lord Diplock continued to use the expression as merely a shorthand label for assets acquired and utilised by husband and wife in the domestic sphere[63] but accepted that the concept was 'devoid of legal meaning' and no legal consequences flowed from it.[64] Lord Hodson's opinion was particularly insightful on this point and suggested some degree of support for the 'family assets' approach. Citing the observations of Diplock LJ in *Ulrich v Ulrich and Fenton* as to the nature of interaction between married couples, Lord Hodson was sympathetic to the prospect of labelling property a 'family asset' and then enabling a judge to exercise discretion on that basis.[65] He noted that:

> 'This solution has the attraction that it appears to narrow the field so as to avoid giving the judge an uncontrolled discretion simply indicating that he may deal with property rights of either spouse by calling specific property family asserts and that he may then exercise his discretion in the light of that decision'.[66]

[58] *Pettitt v Pettitt* (n 7) 795 (Lord Reid).
[59] ibid 810 (Lord Hodson).
[60] ibid 799 (Lord Morris).
[61] ibid 797 (Lord Morris).
[62] ibid 799 (Lord Morris).
[63] ibid 819 (Lord Diplock).
[64] ibid 817 (Lord Upjohn).
[65] *Ulrich v Ulrich and Felton* [1968] 1 All ER 67 (CA).
[66] *Pettitt v Pettitt* (n 7) 810 (Lord Hodson).

Yet, notwithstanding his support for a limited form of discretion Lord Hodson stated that proceeding on this basis was 'a matter of policy for Parliament'.[67] Marriage did not create automatic joint ownership of property and if the 'family assets' approach was recognised, 'community of ownership between husband and wife would be assumed unless otherwise excluded'.[68] Cumulatively the opinions of their Lordships rejected the idea that section 17 of the Married Women's Property Act 1882 could provide for reallocation of assets between husband and wife following relationship breakdown. Section 17 merely provided a summary procedure for the determination of questions as to occupation or ownership and did not provide a judicial mechanism to create, vary or extinguish property rights.

When analysing how discretion was to be used in matrimonial ownership disputes, various observations can be made as to the approach taken by the House of Lords to the interpretation of section 17. Firstly, when rejecting expansive interpretations of section 17, their Lordships focused largely on the earlier Court of Appeal cases that concerned improvements made to property as opposed to cases where both parties had contributed to the acquisition of property. For example, *Appleton* was a key authority analysed by their Lordships. It should be noted at the outset that this approach is understandable for several reasons. Cases dealing with improvements were directly relevant owing to the facts of *Pettitt* where the husband clearly had not made a substantial financial contribution and was relying upon post-acquisition renovations to the property. Similarly, *Appleton* was directly relevant seeing as the Court of Appeal in *Pettitt* felt obligated to follow that decision as a matter of precedent yet were clear in their view that *Appleton* was 'wrongly decided'.[69] However, this focus on improvement cases is problematic and departs from the intention of their Lordships when providing broad guidance on the legal framework applicable to matrimonial property. For example, Lord Reid rejected disposing of *Pettitt* on 'somewhat narrow grounds' and instead sought to look at the issues generated by this area in a broad manner.[70] Nevertheless, by focusing extensively on *Appleton,* this is likely to have resulted in the court adopting a narrow focus. That is, as an approach, it generated a potential over-emphasis on cases using what was termed 'unfettered discretion'[71] by Lord Hodson and 'palm tree justice' as

[67] ibid 810 (Lord Hodson).
[68] ibid 810. This echoes the view of the majority in Home Office, *Report of the Royal Commission on Marriage and Divorce* (Cmd. 9678, 1951-56) that rejected the introduction of community of property in England and Wales.
[69] *Pettitt v Pettitt* (n 6) 1062 (Russell LJ)
[70] *Pettitt v Pettitt* (n 7) 792 (Lord Reid). See also Lord Reid's observation of the need to at 'the wider questions'.
[71] ibid 809 (Lord Hodson).

opposed to cases such as *Rimmer v Rimmer*[72] and *Fribance v Fribance* where the use of discretion was in fact structured.[73] Lord Hodson came the closest to engaging with these earlier decisions but, unfortunately, declined to fully explore structured discretion in this context. This approach is problematic as, whilst the Court of Appeal in improvement cases clearly stretched the scope of section 17, earlier and more modest judicial initiatives required scrutiny particularly if the House of Lords was to perform, as Lord Diplock later noted in *Gissing*, 'a survey…of numerous decisions of the Court of Appeal during the past 20 years'.[74] The House of Lords' methodology focussed on instances of discretion being exercised in an overly expansive manner and this denied full exploration of judicial developments that had structured discretion. Lord Upjohn's opinion provides an example of this somewhat myopic approach: he stated that the issue for the House was whether section 17 gives the court the ability to 'do what is fair between them notwithstanding their proprietary interests or whether the section is only a procedural section'.[75] Here there appears to be a polarisation between expansive and narrow interpretations without recognition of more moderate views. This may have prevented the comprehensive and rigorous review of the Court of Appeal authorities that should have been embarked upon, as required by the senior appellate court in this jurisdiction.[76] It also demonstrates the House of Lords focusing on an exercise of discretion in *Appleton* which, as Chapter One noted, could rightfully be viewed as 'personal, idiosyncratic, irrational, tyrannical, unstable, and chaotic'.[77]

Secondly, the historical focus on the 1870 and 1882 Married Women's Property Acts when interpreting the scope of section 17 has been criticised. Cretney argued that it was 'reasonable' for the House of Lords to argue that the interpretation given to section 17 could not have changed since 1882.[78] However, Lord Reid's belief that it would be unlikely that 'any Parliament of that era could have intended to put a husband's property at the hazard of the unfettered discretion of a judge' could be viewed as 'historically fallacious'.[79] Cretney argued that, upon divorce or nullity and in relation to a marriage settlement, section 5 of the Matrimonial Causes Act 1859 gave the court the ability to

[72] *Rimmer v Rimmer* [1952] 2 All ER 863 (CA).
[73] *Fribance v Fribance* [1957] 1 All ER 357 (CA).
[74] *Gissing v Gissing* (n 8) 904 (Lord Diplock).
[75] *Pettitt v Pettitt* [1970] AC 777 (HL) 812 (Lord Upjohn).
[76] See S Cretney, 'No Return from Contract to Status' (1969) 32 *Modern Law Review* 570.
[77] S Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120 123.
[78] Cretney (n 76) 572.
[79] ibid.

'make such orders…as to the Court shall seem fit'.[80] This observation shows that grants of expansive discretion were not necessarily common in the Victorian period but they certainly were not unknown. This traditionalism and return to first principles perhaps exposes an opinion formed by their Lordships that discretion was always 'unfettered' and necessitated movements towards unpredictable and highly 'individualised' decision making.[81] Previous chapters have shown that a more moderate position can be identified in the case law revealing a 'confined' and 'structured' discretion.[82]

Although the extensive focus on the historical context to the Married Women's Property Acts was predictable owing to prevailing views as to statutory interpretation, nevertheless it highlights *Pettitt* as a backward-looking decision. Lord Upjohn found it 'helpful' to go back to 1870 when interpreting the scope of discretion conferred by section 17 and, after rejecting its substantive interpretation, reinforced the continued use of the presumptions of resulting trusts and advancement.[83] When analysing 'family assets' he noted that:

> '[i]t has been said that young people today do not give their minds to legalistic technicalities of advancements and resulting trusts; neither did they in 1788 and it is only because they did not do so then that these presumptions were invented'.[84]

With this historical focus, the Lordships' speeches prompted a return to doctrinal first principles, rather than giving future guidance for the development of the law. *Pettitt* saw the House of Lords focussing on a particular use of discretion that they were keen to reject and discretionary methodologies such as the 'family assets' approach that they instinctively believed should not underpin the legal framework. General principles of property law were selected to drive legal development. However, as noted above, the principled basis on which such development could occur was not elaborated or articulated in their Lordships' judgments. This process of wiping the slate clean was beneficial in relation to cases such as *Hine* and *Appleton*, yet it was performed at the expense of a thorough systematic analysis of Court of Appeal authorities that evidenced structured discretion and, as will be further explored below, a failure to fully appreciate

[80] See S Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 399.
[81] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977) 5-9.
[82] ibid Chapters Three and Four.
[83] *Pettitt v Pettitt* (n 7) 812 (Lord Upjohn).
[84] ibid 816 (Lord Upjohn) referencing the date of the resulting trust case of *Dyer v Dyer* (1788) 2 Cox 92.

the judicial instincts behind the Court of Appeal's use of discretion. Crucially, the notion of common intention, which later became the cornerstone of the modern legal framework, needed further elaboration and this occurred, in part, just over a year later in *Gissing v Gissing*.

## *GISSING v GISSING*

In *Gissing* a married couple acquired property in the name of the husband, Raymond Gissing. This property was purchased by a mortgage secured in the husband's name along with a loan by his employer. The wife, Violet Gissing, made no direct or indirect financial contribution to the acquisition of the property. She laid a lawn and used her own savings to purchase furnishings. The wife argued that, upon the breakdown of their marriage, the husband made statements indicating that the property would be hers and that he would continue discharging the mortgage debt. Unlike *Pettitt*, where the husband used section 17 of the Married Women's Property Act 1882 to bring a claim, the wife in *Gissing* applied via an originating summons in the Chancery Division for an order recognising her beneficial ownership of the property.[85] In the Chancery Division, Buckley J held that the husband was the sole owner of the property. As noted in Chapter Three, the Court of Appeal reversed this decision and, in a majority judgment, held that the wife was entitled to a half share of the beneficial ownership. Lord Denning MR and Phillimore LJ believed that, as both parties acquired the property through joint efforts, the property was a family asset and ownership was to be divided equally.

The House of Lords unanimously held that the wife was not entitled to an interest in the property as she had not made a qualifying contribution to the property to enable the court to generate an inference that the parties were to share beneficial ownership. The wife's contributions to the home did not represent 'either directly or indirectly, any substantial contribution to the purchase of the house' capable of triggering beneficial entitlement through a trust.[86]

Various key principles were generated by their Lordships' opinions in *Gissing*. As a preliminary observation, Viscount Dilhorne noted the absence of special rules for married couples.[87] Drawing upon similar comments made by Lord Upjohn in *Pettitt*,[88] he

[85] cf G Moffat, *Trusts Law* (5th edn CUP 2009) 611 stating that the claim in *Gissing v Gissing* was brought under section 17.
[86] *Gissing v Gissing* (n 8) 903 (Lord Pearson).
[87] ibid 899 (Viscount Dilhorne).

stated that 'there is not one law of property applicable where a dispute as to property is between spouses and another law of property where the dispute is between others'.[89] Therefore using judicial discretion and designating the property a 'family asset' were approaches that had been deposed in *Pettitt*.[90] This revealed a clear shift from the context-specific approach previously adopted by the Court of Appeal which was developed through the use of discretion. Noting the lack of rules applicable to married couples, Lord Diplock reiterated that section 17 'did not entitle the court to vary the existing proprietary rights of the parties'.[91] For that to happen, that power 'must be found in statutory enactment'.[92]

Echoing *Pettitt*, the House of Lords held that disputes were to be governed by the same ordinary trust principles applied between strangers.[93] With the primary focus placed on trusts, Lord Diplock stated:

> 'Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust'.[94]

Where there was an agreement to share beneficial ownership, the primary method of enforcement would be an express trust of land. However, for this to be enforceable, compliance with the writing requirements stipulated by section 53(1)(b) of the Law of Property Act 1925 would be necessary. If no writing was present, Lord Diplock stated that enforceability of an agreement to share beneficially could be generated via section 53(2) of the Law of Property Act 1925, namely through classifying the trust as 'resulting, implied or constructive'. Lord Diplock provided the following well-known statement:

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[88] *Pettitt v Pettitt* (n 7) 813 (Lord Upjohn).
[89] *Gissing v Gissing* (n 8) 899 (Viscount Dilhorne).
[90] But note *Chapman v Chapman* [1969] 3 All ER 476 (CA), the first Court of Appeal decision decided after the House of Lords' decision of *Pettitt v Pettitt*, which continued to use the term 'family assets'.
[91] *Gissing v Gissing* (n 8) 904.
[92] ibid 898 (Lord Morris).
[93] Note the exception being the presumption of advancement applicable between married couples.
[94] *Gissing v Gissing* (n 8) 904 (Lord Diplock)

> 'A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land'.[95]

Under this formulation, a non-owning spouse could acquire a beneficial interest in a property through an agreement reached between the parties 'notwithstanding the absence of any written declaration of trust'.[96] Lord Diplock envisaged that this alone was not enough to justify equitable intervention and that the non-owning spouse must suffer some detriment in order for the court to give effect to the agreement. Without detriment, it would be a voluntary disposition of an interest in land requiring writing.[97] To justify a finding of a trust, Lord Diplock stated that the non-owning claimant must:

> 'do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure'.[98]

If there was no available common intention between the parties, conduct would suffice and the courts could proceed on the basis of inference measured by what was 'reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the

[95] ibid 905 (Lord Diplock).
[96] ibid 905 (Lord Diplock).
[97] The concept of detrimental reliance introduced via Lord Diplock's dicta has generated extensive comparison between the common intention constructive trust and proprietary estoppel which is outside the scope of this thesis. For modern views on the relationship between the common intention constructive trust and estoppel see D Hayton, 'Equitable Rights of Cohabitees' [1990] *Conveyancer* 370, C Rotherham, 'The Property Rights of Unmarried Cohabitees: The Case For Reform' [2004] 68 *Conveyancer and Property Lawyer* 268, 272, T Etherton, 'Constructive Trusts and Proprietary Estoppel: the Search for Clarity and Principle' [2009] 2 *Conveyancer and Property Lawyer* 104.
[98] *Gissing v Gissing* (n 8) 905 (Lord Diplock).

other party'.[99] Their Lordships stated that a direct financial contribution to the acquisition of property would suffice to infer a common intention to share. For Lord Reid, an indirect financial contribution would potentially suffice, however Lord Pearson indicated that he would support this view only in circumstances where evidence of an agreement between the parties could be adduced.[100] General household expenditure and improvements to property would not generate a beneficial interest through inference and required an express agreement between the parties. Homemaker contributions would not generate any entitlement as, according to Viscount Dilhorne, 'proof of expenditure for the benefit of the family by one spouse will not of itself suffice to show any such common intention as to the ownership of the matrimonial home'.[101] The House of Lords were also clear that a common intention could not be imputed to the parties. Lord Morris stated that 'the court cannot devise arrangements which the parties never made' or 'ascribe intentions which the parties in fact never had'.[102] On this point, Lord Diplock departed from his previous views in *Pettitt* which supported imputation of intentions and in *Gissing* accepted that they were 'not the law'.[103]

Through accepting the House of Lords' interpretation of section 17 in *Pettitt*, the rejection of discretionary resolution of disputes was a key aspect of *Gissing* and will be explored further below. However, what took its place, namely the prioritisation of trust principles, was problematic for several reasons. Furthermore, building on the framework of discretion outlined in Chapter One, the rules laid down in the House of Lords' decision may militate towards the exercise of discretion by the courts. Firstly, at a general level, the judgment lacks a clearly discernible ratio. Lord Diplock's judgment provided the most detail on the principles of common intention but his opinion was, as Rotherham noted, 'loosely reasoned and difficult to reconcile with principle or precedent'.[104] The treatment of the concept of imputed intentions was particularly incoherent. For example, Lord Diplock departed from his earlier views in *Pettitt*[105] and in *Gissing* believed that the courts could not artificially ascribe intentions to parties via imputation. He stated:

[99] ibid 906 (Lord Diplock).
[100] ibid 903 (Lord Pearson).
[101] ibid 901 (Viscount Dilhorne).
[102] ibid 898 (Lord Morris).
[103] ibid 904.
[104] Rotherham (n 97) 272.
[105] A parallel would be the changing opinion of Lord Reid who in *Pettitt* envisaged imputing an agreement to the parties, akin to what Mee terms a 'fictional contract', but then accepted that contract law did not determine the matter in *Gissing* at 896. See J Mee, *The Property Rights of Cohabitees* (Hart 1999) 16. Lord Reid also stated ambiguously, at 897, in *Gissing* that he would be 'content' if imputation was permitted but would prefer a different basis for an agreement to be found.

> 'I did, however, differ from the majority of the members of your Lordships' House who were parties to the decision in Pettitt v Pettitt in that I saw no reason in law why the fact that the spouses had not applied their minds at all to the question of how the beneficial interest in a family asset should be held at the time when it was acquired should prevent the court from giving effect to a common intention on this matter which it was satisfied that they would have formed as reasonable persons if they had actually thought about it at that time. I must now accept the majority decision that, *put in this form at any rate*, this is not the law'.[106]

This statement is representative of numerous confused passages within the decision. Here, Lord Diplock accepted the impermissibility of imputed intentions but the phrase 'put in this form at any rate' suggested that a different form of imputation may be permissible. Lord Diplock does not provide any indication as to an acceptable form of imputed intention. A similar confusion can be seen in Lord Reid's changing views on imputation. In *Pettitt* he also accepted the use of imputed agreements but in *Gissing* accepted the impermissibility of imputation but nevertheless exhibited some support for the process. Their Lordships' approach of denying imputation of an agreement to the parties, and instead resorting to inference of an agreement based on conduct, was problematic for Lord Reid. He accepted that using inference alone meant that he 'could not contemplate the future results of such a decision with equanimity'.[107] This suggests some degree of support for imputation, which resonated with his sympathy for 'an honest and candid wife' who would be denied an interest for admitting that no agreement was reached; compared to a 'more sophisticated wife' who, knowing the law, could acquire an interest after adducing 'some vague evidence' of an agreement.[108]

A different form of ambiguity as to imputation can be seen in Lord Pearson's speech, where he stated that 'an intention can be imputed: it can be inferred from the evidence of their conduct and the surrounding circumstances'.[109] This observation reveals a merging of imputation and inference. Statements such as these injected ambiguity into the developing framework, and may have opened the door for some members of the judiciary to exploit the ambiguity in subsequent decisions, invariably to achieve

[106] *Gissing v Gissing* (n 7) 904 (emphasis added).
[107] ibid 897 (Lord Reid).
[108] ibid 897 (Lord Reid).
[109] ibid 902.

outcomes in cases that they believe are ostensibly just. As Chapter One noted, this may occur through the informal discretion of a judge when interpreting and applying rules.

Another issue was Lord Diplock's treatment of the pre-*Pettitt* case law and the requirement of detrimental reliance. In a clear act of revisionism, Lord Diplock stated that where the courts had previously been analysing agreements between the parties, it was 'assumed sub silentio' that the party relying on the agreement had completed 'something to facilitate its acquisition', that is, demonstrated reliance upon the agreement.[110] As Chapters Two and Three demonstrated, this concept of detrimental reliance was not present in this early case law. Rather, Lord Diplock can be viewed as seeking to establish the legitimacy of his common intention approach by showing that the principle had a heritage or pedigree. This particular approach can be contrasted with that of Viscount Dilhorne, who omitted any reference to reliance upon the agreement as a precursor for enforceability, reasoning that intervention by the court to give effect to the parties' common intention would be justified where there was a 'breach of faith'.[111] The ambiguity in both approaches underscores the difficulty of these decisions as foundations for the future development of the implied trusts. It is arguable that their Lordships' aim for clarifying the legal framework by defaulting back to well-known principles of property law, had unintended consequences and may have provided scope for the continued application of judicial discretion. This form of discretion was different from that used under section 17 and centred on the informal exercise of discretion in the interpretation of rules and fact-finding. After all, as Chapter One noted, the exercise of judicial discretion often arises 'as the result of some absence or indeterminacy of the legal materials'.[112]

## CRITICISMS OF *PETTITT v PETTITT* AND *GISSING v GISSING* AND THE ROLE OF JUDICIAL DISCRETION

*Pettitt* and *Gissing* channelled ownership disputes through the medium of general property law principles. As Nourse LJ later noted in *Grant v Edwards*, whenever a court is determining beneficial ownership through the implied trusts, the court 'must climb again the familiar ground which slopes down from the twin peaks of *Pettitt v*

[110] ibid 905.
[111] ibid 900.
[112] J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 97.

*Pettitt*…and *Gissing v Gissing*'.[113] Academics also regard these decisions as 'foundational',[114] the 'starting point'[115] or the 'origins'[116] of the implied trust framework, in particular the common intention constructive trust.[117] The use of trusts had been present in cases decided prior to *Pettitt* but their application had been modified through the substantive use of section 17. With a substantive use of discretion rejected by the House of Lords, deploying the trust had the benefit of simplicity, yet various issues arise. These issues demonstrate the potential for a continued use of discretion by the courts. There are three key points to note concerning the role of *Pettitt* and *Gissing* in embedding the potential for discretionary resolution of ownership disputes.

As noted above, the implied trust framework prioritised by the House of Lords in *Pettitt* and *Gissing* was ambiguous and both decisions have been subject to extensive criticism in the academic community.[118] In relation to the trust principles, Harpum noted that it is 'not easy to establish from the judgments in the two cases exactly what those principles were considered to be'.[119] Youdan stated that the decisions represented a failure of the House of Lords to 'carry out clear and useful restatement of the law'.[120] As a direct consequence, Harpum identified an absence of 'clear consensus' and 'unanimity amongst the commentators' in relation to the ratio of the decisions.[121] These viewpoints may provide a context in which a judge may call upon discretion to resolve ambiguity. Chapter One noted that one of the circumstances in which discretion can be implied by judges when deciding cases, consistent with Dworkin's weak sense of discretion, is through the discretion to 'make a judgment'.[122] This assumption of discretion will occur in more areas than others particularly, as Galligan opined, where 'legal rules appear to

[113] *Grant v Edwards* [1986] 2 All ER 426 (CA) 431. Noted by Mee (n 105) 117.
[114] JE Penner, *The Law of Trusts* (7th edn, OUP 2010) 101.
[115] Harpum (n 10) 277.
[116] R Smith, *Property Law* (7th edn, Longman 2011) 182.
[117] Barlow even states that *Gissing* 'invented' the constructive trust in A Barlow, 'Rights in the Family Home – Time for a Conceptual Revolution?' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Cavendish 2003) 61. *Gissing* also formed the basis for equitable developments in other Commonwealth jurisdictions; see Mee (n 105), RL Stenger 'Cohabitants and Constructive Trusts-Comparative Approaches' (1988) 27 *Journal of Family Law* 373 and S Wong, 'Constructive Trusts over the Family Home: Lessons to be Learned from other Commonwealth Jurisdictions?' (1998) 18 *Legal Studies* 369.
[118] For criticism see TG Youdan, 'Equitable Transformations of Family Property Law' in S Goldstein, *Equity and Contemporary Legal Developments: Papers Presented at the First International Conference on Equity* (Jerusalem 1990) 531.
[119] Harpum (n 10) 277.
[120] Youdan (n 118) 531.
[121] Harpum (n 27) 277. See also Mee (n 105) 118-119.
[122] R Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997) 31.

be unclear or incomplete'[123] or 'ambiguous, or inconsistent'.[124] As a result and drawing upon the work of Hart, Galligan argued that some legal standards are 'exceptionally open-textured, so that the judge's task in settling questions of interpretation still involves a substantial element of discretion'.[125] In light of the deficiencies in their Lordships' reasoning in both *Pettitt* and *Gissing*, it is arguable that the implied trusts framework provided an appropriate context for the continued use of judicial discretion albeit this time without an express conferral of discretion through a statutory provision.

Particular aspects of both decisions may trigger the use of judicial discretion. As a matter of legal taxonomy, their Lordships did not clarify the type of trust that may be utilised to acquire a proprietary interest in the matrimonial home. This observation fits within a larger issue concerning the lack of detailed analysis of trust principles. In *Pettitt* there was an absence of comprehensive discussion of trust principles and only one of their Lordships engaged fully with trust principles. Lord Upjohn, an experienced property law specialist, approached the issue of ownership of the matrimonial home through the use of the presumptions of resulting trust and advancement.[126] With a critique of the law stretching back to *Dyer v Dyer* in 1788, Lord Upjohn gave an orthodox articulation of resulting trust principles.[127] Lord Upjohn did not sit in *Gissing*, where there was greater discussion of trust principles. The reason for this greater discussion could be that, unlike *Pettitt* where a claim was brought using section 17, the wife made an ordinary originating summons in the Chancery Division, and so the House of Lords in *Gissing* was concerned with 'a property claim arising in the sphere of property law as distinct from matrimonial law and contract law'.[128] Lord Pearson echoed the viewpoint of Lord Upjohn in *Pettitt* by applying resulting trust principles whereas the other members of the House supported Lord Diplock's common intention analysis.[129]

The most common articulation, and arguably most problematic, to describe the trust used in matrimonial ownership disputes was the term 'resulting, implied or constructive' trust. Lord Reid,[130] Lord Morris,[131] Viscount Dilhorne[132] and Lord Diplock[133] all use this

[123] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986) 37.
[124] ibid 38.
[125] ibid 38.
[126] See Oxford Dictionary of National Biography http://www.oxforddnb.com/view/article/31780 accessed 30 January 2012.
[127] *Dyer v Dyer* (n 84).
[128] *Gissing v Gissing* (n 8) 902 (Lord Pearson).
[129] ibid 902.
[130] ibid 896.
[131] ibid 898.

term and do not seek to differentiate the various trusts. Lord Diplock recognised the 'three classes of trust' used in this phrase yet did not distinguish them.[134] The reference to this grouping undoubtedly emanated directly from section 53(2) of the Law of Property Act 1925 noting that the writing requirement for a declaration of trust of land in section 53(1)(b) did not affect 'the creation or operation of resulting, implied or constructive trusts'. However, the failure to distinguish was significant owing to the theoretical distinctions between these trusts. Traditionally, both resulting trusts and constructive trusts fall under the umbrella concept of implied trusts.[135] As Chapter Two demonstrated, the resulting trust is implied by law based on the presumed intention of the contributor to the acquisition whilst the constructive trust is imposed by law, irrespective of the intentions of the parties.[136] A failure to differentiate these types of trusts not only generates academic untidiness from a taxonomy point of view but also has direct consequences for how the trusts apply in practice. This, in turn, may encourage the use of discretion by the decision-maker to provide an answer in a given dispute. For example, confusion relating to the distinction between 'implied' and 'imposed' can be seen clearly in Lord Reid's statement that, in relation to a trustee of the property concerned, '[t]he facts may impose on him an implied, constructive or resulting trust'.[137] The failure to demarcate the different trusts coupled with a lack of differentiation between implying or imposing a trust, demonstrated a high degree of confusion in their Lordships' opinions in *Gissing*.[138]

Another key issue was the meaning of the term 'common intention'. The term was present in *Pettitt* but Lord Reid and Lord Upjohn make no reference to it. Lord Morris briefly mentioned the phrase in relation to a New Zealand decision, *Hofman v Hofman,*[139] and then noted that the husband in *Pettitt* would only be able to acquire an interest in the property if the courts could impute 'some common intention' to the parties based on the husband's renovations.[140] Lord Hodson referred to common intention and

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[132] ibid 901.
[133] ibid 905.
[134] ibid 905.
[135] Support for this approach is found in *Cowcher v Cowcher* [1972] 1 All ER 943, 949 (Bagnall J).
[136] Mee (n 105) 39. See further criticisms of this failure to distinguish the trusts in *Drake v Whipp* [1996] 1 FLR 826.
[137] *Gissing v Gissing* [1971] AC 886 (HL) 896.
[138] See J Wade, 'Trusts, The Matrimonial Home and De Facto Spouses' [1978-1980] 6 *University of Tasmania Law Review* 97, 101 on the requirement of common intention being somewhat at odds with the traditional understanding of constructive trusts as operating against the parties' intentions
[139] *Hofman v Hofman* [1965] NZLR 795.
[140] *Pettitt v Pettitt* (n 7) 806.

quoted from Lord Diplock's use of that term in *Ulrich v Ulrich and Felton*.[141] However, it was Lord Diplock's judgment that provided the most information on the use of the phrase in this context. He noted that, where property was acquired as a 'family asset', the interests of the parties depended on their common intention. After providing this statement of principle, he then asked how the court would 'ascertain the "common intention" of spouses'.[142] The use of quotation marks around the term may indicate its recent creation or, rather, that what was previously termed an agreement between the parties as to ownership by the court has now become categorised as 'common intention'. There was, as history has shown, clear potential for the exercise of judicial discretion in terms of evaluating whether a common intention arose on the facts of the case. For example, the role of bargain was not fully explored. Lord Upjohn in *Pettitt* stated that frequent recourse in previous cases had been made to *Balfour v Balfour*[143] regarding contracts between married couples but he stated that these agreements had 'little if any application to questions of title to the property of the spouses'.[144] This begged the question of whether the nature of the common intention needed to reach a degree of specificity akin to a contract or whether something falling short of a contract, like an informal understanding between the parties, would suffice. Equally, it could be questioned how enforceability was triggered. For example, would enforceability stem from one party failing to follow particular terms of the common intention reached between the parties[145] or would it arise simply on the basis that a common intention was present from which one party sought to resile? Clearly, the opaque requirement of common intention may necessitate the use of judicial discretion to resolve ambiguity.

A related issue which again may provide the foundation for the continued use of discretion is whether common intention analysis is appropriate when applied in ownership disputes over the matrimonial home. The concept of common intention was integral to the operation of the 'resulting, implied or constructive trust' used in *Gissing*. Many academics criticised its use by the House of Lords, particularly when their Lordships simultaneously accepted that articulated agreements or arrangements between the parties were likely to be absent in this context. As illustrated by Chapters Two and Three, this viewpoint had been recognised as early as 1948.[146] Viscount Dilhorne stated

[141] ibid 809-810.
[142] ibid 822.
[143] *Balfour v Balfour* (n 33).
[144] *Pettitt v Pettitt* (n 7) 816.
[145] See *Gissing* at 905 where Lord Diplock stated 'each acts in the manner provided for in the agreement'.
[146] See *Re Rogers' Question* [1948] 1 All ER 328 (CA) 328 (Evershed LJ) analysed in Chapter Two.

that in a 'great many cases, perhaps in the vast majority, no consideration will have been given by the parties to the marriage to the question of beneficial ownership'.[147] This view led Lord Pearson to accept that 'it must often be artificial to search for an agreement made between husband and wife as to their respective ownership rights'.[148] These observations seem to undermine the framework prioritised by their Lordships.

Furthermore, as an approach, the use of common intention was also problematic on a practical level. Following *Gissing,* Freeman noted that it was 'impossible for a solicitor to advise a client with certainty as to her proprietary rights in her home'[149] and in relation to the requirement of common intention, stated that the wife 'will laugh at you when you tell her that much depends on any agreement she has made with her husband'.[150] Here there is potential for an exercise of judicial discretion in the process of fact-finding and drawing inferences from those facts which Chapter One noted has been considered by Barak as the 'first area of judicial discretion'.[151] Similarly their Lordships appeared to accept the limitations of their own approach, which can arguably be viewed as an invitation to use judicial discretion. Lord Morris observed that the court must proceed on a route not 'flood-lit by clear evidence'[152] and even Lord Diplock who was the main proponent of common intention analysis stated that the court must 'do its best'.[153] Therefore, while the prioritisation of common intention may appear at face value to be a return to rules it arguably sanctioned the continued use of judicial discretion.

Another aspect of their Lordships' reasoning that suggests the potential for subsequent development of the use of discretion is the fact that general principles of property law may fail to accommodate the domestic dimension of these types of dispute. As Chapters Two and Three demonstrated, the gradual arrogation of judicial discretion in the pre-*Pettitt* era was motivated by various factors. Courts used discretion as a pragmatic tool to surmount evidential difficulties.[154] For example, the use of equal division in *Rimmer* was motivated by the intractable difficulties of determining precisely the respective

[147] *Gissing v Gissing* (n 8) 900 (Viscount Dilhorne).
[148] ibid 902 (Lord Pearson). A similar observation was made by Lord Reid, at 896, who acknowledged the fact that, even in instances where an agreement could be inferred from conduct, 'neither spouse gives a thought to the legal position or the legal consequences'.
[149] MDA Freeman, 'Towards a Rational Reconstruction of Family Property Law' (1972) *Current Legal Problems* 84, 94.
[150] ibid.
[151] A Barak, *Judicial Discretion* (Yale University Press 1989) 13.
[152] *Pettitt v Pettitt* (n 7) 803.
[153] *Gissing v Gissing* (n 8) 908. See also Lord Morris, at 898, who stated that '[t]he court must do its best to ascertain all the facts and then reach a conclusion'.
[154] *Rimmer v Rimmer* (n 72).

shares of the parties. However, as Romer LJ noted, the ability to award equal division was 'peculiarly applicable to disputes between husband and wife'.[155] Here, discretion was being used to move away from strict proportionate entitlements generated by the presumption of resulting trust to a position of flexibility. In both *Pettitt* and *Gissing*, these motivations behind the use of discretion were not fully explored by their Lordships, even while the unsuitability of trust principles was highlighted. Lord Morris in *Pettitt* accepted that it was 'true that following the strict rights of the parties to ownership of property may have unhappy results'.[156]

In *Pettitt*, Lord Hodson referred to marriage as a 'special relationship'.[157] Similarly, Lord Morris referred to the fact of marriage being 'a weighty piece of evidence' when a court was deciding where beneficial ownership lay between the parties.[158] He also commented upon developments in other Commonwealth jurisdictions where courts had been exploring the effect the status of marriage had upon the judicial determinations regarding property ownership.[159] In particular, he noted judicial attempts in these jurisdictions that recognised that arbitrary rules for determining ownership based on financial contributions alone failed to grapple with the sensitive interpersonal dimension of marriage. Yet, both *Pettitt* and *Gissing* fully accept separate property between husband and wife, which created a peculiar tension with those viewpoints.[160]

There was some evidence of attempts to strike a compromise between the application of general principles on the one hand, and sensitivity to the domestic context, on the other. Lord Upjohn in *Pettitt* sought to explain how marriage affected the application of the trust principles. He stated that:

> 'the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of that relationship'.[161]

[155] ibid 870.
[156] *Pettitt v Pettitt* (n 7) 811.
[157] ibid 806.
[158] ibid 803.
[159] ibid 802.
[160] See J Simon, 'With all my worldly goods…' (Presidential Address to the Holdsworth Club 1963-1964).
[161] *Pettitt v Pettitt* (n 7) 813.

While this viewpoint has the benefit of simplicity through the 'one size fits all' endorsement of trusts, the reference to 'full allowances' required explanation. It was unclear what 'full allowances' would encompass when the court was analysing the facts, particularly as earlier cases such as *Rimmer* and *Fribance*, had highlighted the significance of fact-sensitivity in these disputes. It was arguable that reference to 'full allowances' indicated that Lord Upjohn accepted some degree of unsuitability regarding the trust principles when applied to married couples, based on their inability to adequately accommodate the nature of acquisition of property by parties in a domestic relationship.

Their Lordships' discussion of the presumption of advancement showed another example of endorsement of general property law principles that their Lordships believed were unsuitable when demarcating beneficial ownership. Lord Hodson noted that 'in the old days' the presumption had significance but doubted whether it had 'decisive effect' in 1969.[162] Lord Upjohn was more favourable to the presumption, stating that its utilisation was based on the 'common sense of the matter'.[163] Despite the presumption of advancement falling out of favour with the judiciary,[164] presumptions had an important residuary role to play, particularly when evidence as to party intention was scarce.[165] Lords Reid and Diplock were more critical of the presumption of advancement. Lord Reid stated 'unless the law has lost all flexibility so that the courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished'.[166] However, in spite of critical statements regarding the presumption of advancement, allegiance to general principles of property law was maintained.

The viewpoints of their Lordships typified a legal framework in a state of transition which denied the expansive use of discretion yet simultaneously paved the way for the implicit and informal exercise of discretion by the courts. This discretion would enter judicial reasoning through fact-finding involved in locating common intention, through resolving the ambiguities of the trust framework created in *Gissing* and through the court's development of its 'equitable jurisdiction' to align these principles with modern practices.[167] Whilst at face value the prioritisation of general principles may seem strange, the ability for principled equitable development through the exercise of judicial

[162] ibid 811.
[163] ibid 816.
[164] ibid 811.
[165] ibid 814 (Lord Upjohn)
[166] ibid 793.
[167] *Gissing v Gissing* (n 8) 908.

discretion has a greater claim to legitimacy than interpreting section 17 in an expansive manner. This poses the question as to whether equitable development could provide a structured framework for these disputes. It is also arguable that the House of Lords' view that reform should come from Parliament may explain their endorsement of general property law principles.[168] Their Lordships would also have been aware that recently prior to them handing down their decisions in *Gissing*, the Matrimonial Proceedings and Property Act 1970 had obtained Royal Asset. This meant that a significant majority of future disputes between married couples regarding ownership over the matrimonial home would fall under the provisions of that Act. Section 37 of that Act would also provide a remedy for litigants such as Harold Pettitt, provided that the contribution to the improvement of property was of a substantial nature. All other disputes, in particular, those concerning cohabitants, would fall under these trust principles. Whilst there was some gradual recognition of the rights of cohabitants at this time, it is arguable that applying general property principles to this class of litigants was acceptable as that relationship did not attract the same protection, or hold the same degree of reverence, as marriage.[169] The following section will analyse the application of trust principles to decisions post-*Gissing* to evaluate whether a continued use of discretion was discernable.

## JUDICIAL DISCRETION IN POST-*GISSING v GISSING* CASE LAW

The implications of the deficient reasoning in *Pettitt* and *Gissing* were highlighted in the Court of Appeal decisions of *Falconer v Falconer*[170] and *Heseltine v Heseltine,*[171] both decided after the House of Lords had handed down their judgment in *Gissing*. It should be noted at the outset that Lord Denning MR presided over both of these decisions. Despite his involvement in the use of structured discretion in cases such as *Rimmer* and *Fribance,* it is clear that many of his later decisions resonate more with the approach adopted he adopted in cases such as *Hine* and *Appleton.*

In *Falconer* a plot of land was purchased in the name of the wife using financial contributions from the wife's mother and with the balance raised by a mortgage secured

[168] See *Pettitt,* at 795, where Lord Reid noted that 'lawyers law' was capable of development by the judiciary whilst the courts should not interfere 'with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy for that is the province of Parliament'.
[169] See D Pearl, 'The Legal Implications of a Relationship Outside of Marriage' (1978) 37(2) *Cambridge Law Journal* 252.
[170] *Falconer v Falconer* [1970] 3 All ER 449 (CA).
[171] *Heseltine v Heseltine* [1971] 1 All ER 952 (CA).

in the wife's name with the husband standing as surety. During the building process, the husband and wife lived together in a flat. The husband made payments to the wife which she then used to discharge the mortgage on the plot of land. The first mortgage was discharged and a second mortgage secured in the same format as the first. The parties moved into the property and the husband made contributions to the wife which, when combined with her earnings, she used to discharge the mortgage. The relationship broke down and section 17 of the Married Women's Property Act 1882 was utilised to seek a determination as to the ownership of the property. At first instance the judge held that, owing to the financial contributions of the husband to the wife for discharge of the mortgage and general household expenditure, the property was to be divided equally.

In the Court of Appeal, Lord Denning MR upheld the decision of the judge and maintained equal division of the property. He stated that, following *Gissing*, the court would impose a trust through imputation, which was done 'by way of an inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it'.[172] Crucially, this process was completed 'not so much by virtue of an agreement, express or implied' but rather through inference of a trust generated by a direct financial contribution to the purchase price or through mortgage instalments.[173] Lord Denning MR envisaged that an indirect financial contribution, where one party was responsible for household expenses and the other for the mortgage was also sufficient. Megaw LJ echoed the sentiments of Lord Denning MR, noting the trend in the previous case law to award equal division on the basis of the equitable maxim of 'equality is equity'. For Megaw LJ, the facts, and inferences drawn from the parties' conduct, justified the equal division rather than the application of the 'equality is equity' maxim, which was linked to the disallowed 'family assets' approach.[174]

*Falconer* highlighted many of the anticipated difficulties arising from *Pettitt* and *Gissing*. As to the difficulties of general property law principles, Lord Denning MR was keen to reject out-of-date concepts. His view on the presumption of advancement evidenced this where he stated that '[w]e have decided these cases now for some years without much regard to a presumption of advancement, and I think we should continue so to do'.[175] As for the pre-*Pettitt* case law, Lord Denning MR believed that '[t]he House did not overturn any of the previous cases in this court on the subject' and that they can

[172] *Falconer v Falconer* (n 170) 452.
[173] ibid 452.
[174] ibid 454.
[175] ibid 452 (Lord Denning MR).

'still provide good guidance'.[176] Whilst Lord Denning MR was clearly exploiting the ambiguity in their Lordships' reasoning, there was some evidential basis for his interpretations. For example, with the exception of *Appleton*, none of the pre-*Pettitt* cases were explicitly overruled. Similarly, as noted above, Lord Diplock did seek to give pedigree to his common intention analysis with reference to pre-*Pettitt* case law and argue that the Court of Appeal had been giving effect to the intentions of parties and that also detrimental reliance upon those agreements was present.

In *Heseltine v Heseltine*, the matrimonial home was purchased in the name of the husband.[177] It was purchased through a four-fifths contribution to the purchase price by the wife and an endowment policy was acquired by the husband to cover the mortgage. A joint account was utilised to make the mortgage repayments and, subsequently, further properties were purchased by the parties using this account. All of these properties were in the husband's name. The husband also persuaded the wife to transfer into the joint account numerous significant sums of money which he said would help avoid estate duty. The relationship broke down and the wife used section 17 of the Married Women's Property Act 1882 to obtain a declaration that she was beneficially entitled to the properties and also the proceeds arising from the sale of the matrimonial home.

The Registrar held that the husband was a trustee holding the various properties on trust for the wife. The proceeds of sale of the matrimonial home were also to be held by the husband as trustee, with his entitlement set at one quarter of the beneficial interest. In the Court of Appeal, Lord Denning MR stated that, where the matrimonial home was purchased through the 'joint resources of each', the normal course of action would be for the court to impute a trust recognising equal and joint ownership between the parties.[178] However, Lord Denning held that 'if some other division is more fair, the court will adopt it', thus the registrar's unequal division was upheld.[179] Lord Denning MR also focused on the various payments, and stated that, following *Gissing*, 'the court can and should impute a trust by him for her' as it would be inequitable for the husband to claim the property for himself.[180] When the husband left the wife and sought to retain the benefit of the payments, an 'imputed trust' arose which took the form of a 'resulting trust which resulted from all the circumstances of the case'.[181]

[176] ibid 452.
[177] *Heseltine v Heseltine* (n 171).
[178] ibid 954.
[179] ibid 954.
[180] ibid 955.
[181] ibid 955.

These decisions illustrate the ambiguities in both *Pettitt* and *Gissing*, which enabled the Court of Appeal to exploit the lack of principled direction in these judgments to justify reaching outcomes that they viewed as 'just'.[182] *Heseltine*, in particular, engaged with the idea of a 'just' result, with Lord Denning MR using *Gissing* as a vehicle to impute a trust whenever the denial of beneficial ownership was regarded as inequitable. Lord Denning MR used a broad interpretation of 'inequitable' derived from *Gissing*, as well as applying a theoretically incorrect version of a post-acquisition imputed resulting trust.[183]

*Heseltine* and *Falconer* were part of a body of case law decided shortly after *Gissing* that illustrated the difficulties involved in applying the new trust principles. Other subsequent cases further illustrated the ambiguity in the legal framework and emphasised contradictions within the reasoning of the House of Lords in *Gissing.* For example, in *Hargrave v Newton*, a husband purchased property in his sole name through a loan from his employer.[184] The wife made no direct financial contribution to the acquisition of the property but contributed significantly to household expenses. Their marriage broke down and the property was sold. The wife applied under section 17 for determination of ownership of the proceeds of sale, and the Court of Appeal held that the wife was entitled to equal division of the proceeds of sale.

The basis for this award was that her contributions to the household economy were such that they enabled the husband to pay off the loan used to purchase the property. These contributions were indirect but, nonetheless, referable to the acquisition of the property. Counsel for the husband argued that the contributions made by the wife were merely to defray everyday expenses that married couples would incur when living together. Lord Denning MR rejected this argument and followed the reasoning of Lord Reid in *Gissing v Gissing*, namely that an indirect financial contribution was sufficient to establish an interest.[185] Lord Denning MR stated that '[t]hese indirect contributions were such that the courts can and should impute that he held them in trust for them both jointly, beneficially in equal shares'.[186]

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[182] See DJ Hayton, 'Equity and Trusts' in JL Jowell and JPWB McAuslan, *Lord Denning: The Judge, the Law* (Sweet and Maxwell 1984) 83, 84.
[183] ibid 83-85.
[184] *Hargrave v Newton* [1971] 3 All ER 866 (CA).
[185] cf the approach to indirect contributions in *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107 (HL) analysed in Chapter Five.
[186] *Hargrave v Newton* (n 184) 869.

This decision further illustrated the judicial technique of imputing a trust based on substantial direct or indirect contributions to the property. However, there was an absence of discussion of the nature of this type of trust. The term 'resulting, implied or constructive' was not used in the decision and it was unclear what proprietary device triggered the imputation of a trust in favour of the wife. The acknowledgement of indirect contributions was also noteworthy as it suggested an attempt to soften the rigours of the property principles laid down in *Gissing* and represented a more context-sensitive approach to determining ownership.

*Hargrave v Newton* also demonstrated the tendency of Lord Denning MR to follow particular speeches from *Gissing*, perhaps in recognition that the decision did not speak with a unified voice but more probably owing to his idiosyncratic approach to stare decisis.[187] In relation to the issue of indirect contributions to the property, *Gissing* saw the House of Lords divided. Lord Pearson and Lord Reid favoured the view that an indirect contribution was capable of generating a common intention, whereas Lord Diplock took the opposing view. For Lord Denning MR, this division of opinion injected a degree of confusion into the law and he stated that 'we have to choose between them. I think we should follow those of Lord Reid…and Lord Pearson'.[188] As a matter of precedent, Lord Denning MR should have adopted the majority view yet, through the scope for interpretation of the speeches in *Gissing* he felt able to follow a different course. These decisions capture some of the confusion anticipated by academics following *Gissing*. Youdan neatly summarised this in the following terms:

> 'After Pettitt and Gissing there was a period of extraordinary confusion: massive amounts of litigation; a lack of consensus about applicable principles; developing reliance on a confused notion of a resulting trust based on common intention; and much exercise of judicial discretion camouflaged by spurious articulation of legal principles'.[189]

## CONCLUSIONS

This chapter has analysed the two key House of Lords' decisions that gave quietus to the substantive use of section 17 and further judicial development using that provision to

[187] See, generally, Hayton (n 182).
[188] *Hargrave v Newton* (n 184) 927.
[189] Youdan (n 118) 531.

create a 'doctrine' of family assets.[190] Following these decisions, Kahn-Freund observed that section 17 had now lost its 'potency for adjusting the law to modern social conditions'.[191] In *Pettitt* and *Gissing* general principles of property law were prioritised by their Lordships as the vehicle for future development of the law. Alongside the endorsement of the presumption of resulting trust and, in part the presumption of advancement, was a new judicial methodology reliant upon the common intention of the parties.

With a view to understanding the use of judicial discretion, both decisions represent important turning points for the direction of legal development. The denial of broad, substantive interpretations of section 17 saw the courts rejecting, albeit not actually overruling, Court of Appeal cases analysed in Chapters Two and Three that were incompatible with that view. In that process, their Lordships were particularly critical of cases such as *Hine* and *Appleton* that were viewed as 'unfettered' exercises of discretion.[192] This chapter has argued that this focus by the House of Lords on instances where a broad substantive interpretations of judicial discretion were assumed prevented their Lordships fully considering the evidence, established in Chapters Two and Three, that discretion had in some instances been structured. The movement by the courts from *Rimmer* onwards to structure the application of discretion was not comprehensively analysed and this was arguably attributable to their Lordships' views that the 'family assets' approach could be equated to a form of community of property present in continental systems. Only brief mention was made by Lord Hodson as to the potential of designating property as a family asset which would thereby 'control' the exercise of discretion.[193] Even Lord Hodson's interpretation was open to criticism, since it proceeded on the basis that characterisation as a family asset resulted in automatic joint ownership of property between married couples. In this respect, the House of Lords arguably failed to acknowledge the different ways that discretion is used by the courts as well as recognise the process whereby 'what may begin as discretionary is likely to be translated…over the course of decision-making into settled rules, principles and standards'.[194] By extensively focusing on a particular exercise of discretion by the Court of Appeal that granted a proprietary interest whenever 'fair and just in all the

[190] See G Moffat, *Trusts Law* (CUP 2009) 616 re-emphasising that the 'family assets' approach was 'dead, and with it any immediate prospect of smuggling community principles through the back door of implied trust doctrine'.
[191] Kahn-Freund (n 3) 607.
[192] See *Pettitt v Pettitt* (n 7) 809 where Lord Hodson was critical of the expansive use of discretion in *Appleton* and remarked 'this is, surely, unfettered discretion'.
[193] ibid.
[194] Galligan (n 123) 37.

circumstances of the case',[195] the House of Lords may have reacted to traditional concerns over the so-called 'tyranny of discretion', identified in Chapter One. In doing this, the House of Lords arguably overlooked the structured use of discretion, particularly where a party had made a substantial contribution to the acquisition of the property. Had their Lordships fully considered cases such as *Rimmer*, *Cobb* and *Fribance*, the benefits of the use of discretion within this specific context may have been acknowledged.

It is possible that another contributing factor was also the presence of what Freeman termed 'a battle of wits between the Master of the Rolls and the final court of appeal' particularly as Lord Denning MR departed from interpretations as to the scope of section 17 laid down by the House of Lords in *National Provincial Bank v Ainsworth*.[196] It is arguable that had Lord Denning MR provided expansive interpretations of the discretion conferred by section 17 like *Hine* and *Appleton*, their Lordships may have evaluated earlier case law in a more rigorous fashion. Thus, as Parker noted:

> 'It is possible that the House of Lords would not have rejected Lord Denning's use of the Married Women's Property Act if he had confined its application to cases where the wife had made a substantial financial contribution'.[197]

As demonstrated in Chapter Three, Lord Denning MR manipulated discretion in a manner that made it appear like 'palm tree justice', even where there was an underpinning structure to the requirements, and that this stymied consideration of more moderate uses of discretion. Ultimately, this is likely to have necessitated their Lordships to give effect to 'a gradual hardening of opinion against a solution which could achieve moral fairness in favour of a search for some firmer principle which, though it might on occasion produce hardship, would at least provide a more positive test'.[198] This chapter indicated that the House of Lords may have overly focused on the negative perceptions of judicial discretion at the expense of examples of its structured use.

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[195] *Hine v Hine* (n 4) 347.
[196] Freeman (n 149) 95.
[197] S Parker, *Informal Marriages, Cohabitation and the Law 1750-1989* (St Martin's Press 1990) 137.
[198] Lord Justice Gibson, 'A Wife's Rights in the Matrimonial Home' [1976] 27 *Northern Ireland Legal Quarterly* 333, 339.

Following the development of common intention analysis in *Gissing*, this chapter demonstrated the potential for discretion to continue to be used by the courts despite the explicit rejection of section 17. Whereas a textual reading of section 17 generated wide interpretations, discretion being assumed through the evolution of equitable principles was regarded as legitimate on the basis that it was consistent with the tradition of equitable development in this jurisdiction.[199] *Pettitt* and *Gissing* marked a transition in the development of principles from overt statutory discretion to a more implicit exercise of judicial discretion centred on fact-finding and the interpretation of rules.

Several factors militated towards the continued use of discretion after *Pettitt* and *Gissing*. Firstly, courts frequently engage in discretionary decision-making where the legal texts are ambiguous.[200] There is extensive evidence to support the claim that the creation of a framework based on common intention was ambiguous and arguably flawed.[201] The common intention framework blended a resulting trust that focuses on the intention of the contributor with what was at the time an unspecified type of trust that gave effect to bilateral intentions.[202] Mee even went so far as labelling common intention as something that 'may be compared to one of the imaginary beasts dreamed up by bored medieval minds, a nightmare synthesis of a number of real creatures'.[203]

Secondly, it appeared somewhat strange that after twenty years of Court of Appeal decisions recognising the frequent absence of agreements between married couples as to beneficial ownership, the House of Lords would prioritise an implied trust premised on the parties' intentions. When this feature is combined with the ambiguity surrounding whether imputation of intentions was truly possible, the open-textured nature of common intention would naturally leave ample room for the application of judicial discretion. Thirdly, their Lordships' decision to re-emphasise general principles of property law may have appeared to provide a simple solution to a complex problem, yet it failed to fully acknowledge many of the motivations behind the use of discretion by the Court of Appeal. Shortly before *Pettitt* there were calls for 'special rules'[204] applicable to married couples and even 'recognition of some form of 'marital

[199] See *Midland Bank v Cooke* [1995] 4 All ER 562 (CA) 575 (Waite LJ).
[200] See Bell (n 112) and CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47.
[201] See extensive criticism of common intention see N Glover and P Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325.
[202] See *Gissing v Gissing* [1971] AC 886 (HL) 905 where Lord Diplock stated 'it is unnecessary for present purposes to distinguish between these three classes of trust'.
[203] Mee (n 105) 118.
[204] PV Baker, 'Notes' (1968) 84 *Law Quarterly Review* 309.

community' in cases where the lines of ownership are not clearly drawn'.[205] Section 17 was a conduit through which the courts attempted to reconcile 'bald legal ownership' with 'delicate emotional and economic considerations'.[206] However, the House of Lords' refusal to consider the use of structured discretion not only represented what Cretney termed 'judicial pusillanimity' but also may have necessitated the continued use of judicial discretion as a means to overcome the deficiencies of the trust framework.[207]

Chapters Five and Six will now explore how the use of discretion finds expression in the modern implied trust framework. Building on the findings of this chapter, it will consider whether an expansive discretion was being exercised by the courts and, if so, whether its exercise could be characterised as sanctioning 'palm tree justice' or was instead structured along relatively clear principles. If expansive discretion is visible in the modern framework, Chapters Five and Six will further analyse whether its use by the court effectively accommodates the domestic nature of ownership disputes over the family home.

[205] A Milner, 'Beneficial Ownership of the Matrimonial Home Again' (1958) 21 *Modern Law Review* 473, 476.
[206] ibid.
[207] Cretney (n 76) 575.

# CHAPTER FIVE

## JUDICIAL DISCRETION AND THE COMMON INTENTION CONSTRUCTIVE TRUST: ACQUISITION

### INTRODUCTION

Chapter Four analysed the House of Lords' rejection of substantive discretion conferred by section 17 of the Married Women's Property Act 1882 and the prioritisation of property law principles governing acquisition of a beneficial interest under a trust. The House of Lords in *Gissing v Gissing* endorsed common intention analysis and underlined the official impermissibility of courts exercising an expansive discretion when deciding ownership disputes.[1] However, even at this moment, there were three aspects of their Lordships' reasoning that could potentially lay the foundation for a continued use of informal discretion.[2] These were the lack of clarity in their Lordships' reasoning as to the nature of common intention, the problem of reliance on common intention where agreements have frequently been found to be absent and the prioritisation of a property law framework that failed to accommodate the domestic context.

Chapter Five builds upon the findings of previous chapters and analyses the use of discretion applicable to rules governing the acquisition of an interest under a common intention constructive trust. This chapter analyses case law decided after *Gissing*, in particular, the House of Lords' decision in *Lloyds Bank v Rosset*.[3] It should be noted that following *Gissing*, the Matrimonial Proceedings and Property Act 1970 came into effect and provided the court with wide discretionary powers for the reallocation of assets following divorce, nullity or judicial separation. Recognition of this development is important for several reasons. Firstly, this statute provided married couples with a scheme of equitable redistribution which prevented recourse to general property law principles upon relationship breakdown. It also provided the ability for litigants like the

[1] *Gissing v Gissing* [1971] AC 886 (HL).
[2] See Chapter One on fact-finding discretion and the use of discretion to interpret rules.
[3] *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107 (HL).

claimant in *Pettitt v Pettitt* to make a claim in light of improvements to property.[4] Secondly, this statutory system meant that cohabitants and home sharers were now the main class of litigants that were required to use the 'fall-back' of property principles. These two factors may inform the willingness of the courts to exercise discretion at the acquisition stage owing to judicial views as to the justification of treating married couples more favourably than cohabitants.[5] Although *Pettitt* and *Gissing* did not emphasise the distinction between acquisition of an interest and quantification,[6] subsequent decisions in the modern framework have sharpened the distinction. Therefore Chapter Five will analyse acquisition of an interest whereas Chapter Six will analyse quantification. Both chapters will evaluate how far the boundary between acquisition and quantification of a beneficial interest affects the exercise of judicial discretion.

## JUDICIAL DISCRETION AND EXPRESS COMMON INTENTION

Chapter One demonstrated that even within a legal framework characterised by rules, discretion often continues to be exercised by a court.[7] Fact-finding and the process of applying a rule to a specific factual scenario depend on the exercise of judicial discretion. As Gardner notes, the 'routine application of settled rules depends on the finding of particular facts and fact-finding will reflect the individual approach of the fact-finder'.[8] It was apparent that the House of Lords in *Gissing* sought to emphasise the primacy of rules in this area. Using this approach, a beneficial interest could be claimed through an express agreement between the parties coupled with detrimental reliance or through an agreement inferred from conduct. *Eves v Eves*[9] and *Grant v Edwards*[10] provide guidance on the meaning of express common intention and it will now be questioned whether they also provide insight into the potential for the differing forms of judicial discretion to be used post-*Gissing*.[11]

[4] *Pettitt v Pettitt* [1970] AC 777 (HL).
[5] See D Pearl, 'The Legal Implications of a Relationship Outside of Marriage' (1978) 37(2) *Cambridge Law Journal* 252.
[6] For criticism of this distinction see N Glover and P Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325, 339.
[7] K Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins, *The Uses of Discretion* (OUP 1991) 13.
[8] S Gardner, 'The Element of Discretion' in P Birks, *The Frontiers of Liability* (OUP 1994) 193.
[9] *Eves v Eves* [1975] 3 All ER 768 (CA)
[10] *Grant v Edwards* [1986] 2 All ER 426 (CA).
[11] See also *Midland Bank v Dobson* [1986] 2 FLR 171.

In *Eves*, Miss Eves moved into property that was purchased by the defendant, Mr Eves and placed in his sole name. It was acquired using the proceeds of sale of a previous property that he owned. Mr Eves told Miss Eves that the property was to be their home yet the property was not put in joint names as he used the excuse that she could not share legal ownership of the property as she was under 21. Shortly after moving into the property she gave birth to their daughter. Miss Eves made no financial contribution to the acquisition of the property. However she made various non-financial contributions such as looking after their children and providing domestic labour within the home, including using a 14 pound sledgehammer to break up concrete in the front garden. Miss Eves also engaged in extensive renovations of the property. The defendant ended the relationship and subsequently Miss Eves sought a declaration that he held the property on trust for them both in shares proportionate to their contributions. Pennycuick VC in the County Court dismissed her claim.

The Court of Appeal held that the defendant should hold a one-quarter share in the property on trust for the claimant, but was divided as to how that result was reached. Lord Denning MR drew upon earlier cases where he took a more expansive interpretation of Lord Diplock's dicta in *Gissing*. Drawing upon his earlier opinion in *Cooke v Head*,[12] he said that 'whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust'.[13] Thus for Lord Denning MR, although Miss Eves made no financial contribution, 'this property was acquired and maintained by both by their joint efforts with the intention that it should be used for their joint benefit'.[14] Further evidence to justify this finding was the excuse provided by the defendant for refusing to put the property in joint names along with statements that the property was 'their house and a home for themselves and their children'.[15] Similarly, the combination of the extensive renovations that the claimant did to the property along with the defendant's practice of locking up rooms in the property illustrated inequitable conduct.[16] When justifying the pedigree of his approach, he used Lord Diplock's statements in *Gissing* to announce that equity had created a 'constructive trust of a new model' which 'Lord Diplock brought…into the world and we have nourished'.[17] In these circumstances, and as Lord

[12] *Cooke v Head* [1972] 2 All ER 38 (CA).
[13] *Eves v Eves* (n 9) 771.
[14] ibid 771-772.
[15] ibid 770.
[16] This focus on 'inequitable conduct' as a basis for intervention attracted Lord Denning MR. See A Morris, 'Equity's Reaction to Modern Domestic Relationships' in AJ Oakley, *Trends in Contemporary Trust Law* (Clarendon Press 1997).
[17] *Eves v Eves* (n 9) 771.

Denning MR noted, 'in all fairness', she was entitled to a share in the property based on the acquisition of the property for continuing joint use and that he led the claimant to believe that she would share in the ownership of the property.[18]

Browne LJ and Brightman LJ reached the same result but by a different method. Their approach involved a clearer articulation of the 'basis on which we should decide that Miss Eves is entitled to a share in the beneficial interest in this house'.[19] Brightman LJ's approach was more consistent with Lord Diplock's statements in *Gissing*. He stated the use of an excuse by Mr Eves generated 'a clear inference that there was an understanding between them that she was intended to have some sort of proprietary interest in the house'.[20] Thus, both Browne LJ and Brightman LJ utilised common intention analysis and found an express common intention between the parties following the fact that Mr Eves had 'clearly led the plaintiff to believe that she was to have some undefined interest in the property'.[21] In compliance with Lord Diplock's views in *Gissing*, Brightman LJ stated that a common intention alone would be insufficient. However he noted an alternative scenario where it would be enforceable:

> 'If, however, it was part of the bargain between the parties, expressed or to be implied, that the plaintiff should contribute her labour towards the reparation of a house in which she was to have some beneficial interest, then I think that the arrangement becomes one to which the law can give effect'.[22]

In terms of quantification of the beneficial interest, Lord Denning MR believed that one half was 'too much' and instead thought one quarter was more appropriate yet provided no authority for that particular proposition.[23] Brightman LJ agreed with this division but acknowledged that this was 'the most difficult part of the case' owing to the absence of clear guidance from *Gissing*.[24] Therefore Brightman LJ merely stated, 'without great confidence', that 'the court should imply that the plaintiff was intended to acquire a quarter interest in the house'.[25]

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[18] ibid 772. This approach echoed that used by Lord Denning MR in *Hussey v Palmer* [1972] 3 All ER 744 (CA).
[19] ibid 772.
[20] ibid 773.
[21] ibid 774.
[22] ibid 774.
[23] ibid 772 (Lord Denning MR).
[24] ibid 775.
[25] ibid 775.

On the issue of judicial discretion, *Eves* illustrates a divided Court of Appeal. The approach adopted by Lord Denning MR in *Eves* resonates with that he used in *Appleton v Appleton* that was analysed in Chapter Three.[26] In that case, Lord Denning MR used the discretion under section 17 to 'make such order as appears to be fair and just in all the circumstances of the case' thereby potentially disregarding legal title or contributions made to the property by the parties.[27] This approach departed from the structured use of discretion that had been developing in the 1950s Court of Appeal in cases like *Rimmer v Rimmer*[28] and *Fribance v Fribance*[29] and conflated the important distinction between acquisition and quantification of a beneficial interest. There is evidence that Lord Denning MR wished to adopt this discretionary approach in *Eves* but, in an attempt to show adherence to the principles laid down in *Gissing*, framed it in the language of trusts. Thus, being unable to rely on an express statutory conferral of discretion like section 17, Lord Denning MR sought to use the creativity of equity to reach a result.[30] In the earlier case of *Cooke v Head*, Lord Denning MR articulated the methods used to determine ownership disputes and intimated the possibility of using trusts to adapt 'old systems of property transfer to modern ways of living'.[31] He conceded that section 17 had been interpreted in a way that 'did not empower the courts to alter property rights',[32] that common intention had 'recently come into disfavour, because of the difficulty of ascertaining a common intention'[33] and thus the 'final way' was the 'law of trusts'.[34] Here, Lord Denning MR noted the opportunity for dynamism using this 'fecund area of equity'.[35]

Whilst Lord Denning MR's approach 'avoids the artificiality of trying to ascribe to people intentions which were never formulated',[36] it conflicted with Lord Diplock's dicta in *Gissing* and sought to impose a trust purely on the basis of inequitable conduct. As Webb noted, Lord Diplock's formulation in *Gissing* was not providing a principle that 'a trust can be imputed merely because it is fair where there is no agreement or

[26] *Appleton v Appleton* [1965] 1 All ER 44 (CA).
[27] *Hine v Hine* [1962] 3 All ER 345 (CA) 347.
[28] *Rimmer v Rimmer* [1952] 2 All ER 863 (CA).
[29] *Fribance v Fribance* [1957] 1 All ER 357 (CA).
[30] See further A Denning, 'The Need for a New Equity' (1952) *Current Legal Problems* 1.
[31] C Sawyers, 'Equity's Children – Constructive Trusts For The New Generation' [2004] *Child and Family Law Quarterly* 31, 31.
[32] *Cooke v Head* (n 12) 41.
[33] ibid.
[34] ibid.
[35] Sawyers (n 31) 37.
[36] TC Ridley, 'A Family Affair' (1973) 36 *Modern Law Review* 436, 437.

intention of any kind'.[37] Similarly, the approach of Lord Denning MR failed to produce a doctrinally defensible route. This aspect echoes the methodology he employed in *Appleton* which involved the production of a short, laconic judgment with limited authority cited and, as a result, stood in stark contrast to the structured use of discretion visible in the late 1950s. In contrast to the approach of Browne LJ and Brightman LJ, Lord Denning MR focused more on the specific facts in *Eves* as opposed to analysis of the legal principles enabling a one-quarter share.[38] Montgomery clearly articulated the fears generated by the approach of Lord Denning MR in *Eves* which resonate with some of views of discretion analysed in Chapter One:

> 'Used in this way the constructive trust proved to be an obscure and unpredictable institution, often yielding arbitrary results. No clear principles governed its application. It operated ex post facto to re-arrange existing interests with little consideration of third parties involved. The ideas of justice which the doctrine applied were imposed by the judiciary with little reference to what the parties or society thought. None of these factors instilled confidence in those who had to work in this area of the law'.[39]

In contrast, Browne LJ and Brightman LJ applied the principles laid down in *Gissing* which they acknowledged was the 'principal authority'.[40] Whilst it is arguable that fact-finding discretion continued to apply as it did in the pre-*Pettitt* case law, the approach of Browne LJ and Brightman LJ understandably rejected the ability to exercise expansive discretion as required by the House of Lords' decision in *Gissing.*

It was the latter approach of Browne LJ and Brightman LJ that was discernable in the Court of Appeal's decision in *Grant v Edwards.* This decision clarified the principles laid down in *Gissing* and on the 'rules-to-discretion scale' further distanced the court's methodology from that which used discretion.[41] In *Grant v Edwards*, Miss Grant formed a relationship with Mr Edwards and following the birth of their first child, lived together

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[37] F Webb, 'Trusts of Matrimonial Property' (1976) 92 *Law Quarterly Review* 489, 495. See also Morris (n 16).
[38] For example, Lord Denning MR in *Eves*, at 770, made various comments about the injustice suffered by Janet Eves namely '[h]e locked up two big rooms, leaving Janet and the children one bedroom and the kitchen and toilet. He took away the deep freeze and the stair carpet. It was a poor return for all she had done' and 'Janet was very upset and afraid of what might happen if she stayed in the house. So she left and Stuart and Gloria moved in with an Alsatian dog'.
[39] J Montgomery 'A Question of Intention?' [1987] *Conveyancer and Property Lawyer* 16, 16.
[40] *Eves v Eves* (n 9) 774 (Browne LJ).
[41] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977) 15.

in a property transferred into Mr Edward's name.[42] Two mortgages were obtained by Mr Edwards. Miss Grant, who remained married to someone else, was not a joint owner or involved in the mortgage as Mr Edwards informed her that placing her name on the title would prejudice her ongoing divorce proceedings. She contributed to household expenses and after the birth of their second child she made substantial indirect contributions to household expenses which assisted Mr Edwards in repaying the mortgage. After their relationship ended she claimed a share in the property based on her substantial contributions. The High Court dismissed her claim stating that with the exception of instalments under the second mortgage, all of the instalments under the mortgages were paid for by Mr Edwards.

The Court of Appeal reversed the decision of the High Court and held that Miss Grant was entitled to an equal share of the beneficial ownership. The fact that she would have been a joint co-owner at law *but for* her divorce proceedings was accepted as evidence of a common intention upon which she relied to her detriment through the payment of substantial contributions to the household expenses. Browne-Wilkinson VC stated that 'the representation made by the defendant to the plaintiff that the house would have been in the joint names but for the plaintiff's matrimonial disputes is clear direct evidence of a common intention that she was to have an interest in the house'.[43] Likewise, Mustill LJ stated 'the nature of the excuse which he gave must have led the plaintiff to believe that she would in the future have her name on the title'.[44] However, following *Eves*, the Court of Appeal stipulated that a common intention alone was not enough and that Miss Grant needed to act to her detriment 'in the reasonable belief that by so acting she was acquiring a beneficial interest'.[45] Nourse LJ held that her substantial indirect contributions to the mortgage instalments were sufficient evidence of reliance upon the common intention between the parties.

Unlike *Eves*, there is no evidence of a broad discretion in *Grant v Edwards* which is consistent with their Lordships' views as expressed in *Pettitt* and *Gissing* and also unsurprising as the approach of Lord Denning MR in *Eves* was criticised by Nourse LJ as being 'at variance with the principles stated in Gissing v Gissing'.[46] Thus, for the Court of Appeal 'the existing law of trusts' applied to these disputes' and there were no

[42] Mr Edwards brother was also included but was a nominal purchaser.
[43] *Grant v Edwards* (n 10) 437.
[44] ibid 435.
[45] ibid 437.
[46] ibid 431.

'special doctrines of equity applicable in this field alone'.[47] Mustill LJ denied the existence of a 'concept of family property, whereby people who live together in a settled relationship ipso facto share the rights of ownership in the assets acquired and used for the purposes of their life together'.[48]

Using the framework of discretion in Chapter One, it is argued that the potential for developing the principles laid down in *Gissing* was evident in *Grant*. Discretion can often be exercised where the legal materials are indeterminate[49] and, as Chapter Four highlighted, the 'twin peaks' of *Pettitt* and *Gissing* are problematic authorities owing to the lack of clarity in their Lordships' exposition of the trust framework.[50] As a result Mustill LJ in *Grant* stated:

> 'I do not think that the time has yet arrived when it is possible to state the law in a way which will deal with all the practical problems which may arise in this difficult field, consistently with everything said in the cases'.[51]

In terms of how these principles applied to disputes in a domestic context, Mustill LJ remarked that 'the legal analysis is not…at all easy'.[52] The consideration of common intention analysis also exposed some criticism of the implied trust framework. For example, Nourse LJ opined that 'the fundamental, and invariably the most difficult, question is to decide whether there was the necessary common intention'.[53] Here, the Court of Appeal is acknowledging the difficulties of this approach but rather than choosing to redevelop the principles, as Lord Denning MR did in *Eves,* it is instead refining them. Thus there appears to be a further shift towards the creation of bright-line rules for the courts to apply in this context. There is extensive evidence of this refinement in *Grant v Edwards*. For example, Browne-Wilkinson VC commences his judgment by delineating Lord Diplock's speech in *Gissing* into three issues consisting of the nature of the substantive right, the proof of the existence of that right; and the

[47] ibid 434.
[48] ibid 434 (Mustill LJ).
[49] J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 97.
[50] *Grant v Edwards* (n 10) 431.
[51] ibid 434 (Mustill LJ).
[52] ibid 433 (Mustill LJ).
[53] ibid 431.

quantification of that right.[54] Each element was explored in turn leading Eekelaar to remark that the judgment was 'characterised by analytical rigour and precision'.[55]

This approach has the benefit of differentiating express common intention from inferred common intention but the different formulations of principles by the Court of Appeal were problematic when trying to precisely define the criterion of 'common intention'. There were two key areas where divergence emerged. Firstly, the Court of Appeal approached this issue using express common intention but provided different interpretations of what that term meant. The court consistently used the term 'common intention' but broader and arguably more open-textured synonyms to common intention are visible in the judgment. Browne-Wilkinson VC used the term 'mere agreement'[56] and Mustill LJ noted the need for a 'bargain, promise or tacit common intention'.[57] The use of 'tacit common intention' is particularly interesting as it suggests that the court may give effect to agreements which may be understood without being communicated. This interpretation would be problematic as it could militate towards the use of imputation of an agreement that was impermissible following the majority view in *Pettitt* and the unanimous view in *Gissing*.

The second area of ambiguity in *Grant* is the treatment of 'detrimental reliance'. Lord Diplock stipulated that an agreement alone was not enough and that the claimant must perform 'something to facilitate' the acquisition of the property.[58] In *Grant v Edwards*, two tests for detrimental reliance were created; Nourse LJ defined detrimental reliance as 'conduct on which she could not reasonably have been expected to embark unless she was to have an interest in the house';[59] while Mustill LJ required the conduct for Miss Grant to be 'detrimental to herself' and 'referable to whatever happened on acquisition'.[60] In contrast, Browne-Wilkinson VC stated that:

> 'any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts do not have to be inherently referable to the house'.[61]

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[54] ibid 436.
[55] J Eekelaar, 'A Woman's Place–A Conflict between Law and Social Values' [1987] *Conveyancer and Property Lawyer* 93, 95.
[56] *Grant v Edwards* (n 10) 436.
[57] ibid 434.
[58] *Gissing v Gissing* (n 1) 905.
[59] *Grant v Edwards* (n 10) 432.
[60] ibid 434.
[61] ibid 438.

Browne-Wilkinson VC reached the aforementioned formulation using guidance from the approach taken in estoppel claims. However, irrespective of the source of the various formulations, there were clear and significant inconsistencies. Browne-Wilkinson VC's approach would have greater sensitivity to the domestic context and was arguably less mercenary and 'cynical' than the approach of Nourse LJ.[62] The breadth of the test proposed by Browne-Wilkinson VC would therefore combat defendants explaining the conduct of claimants as attributable to 'mutual love and affection of the parties' and therefore as being unrelated to the acquisition of a proprietary interest.[63] As Warburton later observed, *Grant* firmly accepted the need for detrimental reliance[64] but owing to the different approaches it lacked 'a sound basis for the requirement of a condition of "acting to detriment" in all cases of acquisition of a beneficial interest in property by a wife or cohabitee'.[65]

*Eves* and *Grant* are difficult decisions to place within a taxonomy of judicial discretion as they clearly evidence a shift from discretion to rules in this context. *Eves* demonstrated greater evidence of discretion through Lord Denning's New Model constructive trust but the Court of Appeal in *Grant* rejected that approach and the 'flexible use of the constructive trust to do justice'.[66] Whereas in the pre-*Pettitt* period, the exercise of judicial discretion was used to enable sensitivity to the domestic context, there was some evidence that the process of refining rules in *Grant* provided an appreciation of the domestic context. For example, Browne-Wilkinson VC and Nourse LJ both stated that indirect contributions could generate a beneficial interest although Mustill LJ was more cautious.[67] Similarly, the articulation of detrimental reliance provided some scope for recognising the domestic context but the precise nature of detrimental reliance varied depending on the judge. Therefore for the purposes of this thesis, *Grant* provides very limited evidence of judicial discretion, and instead merely performed, to some limited extent, a process of clarification of the framework laid down in *Gissing*.

[62] ibid 432.
[63] ibid 438.
[64] J Warbuton, 'Interested or not? Grant v Edwards' [1986] *Conveyancer and Property Lawyer* 291, 292.
[65] ibid 293.
[66] D Hayton, 'Equity and the Quasi-Matrimonial Home' (1986) *Cambridge Law Journal* 394, 394.
[67] *Grant v Edwards* (n 10) 435.

As noted in Chapter Four, their Lordships in *Gissing* envisaged that a beneficial interest under an implied trust could arise based on conduct. *Burns v Burns* was decided two years prior to *Grant* and provides guidance on this point.[68] As a dispute between cohabitants (rendering the discretion of the Matrimonial Causes Act 1973 unavailable), *Burns* provided insight into the role played by judicial discretion in ownership claims using trust principles. In *Burns*, Valerie Burns cohabited with her partner Patrick Burns for 17 years. Fully accepting that Patrick Burns would not marry her, Valerie Burns changed her name to his and both parties held themselves out to be married. After initially living in rented accommodation, Patrick Burns purchased his own property which he financed by paying the deposit and subsequently discharging a mortgage using his own funds. Valerie Burns did not work for most of the long period of cohabitation and when she did work she used her earnings to pay for household expenses. The relationship ended and Valerie Burns claimed that she was entitled to a beneficial interest that had been acquired through a resulting trust and was in shares to be determined by the court. Dillon J dismissed her claim and she appealed.

The Court of Appeal denied Valerie Burns a beneficial interest in the property on the basis that her claim did not evidence an express agreement to share beneficially or conduct through which the court could infer a common intention to share the property. For Fox LJ, if Valerie Burns was to establish an interest, it was necessary to show that 'the defendant holds the legal estate on trust to give effect to that interest'.[69] Using trust principles, there needed to be an express trust (that to be enforceable required writing), a resulting trust or a constructive trust. Fox LJ ruled out an express trust and stated that her contributions did not suffice to form the basis of a resulting trust. In relation to a constructive trust, Fox LJ dismissed her claim stating that:

> 'She provided no money for the purchase; she assumed no liability in respect of the mortgage; there was no understanding or arrangement that the plaintiff would go out to work to assist with the family finances; the defendant did nothing to lead her to change her position in the belief that she would have an interest in the house'.[70]

[68] *Burns v Burns* [1984] 1 All ER 244 (CA).
[69] ibid 250.
[70] ibid 251.

May LJ developed this further noting that 'I think that the approach which the courts should follow, be the couples married or unmarried, is now clear'[71] and stated that:

> 'when the house is taken in the man's name alone, if the woman makes no 'real' or 'substantial' financial contribution towards either the purchase price, deposit or mortgage instalments by means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family, in the sense of keeping house, giving birth to and looking after and helping to bring up the children of the union'.[72]

Fox LJ stated that it was therefore 'quite unreal to say that, overall, she made a substantial financial contribution towards the family expenses'.[73] Whilst accepting that Valerie Burns 'can justifiably say that fate has not been kind to her', May LJ believed that the 'remedy for any inequity' was a matter for Parliament and not the courts.[74]

*Burns* is an important decision when analysing judicial discretion. The Court of Appeal emphasised the fact that they did not possess a statutory discretion to award Mrs Burns a share in the property. May LJ began his judgment by contrasting the inability to use an expansive discretion in this case concerning cohabitants with the 'wide discretion' that married couples can benefit from under the Matrimonial Causes Act 1973.[75] Waller LJ and May LJ stated that the principles to be applied were developed following applications under section 17 but both *Pettitt* and *Gissing* were unanimous in their interpretation of that provision as procedural and granted the court 'no overriding general discretion'.[76] By emphasising the procedural nature of section 17, both Fox LJ and May LJ were highly critical of *Appleton,* where the Court of Appeal had interpreted the provision to grant a fair share to the husband who had improved his wife's property. May LJ rejected the legitimacy of this interpretation and stated that equally for cohabitants 'the courts do not have a general power to do what they think is fair and reasonable in all the circumstances'.[77]

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[71] ibid 264 (May LJ).
[72] ibid 265 (Fox LJ).
[73] ibid 254.
[74] ibid 265.
[75] ibid 255 also noted by Waller LJ at 244.
[76] ibid 256 (Fox LJ).
[77] ibid 256 (MayLJ).

However, despite this reluctance on the part of the Court of Appeal to grant Mrs Burns an interest in the property, the Court of Appeal demonstrated some support for developing the principles of *Gissing* through the treatment of indirect financial contributions. In *Gissing* there was limited support for recognising indirect financial contributions by Lord Reid and Lord Pearson.[78] Lord Denning MR subsequently used their speeches in *Gissing* to endorse the use of indirect financial contributions in case law post-*Pettitt* such as *Falconer v Falconer.*[79] It is interesting to note that in *Burns,* which was decided after Lord Denning MR's retirement, there was some support for indirect contributions provided they were referable to the acquisition of the property and not merely to provide for the family as a whole. As Fox LJ stated:

> 'If there is a substantial contribution by the woman to the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly, referable to the acquisition of the house since, in one way or another, it enables the family to pay the mortgage instalments'.[80]

It could be argued that this view represented an attempt to mitigate the severity of the rules laid down in *Gissing* by accepting an indirect financial contribution despite the fact it was doubtful whether this was permitted by the House of Lords' authorities. Thus whilst all the Court of Appeal were keen to reject radical reform of the law - preferring that to be provided by Parliament – reopening the issue of indirect financial contributions perhaps echoes Lord Reid's statement in *Gissing* that 'it is proper for the courts in appropriate cases to develop or adapt existing rules of the common law to meet new conditions'.[81] Of course, recognition of indirect contributions would not have assisted Mrs Burns seeing as she had made non-financial contributions but it is interesting to note that there was some support for indirect contributions.

Valerie Burns has been viewed in modern academic scholarship as a cause celebre for the purported injustice of the criteria which claimants must satisfy when seeking to establish an interest under an implied trust.[82] In many ways the decision in *Burns* perpetuates the failure of the implied trust framework to fully acknowledge the domestic

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[78] See *Gissing v Gissing* (n 1) 896-897 (Lord Reid), 903 (Lord Pearson).
[79] *Falconer v Falconer* [1970] 3 All ER 449 (CA).
[80] *Burns v Burns* (n 68) 252 (Fox LJ).
[81] *Pettitt v Pettitt* (n 4) 794–795.
[82] See A Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181. cf R Probert, 'Trusts and the Modern Woman' [2001] 13(3) *Child and Family Law Quarterly* 275 and R Probert, 'Cohabitation: Current Legal Solutions' (2009) 62 *Current Legal Problems* 316.

context of family home disputes and, as Ingleby notes, *Burns* could consequently be viewed as a decision that aimed to 'provok[e] Parliament into legislative action'.[83] However, while the decision was arguably unfair, it was largely consistent with precedent, and deciding in favour of Mrs Burns would have been untenable in light of both the facts and decision of the House of Lords in *Gissing*.[84] Lowe and Smith acknowledged that 'even Lord Denning MR's subsequent attempts to dilute the strict principles [of *Gissing*]…had not gone as far as this case would have demanded'. [85]

The decision in *Burns* provides valuable insight into the exercise of discretion by the court. The refusal to grant a remedy to Mrs Burns was motivated by various factors. One explanation which illustrates why courts may instinctively prefer rules over discretion was the fact that Mrs Burns was claiming a proprietary interest in the property. Fox LJ stated that 'I think it is necessary to keep in mind the nature of the right which is being asserted'.[86] Another explanation that justified an approach based on the general principles of property law was the fact that the dispute concerned cohabitants. May LJ noted the 'increasing frequency'[87] of disputes between unmarried couples coming to court[88] and, drawing upon the dicta of Griffith LJ in *Bernard v Josephs*, stated that 'different people have very different views about the problems and relationships involved'.[89] Owing to the decision by Parliament to grant discretion to the courts to reallocate property interests on relationship breakdown for married couples only, the decision to endorse general property law principles for cohabitants, ostensibly devoid of discretion, may have reflected a deliberate policy that the courts 'should be slow to attempt in effect to legislate themselves'.[90] This clearly is the key factor underpinning the refusal by the court to exercise discretion in the development of equitable principles in this area. Although courts can develop equitable principles, as the House of Lords did in *Gissing*, that development needs to be principled.[91] Therefore, extending the reach of the framework laid down in *Gissing* to a non-financial contributions, was taking that process too far.

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[83] R Ingleby, 'Sledgehammer Solutions in Non-Marital Cohabitation' (1984) 43(2) *Cambridge Law Journal* 227, 230.
[84] J Mee, 'Burns v Burns: The Villain of the Piece', in S Gilmore, J Herring and R Probert, *Landmark Cases in Family Law* (Hart 2010) 175, 176.
[85] N Lowe and A Smith, 'The Cohabitant's Fate' (1984) 47 *Modern Law Review* 341, 344.
[86] *Burns v Burns* (n 68) 254 (Fox LJ).
[87] ibid 254.
[88] ibid 247 (Waller LJ).
[89] ibid 254 (May LJ).
[90] ibid 256 (May LJ).
[91] Mee (n 84) 187.

# JUDICIAL DISCRETION AND THE HOUSE OF LORDS' DECISION IN *LLOYDS BANK v ROSSET*

The most authoritative statement as to the criteria for the common intention constructive trust is the House of Lords' decision in *Lloyds Bank v Rosset.*[92] This involved a married couple but, because the plaintiff was a creditor, still necessitated the use of trust principles as opposed to the structured judicial discretion of the Matrimonial Causes Act 1973. In *Rosset*, the husband purchased a semi-derelict property using money from his family trust fund. The property was acquired in the husband's sole name at the insistence of the trustees of the trust fund. Mrs Rosset made no financial contribution to the purchase of the property or the costs associated with renovation. However, prior to completion of the transfer in the husband's name, the wife provided labour to help renovate and redecorate the property. Unbeknown to the wife, the husband charged the property to a bank in order to obtain funds to meet the renovation costs. Following registration of the bank's charge, the couple and their two children moved into the property. The marriage subsequently broke down and, following the husband's failure to repay the loan, the bank sought possession and sale of the property. While Mr Rosset accepted the bank's claim, his wife argued that she had acquired a beneficial interest which, coupled with her actual occupation of the property, constituted an overriding interest under section 70(1)(g) of the Land Registration Act 1925. In the County Court, Judge Scarlett found an express common intention between the parties which Mrs Rosset had relied upon to her detriment when she carried out acts of renovation to the property, but held that she did not have actual occupation prior to the parties moving into the property. On appeal, the Court of Appeal accepted the presence of a common intention while a majority comprising Nicholls LJ and Purchas LJ found that she had been in actual occupation at the time of the transaction for the purpose of satisfying section 70(1)(g).[93]

Lord Bridge gave the sole judgment in the House of Lords. Mrs Rosset's claim to an overriding interest protected by section 70(1)(g) was rejected on the basis that she had not acquired a beneficial interest. This meant that it was 'academic' to consider the issues of when she was in actual occupation or the time in which occupation is necessary for the purpose of priorities with the bank.[94] The methodology used by the House of Lords to dismiss a claim to a beneficial interest was important. Mrs Rosset argued that

[92] *Lloyds Bank v Rosset* (n 3).
[93] Mustill LJ dissented.
[94] *Lloyds Bank v Rosset* (n 3) 134.

she had an express common intention with the husband based on conversations that the property would be jointly owned, which she had relied upon to her detriment. Noting the 'conflict of evidence' between the spouses,[95] Lord Bridge stated that the judge needed to assess whether the parties had 'entered into an agreement, made an arrangement, reached an understanding or formed a common intention that the beneficial interest in the property would be jointly owned'.[96] On this point, Lord Bridge refused to accept the presence of such an agreement, since both parties were fully aware of the stipulation by the Swiss trustee that they would only transfer funds to the husband if the property was acquired in his sole name. By reaching an agreement to share beneficially, the parties would be engaging in 'a subterfuge to circumvent the stipulation which the Swiss trustee insisted'.[97] Even if there was the 'clearest oral agreement' between the spouses,[98] Lord Bridge noted that without detrimental reliance on that agreement it would be ineffective owing to the need for writing under section 53(1) of the Law of Property Act 1925.

Following the rejection of an express common intention, Lord Bridge considered whether an agreement could be inferred from conduct. The conduct relied upon by the wife included coordinating the work of builders, obtaining materials from builders' merchants, painting, wallpapering and other acts of renovation. On the point of inferences drawn from conduct, Lord Bridge stated that:

> 'neither a common intention by spouses that a house is to be renovated as a "joint venture" nor a common intention that the house is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property'.[99]

Lord Bridge stated that Judge Scarlett had relied on the work that Mrs Rosset did in the renovation of the property to infer a common intention but remarked that 'by itself this activity, it seems to me, could not possibly justify any such inference'.[100] He went further to note that the monetary value of Mrs Rosset's work, when viewed as a contribution to the property, 'must have been trifling as to be almost de minimis'.[101] Therefore Lord Bridge stated that the wife's claim could not be supported on the evidence.

[95] ibid 127.
[96] ibid.
[97] ibid 128.
[98] ibid 129.
[99] ibid 130.
[100] ibid 131.
[101] ibid.

After disposing of the wife's claim, Lord Bridge sought to emphasise 'one critical distinction' that a judge 'should always have in the forefront of his mind'.[102] This distinction was between a common intention established on the basis of an agreement and one established through conduct. For the former, the court was required to find 'at any time prior to acquisition, or exceptionally at some later date…any agreement, arrangement or understanding reached between them that the property is to be shared beneficially'.[103] This agreement, arrangement or understanding needed to 'be based on evidence of express discussion between the partners, however imperfectly remembered and however imprecise their terms may have been'.[104] Once evidence of this was found which was 'independent of any inference to be drawn from their conduct', Lord Bridge noted the requirement that the claimant must act to their detriment or significantly alter their position in reliance on the agreement. For the latter, 'the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as to the conduct relied on to give rise to constructive trust'.[105] Lord Bridge then provided the following statement as to what conduct would suffice for a court to infer a common intention:

> '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'.[106]

The earlier House of Lords' decisions in *Pettitt* and *Gissing,* discussed in Chapter Four, were analysed using the second category whilst the *Eves* and *Grant v Edwards* were 'outstanding examples' of cases under the first category.[107]

*Rosset* is an important authority when analysing the use of discretion in the acquisition of a common intention constructive trust. In contrast to *Eves*, what is immediately apparent from Lord Bridge's judgment is the absence of discussion of discretion mirroring the approach taken in *Grant*. It therefore further hardens the restrictive and

[102] ibid 132.
[103] ibid.
[104] ibid 132.
[105] ibid 133.
[106] ibid.
[107] ibid 133.

rigid approach taken to acquisition as seen earlier in *Burns*. Dixon noted that *Rosset* represented 'a straightforward application of the principles first elaborated in *Pettitt v Pettitt and Gissing v Gissing* twenty years ago'.[108] However, whilst *Pettitt* and *Gissing* certainty sought to generate a clear framework, the judgment in *Rosset* evidences an even stronger desire by the House of Lords to achieve this through a preference for bright-line rules. The impetus for adopting this rigid approach may also have been attributable to the fact that the dispute was triggered by the claim of a third party creditor. Hayton noted this concern, stating that the 'the informal creation of proprietary interests needs to be confined within narrow limits for the protection of purchasers from, and creditors of, the sole legal owner and to simplify and expedite conveyancing so that land is freely marketable'.[109] Here there is a clear favouring of a system based on rules for the acquisition of an interest.

However, while the House of Lords' approach denies the role of discretion, the ambiguities inherent in some of Lord Bridge's statements left room for implicit and informal exercises of discretion. Building upon the academic literature on judicial discretion, this again underlines that discretion exists even within a framework characterised by rules. As in *Gissing,* the term 'resulting, implied or constructive trust' was used by Lord Bridge without differentiation between the different types of trusts covered by that term. At no point in his speech did Lord Bridge acknowledge the difference between resulting or constructive trusts, or the similarities between the approach of inferred common intention and the resulting trust. Furthermore, Lord Bridge appeared to conflate the express common intention constructive trust with proprietary estoppel. For example when explaining the requirements for express common intention he stated that satisfaction of these requirements would 'give rise to a constructive trust or a proprietary estoppel'.[110] Whilst consideration of proprietary estoppel is outside the scope of this thesis, the lack of precision in Lord Bridge's judgment exposed the difficulties in using the judgment as guidance for future cases. Indeed, there are extensive differences between a trust and proprietary estoppels, yet these are blurred in *Rosset* through Lord Bridge's 'undifferentiated use of the terminology'.[111] The conflation could be attributable to Browne-Wilkinson VC in *Grant* who noted that

[108] M Dixon, 'Acquiring an Interest in Another's Property' (1991) 50 *Cambridge Law Journal* 38, 40.
[109] Hayton (n 66) 398.
[110] *Lloyds Bank v Rosset* (n 3) 133. Lord Bridge intimates, at 129, that an express agreement between the parties that was subsequently relied upon could form the basis of an enforceable interest 'by way either of a constructive trust or of a proprietary estoppel'.
[111] JD Davies, 'Informally Created Trusts of Land and Some Alternatives to Them' (1990) 106 *Law Quarterly Review* 539, 544.

'useful guidance' could be acquired from proprietary estoppel.[112] This failure to differentiate the common intention constructive trust resulted, in turn, in a line of subsequent cases that continued to conflate the doctrines,[113] with later cases then emphasising their fundamental differences.[114]

A similar ambiguity can be found in Lord Bridge's articulation of the requirement of common intention which, as Chapter Four noted, could provide the basis for the use of discretion by the judiciary to clarify that ambiguity. He stated that the court must determine whether the parties had 'entered into an agreement, made an arrangement, reached an understanding or formed a common intention'.[115] Later in his judgment, the words 'common intention' are omitted from this list.[116] It was clear that Lord Bridge intended 'evidence of express discussions between the partners'[117] and that he did not 'think it is of importance which of these alternative expressions one uses'.[118] However, it can be questioned why Lord Bridge intended to articulate 'common intention' in such a variety of ways, and, in fact, differentiated common intention from 'an agreement, arrangement or understanding'. Whilst courts may have been clear on the need to identify an agreement between the parties, it is certainly arguable that, for example, an arrangement may in fact be different from an understanding.[119] Lord Bridge's use of these numerous expressions may be explicable based on a synthesis of terms used in earlier cases of *Eves* and *Grant v Edwards*. For example the Court of Appeal in *Eves* uses the terms 'arrangement'[120] and 'understanding'.[121] Yet, as noted in Chapter Four, emphasising express agreements also serves as a reminder of the recurring tensions associated with prioritising a framework premised on the shared intentions of parties in a context where those intentions are rarely articulated expressly. Indeed, Lord Bridge acknowledged the 'special difficulties for judges' when pinpointing intentions[122] and that 'spouses living in amity will not normally think it necessary to formulate or define

[112] *Grant v Edwards* (n 10) 438 (Browne-Wilkinson VC).
[113] *Yaxley v Gotts* [2000] Ch 162 (CA) 177 (Walker LJ).
[114] *Stack v Dowden* [2007] UKHL 17 [37] (Lord Walker). For early academic comment noting their differences see P Ferguson, 'Constructive Trusts – A Note of Caution' (1993) 109 *Law Quarterly Review* 114.
[115] *Lloyds Bank v Rosset* (n 3) 127.
[116] ibid 132.
[117] ibid 132.
[118] ibid 127.
[119] See N Piska, 'Constructive Trusts and Constructing Intention' in M Dixon, *Modern Studies in Property Law: Volume 5* (Hart 2009).
[120] *Eves v Eves* (n 9) 772 (Browne LJ), 774 (Brightman LJ).
[121] ibid 773 (Brightman LJ)
[122] *Lloyds Bank v Rosset* (n 3) 127.

their respective interests in property in any precise way'.[123] Therefore the observation of Dixon that the House of Lords in *Rosset* engaged in a 'straightforward application' of *Pettitt* and *Gissing* may be correct. With that endorsement of those decisions, the House of Lords also continued to support a framework based on common intention that would struggle to accommodate the interpersonal dimension inherent within home-sharing.

A final issue that illustrated a further hardening of the rules in this area was the treatment of contributions for the purpose of establishing an inference of common intention. Lord Bridge restricted the range of contributions capable of establishing inference to 'direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments'.[124] That approach closed down the possibility of recognising an implied common intention based on indirect contributions, a principle which the minority in *Gissing* favoured and for which some support was visible in *Burns* and *Falconer*. For Thompson, this approach 'seems a little less liberal than that which has been adopted in the past'.[125] Whilst Lord Bridge's reading of authorities is arguably correct (although he did not cite the authorities directly), several academics lamented the consequences of this decision to restrict contributions to direct financial contributions. For example, O'Hagan stated that, in the absence of express discussions as to ownership, 'an ever increasing number of cohabitees will find that years of indirect contributions will leave them with no interest in the home should the couple separate'.[126] When viewed from the perspective of discretion, Lord Bridge was clearly seeking to close down the scope for the exercise of discretion by emphasising 'bright-line' rules. Lord Bridge also departed from the tenor of *Gissing* where there was some support for looking at how the contribution generated the common intention to a position where a mere presence of a contribution sufficed. Put differently, Lord Bridge was making the application of the rule more mechanical by enabling a direct contribution, by itself and devoid of context, to 'readily justify the inference' of a common intention; in contrast to the approach in *Gissing* whereby the contribution was to be viewed within the context in which it had been made.[127]

Chapter Four noted the deficiencies of *Pettitt* and *Gissing* as the foundation for the development of implied trusts in this area. In particular, it noted that the endorsement of

[123] ibid 127-128.
[124] ibid 133.
[125] MP Thompson, 'Establishing an Interest in the Home' (1990) *Conveyancer and Property Lawyer* 314, 317.
[126] P O'Hagan, 'Lloyds Bank Plc v Rosset – McFarlane v McFarlane Revisited' (1991) 42(3) *Northern Ireland Legal Quarterly* 238, 244.
[127] *Lloyds Bank v Rosset* (n 3) 133.

general principles of property law failed to recognise the specific nature of acquisition of a home by spouses. *Rosset* continued that trend; Lord Bridge refused to 'attempt an elaborate and exhaustive analysis of the relevant law' questioning whether it would 'contribute anything to the illumination of the law'.[128] This decision to not review the authorities was unfortunate in light of the 'plethora of decisions since the House of Lords was last seised of the issue in Gissing'.[129] This approach also indicated a hardening of Lord Diplock's dicta in *Gissing* into rules, and identifies *Rosset* as a retrograde decision, particularly in light of its treatment of indirect contributions.

Drawing upon the findings of Chapter One, Davis noted that frequent polarisation of rules and discretion in academic scholarship often failed to recognise their connection. For Davis, by recognising the connection between rules and discretion the key issue becomes 'the optimum point on the rules-to-discretion scale'.[130] *Rosset* clearly shows a preference for placing that point firmly on the side of rules, and further narrows potential avenues for the use of discretion stemming from *Gissing*. Whilst there certainly was some ambiguity in Lord Bridge's formulation of express and inferred common intention that could provide the foundation for more discretion as to fact-finding, the House of Lords clearly favoured predictability and certainty over considerations of fairness. Hayton expressed concerns of the 'diluting'[131] of the need for certainty in land transactions and even went so far to note that 'the woman should bear the burden of his [the husband's] feckless roguery rather than his creditors or purchasers from him'.[132]

*Rosset* signalled a commitment to clear precise rules for the acquisition of an interest and, in stark contrast to cases under section 17 or early cases like *Eves*, provides ample evidence of a 'return to principle'.[133] Yet the approach in *Rosset* provoked concern at the time.[134] One academic, noting these restrictive trust principles, favoured estoppel because of the remedial flexibility involved and, more significantly, its discretionary nature.[135] This arguably shows the development of the trusts framework into a system of 'crystalline rules'[136] which is consistent with Rose's theory as to the incremental

[128] ibid 132.
[129] Thompson (n 125) 316.
[130] Davis (n 41) 15.
[131] Hayton (n 66) 397.
[132] ibid 399.
[133] Montgomery (n 39) 18.
[134] See Thompson (n 125) and Dixon (n 108).
[135] Thompson (n 125) 317-318.
[136] C Rose, 'Crystals and Mud in Property Law' [1987-1988] 40 *Stanford Law Review* 577, 578.

development of property law.[137] As seen in Chapter One, Rose noted that a natural process in the development of the common law was the hardening of seemingly discretionary frameworks into a system of precise rules which then owing to rigidity would be made flexible again through the use of discretion. Whilst not extinguishing the courts ability to use informal discretion, the House of Lords appeared to favour the need for a restatement of the law rather than a full consideration of the suitability of these rules when applied to parties in an intimate relationship.

## CHALLENGES TO *LLOYDS BANK v ROSSET*

The discussion in the previous section has illustrated a clear preference for rules over the exercise of discretion when determining an acquisition claim. This section will further explore the criticisms of *Rosset* and then move on to analyse subsequent judicial attempts to inject greater flexibility into the implied trust framework, and thereby depart from the rigidity of *Rosset*. It will consider whether the trust framework continued to adopt a restrictive interpretation of acquisition principles.

As noted above, the express common intention constructive trust gives effect to the common intention of the parties. The House of Lords in *Rosset* affirmed that it could not be imputed to the parties, so avoiding the imposition of an outcome by the judiciary.[138] However, Chapter Four noted the problems of reliance on common intention within a domestic relationship; consequently the requirement of common intention has been extensively criticised by the judiciary[139] and the academic community.[140] It has been criticised as a 'myth' and as '[t]he most persistent red herring',[141] mainly because in interpersonal relationships, as acknowledged by the judiciary as early as 1948, unromantic discussions as to legal entitlement rarely happen in practice.[142] Whilst the House of Lords in *Pettitt* stated that it was 'grotesque' to expect couples to hammer out agreements as to ownership, the endorsement of common intention analysis in that case and *Gissing* nevertheless required the parties to do just that, and also to interact with one

[137] ibid 578-579.
[138] See N Piska, 'Constructive Trusts and Constructing Intention' in M Dixon, *Modern Studies in Property Law: Volume 5* (Hart 2009) 203.
[139] See the Supreme Court of Canada decision in *Kerr v Baranow* [2011] 1 SCR 269 [26] (Cromwell J) on the artificiality of common intention analysis.
[140] For extensive criticism of intention-based doctrines in other jurisdictions see S Gardner, 'Rethinking Family Property' (1993) 109 *Law Quarterly Review* 263, 279.
[141] Glover and Todd (n 6) 328. Also note Glover and Todd's thesis that the constructive trust is redundant and cases can be resolved using express trusts and resulting trusts. Therefore the search for common intention is 'misguided'.
[142] See *Re Rogers' Question* [1948] 1 All ER 328 (CA) and *Rimmer v Rimmer* (n 28) analysed in Chapter Two.

another with seemingly mercenary motives.[143] *Rosset* equally perpetuated this approach, and as Davies noted, 'place[d] more emphasis on the evidential side than on the inherent improbability in these cases of a common intention being real'.[144] Davies' viewpoint supports Gray's assertion that the common intention constructive trust is a 'prisoner of its own dogma',[145] leading the courts to prioritise agreements in a context where they frequently do not exist.

A different criticism can be identified in light of *Eves* and *Grant*, where the Court of Appeal constructed agreements despite their clear absence. This has resulted in the criticism that common intention is 'no more than fiction relied on by the court in an attempt to do justice'.[146] The reasoning deployed in *Eves* and *Grant* demonstrate the ways in which the court has 'fudged' the presence of an express common intention, particularly in circumstances where the claimant has not made the necessary financial contribution to trigger either a resulting trust or an inferred common intention constructive trust.[147] These two cases highlight the artificiality in searching for common intentions and, as will be further explored below, create a tension with the view that the common intention between the parties has to be 'real' or 'true'.[148] The artificiality of common intention analysis becomes even more pronounced when litigants openly admit that they had reached no common intention to share beneficial ownership yet without the potential of imputing intentions, the court nevertheless proceeds on the basis of common intention.[149] Ultimately, as Gardner has noted, 'agreements are in reality found or denied in a manner quite unconnected with their actual presence or absence'.[150] Even where there is evidence of a real common intention between the parties, the consequences of that finding are extensive but often unappreciated by the parties. As Waite J observed, 'many thousands of pounds of value may be liable to turn on fine questions as to

[143] *Pettitt v Pettitt* (n 4) 810 (Lord Hodson).
[144] JD Davies (n 111) 541.
[145] K Gray and S Gray, *Elements of Land Law* (5th edn, OUP 2009) 872.
[146] U Riniker, 'The Fiction of Common Intention and Detriment' [1998] *Conveyancer and Property Lawyer* 202, 207.
[147] Examples being the 'excuse cases' of *Eves v Eves* (n 9), *Grant v Edwards* (n 10) and *Hammond v Mitchell* [1992] 2 All ER 109. See A Lawson, 'Acquiring an Interest in the Family Home' [1992] *Conveyancer and Property Lawyer* 218, 220-223 for criticism.
[148] *Stack v Dowden* (n 114) [69] (Baroness Hale). For example, in *Springette v Defoe* [1992] 2 FCR 561 (CA) 568 the Court of Appeal held that silent or non-communicated intentions were not sufficient and that property rights could not be created 'at a subconscious level' or 'affected by telepathy'.
[149] See *Midland Bank v Cooke* [1995] 4 All ER 562 (CA) 567-568 where Waite LJ cited transcripts from interviews with the parties where they revealed openly that they had reached no common intention as to beneficial ownership. The limitations of common intention were also noted in *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 3 All ER 703 (CA) [71] (Chadwick LJ).
[150] Gardner (n 149) 264.

whether the relevant words were spoken in earnest or in dalliance and with or without representational intent'.[151]

The requirement of detrimental reliance which is needed to generate enforceability of the agreement despite the lack of compliance with section 53(1)(b) of the Law of Property Act 1925 has also been subject to academic criticism. Chapter Four highlighted Lord Diplock's doubtful view that case law pre-*Pettitt* illustrated the court acknowledging detrimental reliance as a component of a claim to a beneficial interest over the matrimonial home. However, both *Eves* and *Grant v Edwards* illustrate the need for detrimental reliance but provided different tests. *Rosset* failed to clarify whether the correct approach was that of Nourse LJ requiring evidence of conduct that the claimant would not reasonably be expected to perform *but for* a belief of acquiring a beneficial interest or that of Browne-Wilkinson VC requiring any conduct referable to their joint lives. Subsequent academic commentary appears to favour the interpretation of Nourse LJ, but this in turn has generated various issues. The main criticism is its tendency to impact disproportionately upon litigants based on gender which, as Lawson has noted, renders it 'an inappropriate hurdle for claimants to clear in cases arising out of disputes between formerly cohabiting couples'.[152] The motivations of mutual love and affection that often form the basis of a common intention are not sufficient to justify equity's intervention and, in general, litigants satisfy detrimental reliance by undertaking tasks that go well beyond perceived gender roles. As Lawson has observed:

> 'It is not reasonable to expect women acting out of love and affection to wield 14lb. sledgehammers, to demolish or construct buildings or to work awkward cement mixtures. On the other hand, it does appear to be thought reasonable to expect such motives to prompt them to move in with their lovers, abandon their marriages, bear and bring up their lovers' babies and generally perform 'all wifely duties'.[153]

This model generates the risk Gardner identified that 'even the most hard-nosed behaviour can plausibly be put down to securing or improving one's dwelling'.[154]

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[151] *Hammond v Mitchell* (n 147) 121.
[152] A Lawson, 'The Things we do for Love: Detrimental Reliance in the Family Home' (1996) 16 *Legal Studies* 218, 219.
[153] ibid 225.
[154] S Gardner, 'A Woman's Work…' (1991) 54 *Modern Law Review* 126, 127.

For the purpose of establishing an inferred common intention constructive trust judges and academics have argued that the court should recognise a broader range of contribution to the home.[155] As Chapter Four and this chapter have shown, the Court of Appeal decisions prior to *Rosset,* supported this view and it was also viewed favourably by Lords Reid and Diplock in *Gissing*. The requirement laid down in *Rosset* of a direct financial contribution or a mortgage repayment is an exclusionary rule for some litigants and arguably incentivises litigants to ask the court to 'discover imaginary express agreements'.[156] Furthermore it is also susceptible to similar criticism levelled against the resulting trust for the narrow focus on monetary contribution which may penalise economically weaker parties.[157] In light of these criticisms it is perhaps understandable that there was support from academics and litigants for the court to exercise discretion in a manner that refined the framework of rules to enable them to better accommodate the interpersonal context. The post-*Rosset* case of *Le Foe v Le Foe* evidenced this approach through recognition of indirect financial contributions and requires further analysis.[158]

In *Le Foe* the parties had been married for over 40 years. For a significant portion of that time the parties lived in a property purchased in the name of the husband. The property was acquired with the assistance of a mortgage. Both parties worked and the husband's earnings were used to discharge the mortgage whereas the wife's earnings were spent on domestic expenditure. The husband formed a new relationship and engaged in a fraudulent scheme that involved re-mortgaging the property without the wife's knowledge. The husband defaulted on the mortgage repayments and the mortgagee sought repossession. The question for Nicholas Mostyn QC, sitting as a deputy High Court judge of the Family Division was whether the wife had acquired a beneficial interest capable of binding the mortgagee.

Nicholas Mostyn QC found that the wife had acquired a beneficial interest in the property. He recalled Lord Bridge's formula in *Rosset* and stated that: 'I do not believe that in using the words "direct contributions" Lord Bridge meant to exclude the situation

[155] See M Pawlowski, 'Beneficial Entitlement- Do Indirect Contributions Suffice' [2002] *Family Law* 190, 194 and MP Thompson, 'An Holistic Approach to Home Ownership' [2002] 66 *The Conveyancer* 273, 276-277.
[156] Gardner (n 154) 127.
[157] See S Wong, 'Re-thinking Lloyds Bank v Rosset from a Human Rights Perspective' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Routledge Cavendish 2003) 79, 81.
[158] [2001] All ER (D) 325. For support of *Le Foe* see Law Commission, *Sharing Homes A Discussion Paper* (Law Com No 278, 2002) para 4.26.

which obtains here'.[159] Furthermore, he highlighted Lord Bridge's doubt as to whether 'anything less will do' than a direct contribution was an expression that was clearly not 'in absolute terms'.[160] By reading Lord Bridge's dicta to mean that in exceptional circumstances an indirect contribution would be permitted he observed that:

> 'I have no doubt that the family economy depended for its function on W's earnings. It was an arbitrary allocation of responsibility that H paid the mortgage, service charge, and outgoings, whereas W paid for day to day domestic expenditure. I have clearly concluded that W contributed indirectly to the mortgage repayments, the principal of which furnished part of the consideration for the initial purchase price'.[161]

Although the wife also made direct financial contributions, the recognition of indirect contributions was viewed positively in the academic community and this indicates support for the courts using their discretion to develop the legal framework in a manner that is more sympathetic to the domestic context. Thompson stated that 'this aspect of the decision is to be applauded'[162] whilst Pawlowski also applauded the 'open recognition' of indirect contributions.[163] As noted in Chapter Four, the methodology employed by Nicholas Mostyn QC saw the High Court drawing upon the ambiguity in *Gissing* and also Lord Bridge's opinion in *Rosset* to enable a broader recognition of the various contributions to the acquisition of property. This approach may be viewed as inconsistent with *Rosset,* however the case for recognition of indirect contributions was arguably a strong one if it is recognised that equity 'matches established principle to the demands of social change'.[164] Lords Reid, Pearson and to some extent Diplock in *Gissing,* supported indirect contributions in *Gissing*. Similarly, in *Rosset* the numerous Court of Appeal authorities supporting indirect contributions were not referred to by Lord Bridge,[165] perhaps as Lord Bridge sought to decide the case 'on the facts' without attempting to provide 'an elaborate and exhaustive analysis of the relevant law'.[166] As indirect contributions were not engaged in *Rosset,* it is arguable there was no need to discuss them. *Le Foe* represents a positive development seeing as it did not permit *every* type of contribution to be capable of triggering an inferred common intention

[159] *Le Foe v Le Foe* (n 158) [47].
[160] ibid [43].
[161] ibid [10].
[162] Thompson (n 155) 276.
[163] Pawlowski (n 155) 190.
[164] *Midland Bank v Cooke* (n 149) 575.
[165] Such as *Falconer v Falconer* (n 79) and *Hargrave v Newton* [1971] 3 All ER 866 (CA).
[166] *Lloyds Bank v Rosset* (n 3) 32.

constructive trust. Household expenses that were not referable to the acquisition of the property, the purchase of domestic items and ephemeral renovations would not be sufficient to establish an interest which reveals a compromise between the commitment to certainty seen in *Rosset* and recognition of the domestic context when parties are acquiring property. Nicholas Mostyn QC adopted a more discretionary approach to the requirements of contributions and indicated a modest departure from the 'bright-line' and seemingly arbitrary rule in *Rosset.* Here the various benefits of discretion outlined in Chapter One can be seen such as its ability to modernise the law[167] and to help the law keep 'in touch with the people it seeks to regulate and assist' and 'with the social circumstances in which they live'.[168]

There is little evidence of the approach adopted by *Le Foe* being used in subsequent cases but its approach to indirect contributions was approved by the Law Commission in their discussion paper, Sharing Homes.[169] Another instance of limited support for *Le Foe* can be seen in *Stack v Dowden*, which according to Probert, 'implicitly approved' the decision.[170] *Stack* was primarily concerned with quantification of a beneficial interest and will be explored in Chapter Six. Nevertheless, various statements were made by the majority to suggest that *Rosset* had made the law too rigid and that the courts should soften the application of these rules. As Baroness Hale noted in relation to the acquisition hurdle '[t]here is undoubtedly an argument for saying, as did the Law Commission in Sharing Homes…that the observations, which were strictly obiter dicta, of Lord Bridge of Harwich in *Lloyds Bank v Rosset* [1991] 1 AC 107 have set that hurdle rather too high in certain respects'.[171] This statement suggested the possibility of the courts allowing a broader range of contributions to trigger an inferred common intention constructive trust consistent with the approach in *Le Foe*.

Contrastingly, following the framework developed in *Stack,* there was also evidence to suggest that the courts may be moving towards creating another acquisition route which does not rely on relaxing the express or inferred intention routes previously established in *Rosset.* Academics used the overall tenor of the majority decision in *Stack* to produce

[167] See O Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33(6) *Modern Law Review* 601.
[168] CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47, 64.
[169] Law Commission (n 158) paras 3.31, 4.26.
[170] See, also, Probert (n 82) 335.
[171] *Stack v Dowden* (n 114) [63] and Lord Walker [26] who stated in relation to inferred common intention that '[w]hether or not Lord Bridge's observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction'. Echoed in the Privy Council decision of *Abbott v Abbott* [2007] UKPC 53 [3]-[6].

a third route for the acquisition of a beneficial interest.[172] As will be explored further in Chapter Six, the basis for this was endorsement by the majority in *Stack* of common intention being 'actual, inferred or imputed' which led some academics to believe that the court may 'impute' to parties a common intention to share beneficially based on the whole course of conduct of the parties in relation to the property.[173] This more discretionary approach would enable imputation of an intention to share ownership, not simply an intention as to shares, once ownership has been determined.

However, no modification of *Rosset* has occurred in subsequent cases whether through an express or inferred common intention or alternatively through the court using imputation at the acquisition stage, despite some academic comment suggesting otherwise.[174] Rather, the courts have maintained the strict approach of *Rosset*, often without direct discussion of the principles laid down in that case, leading one commentator to argue that the courts have merely 'scraped the mouldy bits off *Lloyds Bank v Rosset* and declared it good eating…whilst managing not to mention *Lloyds Bank v Rosset* by name'.[175] This appears to suggest the continuation of a framework of rules characterising acquisition which, as Chapter Six will demonstrate, is very different to the arguably structured discretion visible at the quantification stage and that was used by the Court of Appeal prior to *Pettitt*.

The evidence of a refusal by the courts to use discretion as a means of injecting flexibility into the acquisition framework is clear from post-*Stack* case law. For example in *James v Thomas*, Ms James, who provided 'near Herculean' unpaid work in the family business, sought to establish a beneficial interest in the property via an express and inferred common intention.[176] The Court of Appeal found that statements such as 'this will benefit us both' and, in the event of Mr Thomas' death, 'you will be well provided for', were mere assurances rather than promises of a beneficial interest capable of triggering an express common intention constructive trust.[177] Similarly, as there was

[172] See M Dixon, *Modern Land Law* (7th edn, Routledge 2010) 171 stating 'it is now possible to find a common intention by examining the whole range of the parties' conduct in relation to the property and, in that context, to each other' and C Harpum, S Bridge and M Dixon, *Megarry and Wade's The Law of Real Property* (7th edn, Sweet and Maxwell 2008) para 11-025. See also M Tattersall, 'Stack v Dowden: Imputing an Intention' [2008] 38 *Family Law* 24.
[173] *Stack v Dowden* (n 114) [60] (Baroness Hale).
[174] See, for example, K Lees, 'Geary v Rankine: Money Isn't Everything' [2012] *Conveyancer and Property Lawyer* 412, 417-418.
[175] A Ralton, 'Establishing a Beneficial Share: Lloyds Bank v Rosset Revisited' [2008] 38 *Family Law* 424, 425. *Geary v Rankine* [2012] EWCA Civ 555 and *Thompson v Hurst* [2012] EWCA Civ 1752 also evidence this approach.
[176] *James v Thomas* [2007] EWCA Civ 1212 (CA) [11] (Sir John Chadwick).
[177] ibid [13].

no direct financial contribution to the purchase price, an inferred common intention constructive trust could not arise, despite her substantial help in improving the value of the property and the success of their business.[178] This case is noteworthy for illustrating the reluctance by the Court of Appeal to consider obiter statements in *Stack* which had suggested modifying the acquisition routes for a common intention constructive trust. It is clear that following the ratio of *Rosset* and *Stack* is of key importance for the courts but, as Zuckerman has noted in the context of matrimonial property disputes, it is arguable that the process of adjudication should not be a purely mechanical exercise and should involve the court engaging in a full consideration of the authorities.[179] Even a literal reading of Lord Bridge's dicta in *Rosset* suggests a small degree of flexibility in the requirement of an agreement, arrangement or understanding through the subsequent words 'however imperfectly remembered and however imprecise their terms may have been'.[180] This formulation undoubtedly does not sanction the invention of a common intention but does underline the need for a rigorous approach to fact-finding. It is arguable that this may have been overlooked in post-*Stack* case law such as *James* and also *Morris v Morris* that appear to apply the *Rosset* formula in an overly mechanical manner.[181]

More recently, *Slater v Condappa*[182] and *Re Ali*[183] both illustrate that the precise requirements laid down in *Rosset* continue to apply at the acquisition stage despite *Stack*. In *Slater,* Pattern LJ stated that for the cohabitant to acquire an interest 'it is necessary for her to establish an agreement or representation made that she should become a joint beneficial owner which she has relied on to her detriment'.[184] A similar approach was adopted in *Re Ali,* where Dobbs J held that there needed to be 'evidence of an actual agreement, arrangement or understanding between the parties.'[185] Imputation of a common intention to share beneficial ownership at the acquisition stage has also not occurred and case law suggesting this is the case, such as the High Court decision in

[178] See N Piska, 'A Common Intention or a Rare Bird? Proprietary Interests, Personal Claims and Services Rendered by Lovers Post-Acquisition' [2009] 21(1) *Child and Family Law Quarterly* 104 who comments that *James v Thomas* and *Morris v Morris* [2008] EWCA Civ 257, [2008] All ER (D) 333 (CA) suggest that the 'non-owning claimant may in fact be in a worse position than before *Stack v Dowden*'. See also *Thomson v Humphrey* [2009] All ER (D) 280 and *Walsh v Singh* [2009] EWHC 3219 for similar results.
[179] AAS Zuckerman, 'Ownership of the Matrimonial Home-Common Sense or Reformist Nonsense' [1978] 94 *Law Quarterly Review* 26, 39.
[180] *Lloyds Bank v Rosset* (n 3) 132.
[181] *Morris v Morris* (n 178).
[182] *Slater v Condappa* [2012] EWCA Civ 1506.
[183] *Re Ali* [2012] EWHC 2302 (Admin).
[184] *Slater v Condappa* (n 182) [28].
[185] *Re Ali* (n 183) [104].

*Hapeshi v Allnatt*, evidence a confusion on the part of the court between the principles applicable at the acquisition and quantification stages following *Stack*.[186]

Ultimately, these cases indicate that concerns of fairness or the utilisation of judicial discretion visible at the quantification stage do not exert a direct influence on how the courts analyse the acquisition of an interest under a common intention constructive trust. This shows that the position at acquisition is that '[t]he court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair'.[187] Whilst cases frequently refer to the concept of fairness, the blurring of the acquisition and quantification boundary which Gardner and Davidson viewed as a potential consequence of *Stack* and *Kernott* has not occurred.[188] This chapter has therefore shown that the acquisition principles are typified by bright-line rules coupled with a clear reluctance on the part of the judiciary to modify these principles despite extensive calls to do so.

## CONCLUSIONS

This chapter has demonstrated that when a litigant is acquiring an interest under a common intention constructive trust the court does not engage in an extensive use of discretion. Unsurprisingly, owing to the House of Lords' decision in *Pettitt*, the court does not exercise a discretion similar to that used by the Court of Appeal pre-*Pettitt* under section 17. As Chapter Two noted, the discretion conferred by section 17 initially resembled a strong discretion in a Dworkinian sense whereby the decision-maker was not bound by any set of standards and the exercise of which Goodin termed as being characterised by 'the absence of any rule'.[189] However, it was argued in Chapters Two and Three that, despite the clear presence of discretion being conferred by section 17, the courts incrementally structured their use of discretion and this process demonstrated that it did not embody 'palm tree justice'. Chapter Four demonstrated that 'a generally discretionary jurisdiction to apportion shares in the property on the basis of what was

[186] *Hapeshi v Allnatt* [2010] EWHC 392. For a general discussion of the decision see R Hawthorne, 'Acquiring a Beneficial Interest by Imputation: *Hapeshi v Allnatt*' [2010] 16(10) *Trusts and Trustees* 859.
[187] *Springette v Defoe* (n 148) 567 (Dillon LJ).
[188] See S Gardner and K Davidson, 'The Future of Stack v Dowden' (2011) 127 *Law Quarterly Review* 13 on the desire to create a single regime of legal principles governing trusts of the family home. Noted in *Jones v Kernott* [2011] UKSC 53 [16] (Lady Hale and Lord Walker). For an extension of this view see Gardner's contribution to this area S Gardner, 'Problems in Family Property' (2013) *Cambridge Law Journal* 301.
[189] RE Goodin, 'Welfare, Rights and Discretion' (1986) 6(2) *Oxford Journal of Legal Studies* 232, 234.

perceived to be fair' was 'emphatically rejected' in *Pettitt* and *Gissing*.[190] Whilst a broad discretionary approach was then adopted in the mid-1970s by the Court of Appeal in *Eves*, *Burns* adopted a restrictive and conservative application of the *Gissing* principles which was an approach developed even further in *Rosset.*[191]

When analysing whether there was a continued engagement with discretion, the development of the acquisition framework under the common intention constructive trust shows a clear judicial preference for bright-line rules and a commitment to certainty in transactions with real property. Indeed, as Gardner stated, *Rosset* illustrated what he termed a 'preoccupation' of the House of Lords that centred on 'increasing the efficiency of the judicial system by putting the law into concrete 'bright-line' formulae'.[192] *Rosset* and its subsequent interpretation show a continued commitment by the judiciary to that preoccupation and provide support to Maudsley's assertion that 'English Law likes to have clear rules to apply'.[193] The justifications for that approach are also apparent and resonate with the criticisms levelled against the Court of Appeal judgments in *Hine* and *Appleton*. For example, a key theme in the acquisition cases is that trusts of land are 'proprietary interests and entail definite and significant consequences'.[194] As Fox LJ stated in *Burns*, the court must 'keep in mind the nature of the right which is being asserted'.[195] As a direct consequence, the use of expansive discretion or considerations of fairness in the generation of a trust are perceived as direct affronts to the 'proprietary nature of the claim'.[196]

With that consideration in mind, the modern acquisition cases show a clear denial of the ability of a judge to use discretion expansively. Whilst fact-finding discretion remained, it is arguable that the courts were reluctant to exercise discretion as to the interpretation of the *Rosset* rules.[197] Despite both *Stack* and *Kernott* stating that the principles of *Rosset* had set the hurdle too high and that the court should consider reinterpreting *Rosset*, this chapter has shown that this has clearly not occurred. Whereas the pre-*Rosset* case law evinced a tendency to do this and for courts to 'fashion phantoms of common intention'

[190] MP Thompson, 'The Obscurity of Common Intention' [2003] *Conveyancer and Property Lawyer* 411, 411
[191] However, note the treatment of indirect financial contributions in *Burns.*
[192] Gardner (n 154) 128.
[193] RH Maudsley 'Constructive Trusts' (1977) 28 *Northern Ireland Legal Quarterly* 123, 123.
[194] JD Davies, 'Informally Created Trusts of Land and Some Alternatives to Them' (1990) 106 *Law Quarterly Review* 539, 539.
[195] *Burns v Burns* [1984] 1 All ER 244 (CA) 254 (Fox LJ).
[196] M Dixon, 'Editors Notebook' [2009] *Conveyancer and Property Lawyer* 365, 366.
[197] cf *Le Foe* which is an exception to this trend.

when resolving these disputes, post-*Stack* case law evinces a strict application of the rules laid down in *Rosset*.[198]

However, it should be noted that there remains the potential for discretionary resolution within a framework of rules. This potential stems from the ambiguous nature of their Lordships' reasoning in *Pettitt* and *Gissing* which is then mirrored by the reasoning of Lord Bridge in *Rosset*. Thus, drawing upon the findings of Chapter One, it is argued that judiciary may have been overly reluctant to exercise discretion that has always been inherent within judicial reasoning. Following Lord Bridge's formulation of express and inferred common intention in *Rosset*, Gardner stated that 'the lines of the resulting formula may look bright, but the continued fundamental ambiguity means that in practice there remains much uncertainty'.[199] Seeing as discretion is often used as a means to overcome the ambiguity of legal texts,[200] it is unfortunate that the courts were tentative in their interpretation of *Rosset* and further developed an overly mechanical and formalistic approach. After all, to state that the principles stemming from *Pettitt* and *Gissing* were clear would be a mistake. Following *Pettitt*, the decision was swiftly sent to the Law Commission for consideration.[201] When combined with *Gissing*, both decisions were regarded by Tiley as 'more delphic than the oracle, who at least had the advantage that her ambiguities were uttered in only one voice'.[202] Likewise *Rosset* had the benefit of a sole judgment but, as noted above, its bright-line formula was 'somewhat misleading'.[203]

A reluctance to reinterpret the much-criticised rules laid down in *Rosset* can be easily explained on the basis that *Rosset* remains the leading authority on the acquisition of an interest yet reluctance may evidence a failure to appreciate the inherent discretion in interpreting rules and the 'use of judgment to make a decision'.[204] It is not claimed here that judges should depart from unambiguous rules of the law or disregard clear binding precedents. Rather it is suggested that the modern acquisition case law reveal courts that have interpreted *Rosset* in an overly restrictive manner which failed to appreciate the

[198] K Gray, 'The Law of Trusts and the Quasi-Matrimonial Home' (1983) 42 *Cambridge Law Journal* 30, 33.
[199] Gardner (n 154) 128.
[200] See J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 97.
[201] Ultimately resulting in section 37 of the Matrimonial Proceedings and Property Act 1970.
[202] J Tiley Family Property Rights-Contribution and Improvement' (1969) 27 *Cambridge Law Journal* 191, 196.
[203] MP Thompson, 'The Obscurity of Common Intention' [2003] *Conveyancer and Property Lawyer* 411, 422.
[204] W Lucy, 'Adjudication' in J Coleman and S Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 206, 215.

discretion embedded within the process of adjudication. For example, Zuckerman criticised what he termed the 'all or nothing rule' in *Pettitt* and *Gissing* whereby 'either there was an agreement, at the time of the improvement to share the beneficial interest or there was no such agreement, and the result follows accordingly'.[205] It is this definitive approach that is clearly adopted again in *Rosset*. Yet, for Zuckerman, Lord Diplock's differing approach to the majority of looking more broadly at the issues at hand and the context of the contributions was beneficial:

> 'The lesson from this approach –and it has not always been adhered to-is that at times the judge's duty is to weigh a number of ingredients; he does not and must not invent them, but he is duty bound to bring them to bear on his decision, looking to previous cases in order to identify the relevant ingredients rather than for the purpose of deriving a precise formula capable of mechanical operation'.[206]

Recognising the implicit discretion involved in adjudication may provide renewed support for decisions such as *Le Foe* and illustrate that the ultimate decision of Nicholas Mostyn QC may actually represent a logical and principled development of the law rather than an unhelpful departure from *Rosset*. As cohabitation reform has been stalled, this recognition would also incentivise the courts to incrementally develop the trust framework that has been comprehensively criticised as 'complex, not well understood and prone to produce unfair results'.[207] Although Dewar identified in this area the tendency of the courts to engage in a process of 'familialisation' namely to incrementally modify general principles of property law to accommodate the specific needs of family members, it is apparent that this process following *Rosset* has stopped.[208] Recent viewpoints by the judiciary and Law Commission state that the trust principles are 'unfair' to women,[209] they 'discriminate against those who do not earn income from employment'[210] and fail to 'respond to the realities of family life and the

[205] AAS Zuckerman, 'Ownership of the Matrimonial Home-Common Sense or Reformist Nonsense' [1978] 94 *Law Quarterly Review* 26, 39.
[206] Zuckerman (n 179) 40-41.
[207] *Fowler v Barron* [2008] EWCA Civ 377, [2008] All ER (D) 318 [50] (Toulson LJ).
[208] See J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 327 and A Hayward, 'Family Property and the Process of Familialization of Property Law' [2012] 23(3) *Child and Family Law Quarterly* 284.
[209] *Curran v Collins (Permission to Appeal)* [2013] EWCA Civ 382 [9] (Toulson LJ).
[210] Law Commission, *Sharing Homes* (n 158) para 2.108.

problems of family breakdown'.[211] Thus a greater willingness on the part of the courts to adapt the general principles of property law through the use of discretion would not necessarily involve the use of an overly expansive discretion or a return to approaches visible in *Appleton v Appleton*. Developing the law in a manner like *Le Foe* would not result in litigants being granted property rights on the basis of fairness nor would it necessarily represent a radical departure from *Pettitt*, *Gissing* and *Rosset*.

Having analysed the use of discretion when acquiring a beneficial interest, Chapter Six will now analyse whether the courts utilise discretion when quantifying an interest under a common intention constructive trust.

[211] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* Report (Law Com No 307, 2007) para 2.4 referencing the Consultation Paper (Law Com CP No 179, 2006) Part 4.

# CHAPTER SIX

# JUDICIAL DISCRETION AND THE COMMMON INTENTION CONSTRUCTIVE TRUST: QUANTIFICATION

## INTRODUCTION

Chapters Two and Three analysed the case law decided before the House of Lords' decision in *Pettitt v Pettitt* and demonstrated that when quantifying beneficial interests in the matrimonial home the courts were exercising discretion through interpretations of section 17 of the Married Women's Property Act 1882.[1] Whilst some of the case law gave an appearance of a very wide discretion and this was an accurate characterisation in some cases such as *Hine v Hine*[2] and *Appleton v Appleton*,[3] these chapters revealed that the exercise of discretion had gradually become structured. This finding therefore challenged Zuckerman's interpretation of section 17 as a 'strong discretion' in the Dworkinian sense, that is, a discretion characterised by the absence of legal rules.[4] Instead, this period demonstrated that the court was in fact structuring its use of discretion and, consistent with the legal scholarship analysed in Chapter One, provided evidence for the view that even areas characterised by the use of discretion often see rules 'constituting, defining and constraining discretion'.[5]

Focusing primarily on disputes between former cohabitants, this chapter will consider whether this structured use of discretion is visible in the court's current methodology when quantifying beneficial interests under the common intention constructive trust. Linking back to the research questions of this thesis, this chapter will consider the exercise of discretion by the courts in the modern case law and the motivations behind its use. This chapter will, firstly, analyse the Court of Appeal decisions in *Midland Bank*

[1] *Pettitt v Pettitt* [1970] AC 777 (HL).
[2] *Hine v Hine* [1962] 3 All ER 345 (CA).
[3] *Appleton v Appleton* [1965] 1 All ER 44 (CA).
[4] AAS Zuckerman, 'Ownership of the Matrimonial Home-Common Sense or Reformist Nonsense' (1978) 94 *Law Quarterly Review* 26, 39.
[5] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986) 3.

*v Cooke*[6] and *Oxley v Hiscock*[7] that have been viewed as creating new analytical approaches to quantification. Having identified the presence of structured discretion in both decisions, this chapter will then analyse the most recent authorities on quantification, namely the House of Lords' decision in *Stack v Dowden*[8] and the Supreme Court decision in *Jones v Kernott*.[9] Although these two decisions concerned legal co-owners, they provide guidance as to the modern approach to quantification applicable to both sole and joint legal title disputes along with insights into the use of judicial discretion in this area.

## JUDICIAL DISCRETION IN *MIDLAND BANK v COOKE* AND *OXLEY v HISCOCK*

There are various approaches a court can adopt when quantifying a beneficial interest under an implied trust, exhibiting varying levels of judicial discretion. Chapter Two demonstrated the method of quantification applied to resulting trusts: where a claimant could demonstrate an interest under a resulting trust, the legal title holder would become a trustee holding the property on trust in proportion to the claimant's contribution. Adopting a mathematical approach, the claimant was entitled to the precise value of what they contributed towards the acquisition of the property.[10] Here, short of using discretion as to fact-finding, the extent of discretion used by the court in the demarcation of shares was limited, albeit as Chapter One revealed, not absent.

Another approach to quantification was identified in Chapter Four, where the House of Lords in *Gissing v Gissing* shifted the court's focus away from sole reliance on the presumption of resulting trust to an approach using common intention analysis.[11] It is this approach that will be analysed in this chapter. As this section will demonstrate, the common intention constructive trust provided the scope for a more flexible approach to quantification than the approach generated by the presumption of resulting trust. Indeed, as Chapter Four argued, three factors may have contributed to the courts adopting a more discretionary approach at this stage: the ambiguity of the rules laid down in *Pettitt* and *Gissing*; the requirement of common intention in an area where, in reality, such

[6] [1995] 4 All ER 562 (CA).
[7] [2004] EWCA Civ 546, [2004] 3 All ER 703 (CA).
[8] [2007] UKHL 17.
[9] [2011] UKSC 53.
[10] *Dyer v Dyer* (1788) 2 Cox 92. For more modern treatment see *Tinsley v Milligan* [1994] 1 AC 340 (HL) and *Curley v Parkes* [2004] EWCA Civ 151, [2004] All ER (D) 344 (CA).
[11] *Gissing v Gissing* [1971] AC 886 (HL).

intentions are frequently not formulated, and the prioritisation of general principles of property law within the domestic context. Building on the findings of previous chapters, this chapter will show that these factors provided the impetus for the exercise of judicial discretion. This exercise of discretion also correlated with legal scholarship that identifies the tendency for discretion to be used when 'legal standards are indeterminate and unsettled in meaning, or where there appear to be gaps in them'.[12]

It should be noted at the outset that, prior to the 1990s, there was little guidance on the principles for quantification of a beneficial interest under a common intention constructive trust. As Hopkins notes, 'until relatively recently the quantification of beneficial interests had been subject to little discussion in the courts'.[13] This viewpoint is consistent with the findings in Chapter Five which demonstrated that *Grant v Edwards* and, in particular, *Eves v Eves* saw the Court of Appeal fail to produce a clear methodology on the issue of quantification.[14] There are several reasons for the minimal discussion of quantification in the case law. Firstly, it was only in the 1990s that the courts sharpened the distinction between acquisition and quantification of an interest and thereby instigated a discussion as to how courts quantify an interest.[15] One reason for this was the prominence of resulting trust analysis in *Pettitt* and *Gissing* as the rules governing acquisition of the interest simultaneously answered the question of how much a party received under a resulting trust. Secondly, any discussion of quantification in *Pettitt*, *Gissing* and *Lloyds Bank v Rosset* was strictly *obiter* as none of the claimants were successful in acquiring an interest in those cases.[16] Thirdly, as noted in Chapter Four, Lord Diplock's dictum in *Gissing* – which proffered three possible methods for quantification – was not particularly clear. For example, Lord Diplock accepted that the size of the parties' shares was dependent upon the parties' agreement as to shares[17] which could be express or inferred from conduct;[18] and then, in the alternative, suggested that where there was no evidence to infer shares the court could default to 'equality is equity'.[19] In addition to these two techniques, Lord Diplock also proffered the idea that it could be inferred from conduct that the parties intended the court to award them a fair share on the basis that the parties may have had an understanding:

[12] Galligan (n 5) 2.
[13] N Hopkins, *Informal Acquisition of Rights in Land* (Sweet and Maxwell 2000) 118.
[14] See *Eves v Eves* [1975] 3 All ER 768 (CA) 772 (Lord Denning MR) discussed in Chapter Five.
[15] See J Masson, R Bailey-Harris and R Probert, *Cretney's Principles of Family Law* (8th edn, Sweet and Maxwell 2008) 130 para 5-013.
[16] *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107 (HL).
[17] *Gissing v Gissing* (n 11) 908.
[18] ibid 908.
[19] ibid 908.

> '…that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date. Where this was the most likely inference from their conduct it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share'.[20]

This range of options for quantification enabled the court to adopt a variety of different analytical approaches. The scope for the exercise of judicial discretion is easily identifiable and would apply to fact-finding when isolating a common intention as to shares or through the use of fairness. When identifying which approach was to be adopted, a key turning point, or 'watershed', was *Midland Bank v Cooke* which also heightened visibility of judicial discretion relating to quantification.[21] In *Cooke*, a married couple moved into the matrimonial home that was conveyed into the sole name of the husband. The property was purchased through a range of contributions but of particular significance was a wedding present of £1,100 given to the couple by the husband's parents. A series of mortgages were executed and following default on repayments by Mr Cooke, the bank sought repossession. The main issue for the court was whether Mrs Cooke could claim an interest in the property to defeat the mortgagee's claim.

The Court of Appeal found that the wedding gift was given to the couple jointly and this enabled Mrs Cooke to demonstrate a direct financial contribution to the acquisition of the property in accordance with the rules laid down by the House of Lords in *Rosset*. More importantly, for the purposes of analysing the use of discretion, the Court of Appeal's approach to quantification was significant. Whereas under a resulting trust Mrs Cooke's half share of the £1,100 wedding gift would result back to her in a proportionate share of the equity in the property, the Court of Appeal granted Mrs Cooke a half share in the property. This was an increase from 6.47 per cent to 50 per cent of the beneficial interest. Waite LJ reached this result by stating that, where there was no direct evidence of a common intention as to the shares, the court through a process of inference

[20] ibid 909.
[21] G Battersby, 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *Child and Family Law Quarterly* 259, 263.

should seek to determine a 'probable common understanding about the amount of the share of the contributing spouse'.[22] Where inferences as to conduct could not be made the court could resort to equal division through the application of the maxim 'equality is equity' or, in instances where it was apparent that the parties did not intend their shares to be quantified at the point of acquisition but rather at a later date, on the basis of 'what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date'.[23] More importantly, in a departure from Lord Diplock's dicta in *Gissing* which stipulated direct or indirect contributions as the key elements to consider when quantifying a beneficial interest, Waite LJ stated that:

> '…the duty of the judge is to undertake a survey of the whole course of dealings between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place'.[24]

It is important to note here the uncoupling of the 'acquisition question' from the 'quantification question'. Under the approach laid down in *Cooke*, contributions that were insufficient to generate an inference of common intention in the first place could now be taken into account when quantifying the beneficial interest. This approach therefore enabled Mrs Cooke's indirect contributions to be recognised alongside the relationship dynamics of the parties, as evidenced by Waite LJ's observation that 'one could hardly have a clearer example of a couple who had agreed to share everything equally' from:

> 'the profits of his business while it prospered, and the risks of indebtedness suffered through its failure; the upbringing of their children; the rewards of her own career as a teacher; and, most relevantly, a home into which he had put his savings and to which she was to give over the years the benefit of the maintenance and improvement contribution. When to all that there is added the fact (still an important one) that this was a couple who had chosen to introduce into their relationship the additional commitment which marriage involves, the

[22] *Midland Bank v Cooke* (n 6) 572 citing *Gissing v Gissing* (n 11) 908-908 (Lord Diplock).
[23] *Gissing v Gissing* [1971] AC 886 (HL) 909 (Lord Diplock).
[24] *Midland Bank v Cooke* (n 6) 574.

> conclusion becomes inescapable that their presumed intention was to share the beneficial interest in the property in equal shares'.[25]

Before analysing the implications of this holistic approach, another Court of Appeal decision that further developed this methodology must be noted. In *Oxley v Hiscock,* the parties were unmarried and purchased property in Mr Hiscock's sole name.[26] Both contributed financially to the acquisition of the property. Following the breakdown of their relationship, the property was sold at an increased value. It was not disputed between the parties that there was an express agreement to share the beneficial ownership thereby satisfying the requirements of *Rosset* however there was no agreement between them as to the size of the shares. Mr Hiscock provided Mrs Oxley with approximately one sixth of the proceeds of sale and Mrs Oxley used section 14 of the Trusts of Land and Appointment of Trustees Act 1996 to seek a declaration that the proceeds of sale were held on trust in equal shares. Using the approach laid down by Waite LJ in *Cooke*, Her Honour Judge Hallon in the County Court divided the proceeds of sale equally on the basis that this was implied through their conduct. Mr Hiscock appealed, arguing that, in the absence of an express agreement as to shares, the property should be divided proportionately using the presumption of resulting trust.

The Court of Appeal granted Mrs Oxley a 40 per cent share in the property. After a detailed review of the case law, Chadwick LJ rejected the view advanced in the earlier Court of Appeal decision in *Springette v Defoe,* that in the absence of an agreement as to shares, the court was limited to consider only direct financial contributions when inferring shares.[27] Chadwick LJ also accepted that Lord Bridge's dicta in *Rosset* emphasised the need for party agreement. The approach adopted by Chadwick LJ was that when quantifying shares in a property 'the answer will be provided by evidence of what they said and did at the time of acquisition'.[28] Where there was 'no evidence of any discussion between them as to the amount of the share…each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property'.[29] This encompassed consideration by the judge of:

> 'the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities,

[25] ibid 576.
[26] *Oxley v Hiscock* (n 7).
[27] *Springette v Defoe* [1992] 2 FCR 561 (CA).
[28] *Oxley v Hiscock* (n 7) [69].
[29] ibid.

> repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home'.[30]

Indirect financial contributions, along with non-financial contributions, could be taken into account at the quantification stage and, like *Cooke*, this revealed that contributions that would not satisfy *Rosset* for the purposes of acquisition of an interest were now capable of being examined when determining quantum.

When analysing the use of discretion in *Cooke* and *Oxley*, it is important to note the engagement by the Court of Appeal with expansive discretion that went beyond the implicit forms of discretion used in the process of adjudication. Significant for this thesis is the degree of discretion permitted by the Court of Appeal and, as Hopkins notes, *Cooke* instigated 'the re-introduction of an element of discretion at the stage of quantifying beneficial shares' which was then further developed in *Oxley*.[31] However, both *Cooke* and *Oxley* generated criticism in the academic community. Many of these criticisms resonated with traditional concerns over the use of discretion identified in Chapter One, namely that the exercise of such expansive discretion and the endorsement of fairness could be viewed as 'personal, idiosyncratic, irrational, tyrannical, unstable, and chaotic'.[32] Thus, concerns were expressed in the academic commentary regarding individualised justice, unpredictability of outcomes and the legitimacy of departing from the rules laid down in *Rosset* that were perceived too rigid.[33] Battersby observed that the approach to quantification laid down in *Oxley*:

> 'will lead to palm-tree justice in much the same manner as was previously condemned when practiced by the Denning Court of Appeal in the 1950s and again in the 1960s and 1970s. The objections remain much the same as before, principally that quantification becomes a matter of judicial hunch, not based on any identifiable principles; the result is to create uncertainty and to promote litigation'.[34]

Historical comparisons to the discretionary jurisdiction under section 17 were used by Battersby to depict this early period as involving the exercise of 'unfettered discretion'

[30] ibid.
[31] Hopkins (n 13) 125.
[32] S Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120, 123.
[33] See M Dixon, 'A Case Too Far?' [1997] *Conveyancer and Property Lawyer* 66 and Battersby (n 21).
[34] Battersby (n 21) 264.

that generated uncertainty and created a 'the tide of litigation' in this area.[35] Dixon was also highly critical of *Cooke*, stating that 'nearly any conceivable reform will be better than the confusion which currently reigns'.[36]

Using the framework of discretion identified in Chapter One, it is argued that they are in many ways overstated and evince a trend of misinterpreting the exercise of discretion. Firstly, Battersby's argument that *Cooke* and *Oxley* take the legal framework back to the Denning Court of Appeal from the 1950s to the 1970s and consequently 'revert to those years of palm-tree justice' is an exaggeration for several reasons.[37] It is a contradiction of his earlier work where he noted that 'in the period up to Lord Denning's return to the Court of Appeal as Master of the Rolls in 1962 most judges followed a fairly orthodox approach'.[38] Here, Battersby accepted the fact that prior to the expansive interpretations of section 17 in cases such as *Hine* in 1962 and *Appleton* in 1965 the court adopted a relatively consistent methodology, the 'structured discretion' illustrated in Chapter Two. Building on the findings in Chapter Three as to the willingness of individual judges to exercise discretion, it is interesting to note that Denning LJ adjudicated both *Rimmer v Rimmer*[39] and *Fribance v Fribance*[40] that evidence the 'fairly orthodox approach' identified by Battersby.

Furthermore, Battersby's claims that *Cooke* and *Oxley* specifically exhibit the form of discretion used in *Hine* and *Appleton*, again represents a misrepresentation of the approach undertaken by the courts. *Cooke* and *Oxley* do not follow *Appleton* to permit 'palm tree justice' through an automatic entitlement for a litigant to have their beneficial ownership determined on the basis of fairness. It is important to note that the ratio of *Appleton* was that the court did not have to find 'any bargain in the past, or any expressed intention'[41] but could grant a proprietary interest when 'reasonable and fair in the circumstances.[42] In contrast, *Cooke* and *Oxley* concern quantification as opposed to acquisition and require an initial search for express agreements as to shares and, in default, an agreement inferred from conduct; thus, a clearly structured exercise of discretion.

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[35] ibid. Reminiscent of the observation by Lord Nicholls in *White v White* [2001] 1 AC 596 (HL) 599 that 'fairness, like beauty, lies in the eye of the beholder'.
[36] Dixon (n 33) 66.
[37] Battersby (n 35) 266.
[38] ibid 261.
[39] *Rimmer v Rimmer* [1952] 2 All ER 863 (CA).
[40] *Fribance v Fribance* [1957] 1 All ER 357 (CA).
[41] *Appleton v Appleton* [1965] 1 All ER 44 (CA) 46.
[42] ibid 45-46.

Admittedly, the concept of 'fairness' used in *Oxley* is naturally opaque, which has caused problems when fairness is used in other areas of law,[43] yet the guidance laid down by the Court of Appeal in *Oxley* confers a distinctive meaning on 'fairness' in this context. For example, Gardner concedes that fairness, at face value, suggests that 'all sorts of matters could enter the reckoning'[44] but notes that the test laid down in *Oxley* requiring the court to ask 'what would be a fair share for each party having regard to the whole of dealing between them in relation to the property?' may in fact be restricted.[45] Thus the caveat of 'in relation to the property' may focus the judge's mind to conduct of the parties directly relating to the property. Ultimately, what this perspective shows is that the presence of a seemingly broad term like 'fairness' may trigger the reaction that the court possesses an expansive discretion or that decisions necessarily would be decided within the 'formless void of individual moral opinion'.[46] The same could be said for the term 'as he thinks fit' used in section 17. The findings in Chapter Two disputed the truth of these viewpoints and noted that, even where the ability to use discretion looked expansive, it was often circumscribed through rules and a systematic methodology that the court must follow when exercising that discretion. Hence, in a Dworkinian sense, the use of discretion was clearly bounded by rules.

Conversely, and in stark contrast to the concerns of Battersby and Dixon, there are several reasons why the use of discretion in *Cooke* and *Oxley* could be viewed as appropriate and reveal why the developments in these decisions were, in fact, deemed beneficial by the academic commentary.[47] These reasons correlate to the virtues of discretion identified in Chapter One and evidence why in some contexts discretion is favoured. Both *Cooke* and *Oxley* emphasise the foundational principle created in *Gissing* and later affirmed in *Rosset* that any claim to beneficial ownership is dependant upon party agreement. However, echoing the findings of Chapter Three, the Court of Appeal

[43] For the role of fairness in ancillary relief see E Cooke, 'Miller/McFarlane: law in search of discrimination' [2007] 19(1) *Child and Family Law Quarterly* 98, J Miles, 'Principle or pragmatism in ancillary relief?' (2005) *International Journal of Law, Policy and the Family* 242 and R Bailey-Harris, 'The paradoxes of principle and pragmatism: ancillary relief in England and Wales' [2005] *International Journal of Law, Policy and the Family* 229.

[44] S Gardner, 'Quantum in Gissing v Gissing Constructive Trusts' (2004) 120 *Law Quarterly Review* 541, 544.

[45] *Oxley v Hiscock* (n 7) [73] (Chadwick LJ). See S Edwards, 'Property Rights in the Family Home – Clarity at Last' [2004] *Family Law* 524.

[46] *Carly v Farrelly* [1975] 1 NZLR 356, 367 (Deane J).

[47] See K Gray and S Gray, *Elements of Land Law* (4th edn, OUP 2005) 931. Dixon was critical of *Cooke* in Dixon (n 33) but in M Dixon, 'Resulting and Constructive Trusts of Land: The Mist Descends and Rises' [2005] *Conveyancer and Property Lawyer* 79, 79 noted that the movement away from *Rosset* in Oxley was 'not *necessarily* for the worse'.

in both cases also noted the complexity of trusts of the family home cases and the fact that where there is no agreement between the parties as to ownership, the issue still needs a resolution and 'the question still requires an answer'.[48] As Waite LJ stated in *Cooke*:

> '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 inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it'.[49]

In both *Cooke* and *Oxley*, the difficulty of common intention analysis in the context of intimate relationships necessitated the exercise of discretion by the Court of Appeal to produce a result.[50] In *Cooke*, Mr Cooke was cross-examined on the arrangements as to who owned the house and when asked whether at the time of acquisition or subsequently there was a discussion as to ownership he replied 'Not really, no. We were just happy, I suppose, you know'.[51] A similarly unspecific response as to an agreement regarding beneficial ownership was provided by Mrs Cooke.[52] In *Oxley*, there was also an absence of agreement as to shares alongside statements by Mrs *Oxley* that she did not need written legal protection or a definite agreement being reached between the parties.[53] In these instances, it is understandable that the Court of Appeal in *Cooke* presumed an intention to share between the parties and in *Oxley* sanctioned the use of 'fairness' since reliance on the evidence to find an explicit common intention between the parties proved futile. This reveals broad yet structured discretion being used as a pragmatic tool to help overcome evidential difficulties. This exercise of discretion begins when the court is fact-finding and applying standards especially when the facts are hard to discern and the standards to apply vague. Galligan has conceptualised 'fact-finding' as an exercise of discretion, reasoning that:

> 'it seems odd to talk of discretion as to matters of fact; the decision-maker is not entitled in any way to choose or select the facts since his primary duty is to seek out and arrive at the truth. Nevertheless, the facts can be ascertained only be

[48] *Oxley v Hiscock* (n 7) [69] (Chadwick LJ).
[49] *Midland Bank v Cooke* (n 6) 575.
[50] See *Pettitt v Pettitt* (n 1) 799, 804 (Lord Morris) and *Gissing v Gissing* (n 11) 898 (Lord Morris).
[51] *Midland Bank v Cooke* (n 6) 568.
[52] ibid.
[53] *Oxley v Hiscock* (n 7) [9] (Chadwick LJ).

> imperfect means, relying on imperfect procedures – the evidence of others, one's own perceptions and understandings and the classification of those perceptions'.[54]

Lastly, the use of discretion in *Cooke* and *Oxley* is also consistent with the findings in Chapter One that the courts may utilise discretion as a means of injecting flexibility and creativity into the law.[55] Schneider identified what he termed 'rule-building discretion', whereby a decision-maker is granted a discretion because the rule-maker concludes that the legal framework would be developed in a more effective manner through case by case pronouncements rather than through rules. Although in *Oxley* and *Cooke*, Parliament did not expressly grant the courts the power to develop a framework for quantification, both decisions illustrate the gradual and creative building of a structured methodology to be applied by the courts when quantifying shares. 'Rule-building discretion' has particular utility in times of 'rapid or great social change' because it enables 'courts to adjust incrementally to changing social ideas instead of being confined to legislative standards that are not readily altered'.[56] When *Cooke* and *Oxley* are viewed from this perspective, it is arguable that the courts' broader consideration of contributions shows them placing greater emphasis on the fact that these disputes engage the 'most socially rooted branch of property law which affects the lives and wealth of so many people'.[57] There is greater sensitivity to the sharing that occurred between Mr and Mrs Cooke and the partnership present between Mrs Oxley and Mr Hiscock. Just as the Court of Appeal in the 1950s endeavoured to overcome the absence of a statutory power to reallocate assets, the courts in *Cooke* and *Oxley* adopt a discretionary approach which, through sensitivity to the facts, recognised the interpersonal context within which the acquisition of domestic property occurred. This receptiveness to the interpersonal context in these cases was also identified in the work of Gardner and threw into sharp relief a 'clash of cultures' between a mutualist family-centric approach and one premised on individualism consistent with *Pettitt* and *Gissing*; namely, the 'classic authorities approach'.[58] For Gardner, the former approach was superseding the latter, and gained greater visibility through the decision of Chadwick LJ in *Oxley* when he highlighted the range of contributions made by the parties to the relationship.

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[54] Galligan (n 5) 34.
[55] See, generally, F McKean, 'Some Aspects of Judicial Discretion' (1936) 40 *Dickinson Law Review* 163.
[56] CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47, 64.
[57] Dixon (n 47) 79.
[58] S Gardner, 'Fin de Siècle chez *Gissing v Gissing* - *Midland Bank Plc v Cooke* [1995] 4 All ER 562' (1996) 112 *Law Quarterly Review* 378, 383. Echoed again in Gardner (n 44) 547.

Ultimately, it is argued that the approach adopted in *Cooke* and *Oxley* involved the courts modifying principles of property law through the use of judicial discretion. The exercise of discretion in this context surpassed the exercise of discretion inherent within fact-finding and enabled the arguably inadequate rules to be translated into action in a manner cognisant of the nature of the family home. Recognition of the relationship between the parties and context of the dispute was also a key element in the House of Lords' decision in *Stack v Dowden* which will now be analysed.

## *STACK v DOWDEN*

The contribution of *Stack v Dowden* to quantification of a beneficial interest under an implied trust and the role of judicial discretion arose in the context of a joint legal title dispute.[59] This section will briefly outline the background to the dispute and then analyse the role played by judicial discretion alongside motivations behind its use. Prior to *Stack v Dowden,* the legal framework applicable to the purchase of property in joint names was relatively clear. As Chapter Four noted, Lord Upjohn stated in *Pettitt* that a conveyance of property into joint names at law 'operates to convey the beneficial interest to the spouses jointly, ie with benefit of survivorship'.[60] However, notwithstanding that 'equity follows the law', Lord Upjohn noted that the presence of the beneficial joint tenancy was seldom 'determinative' as equal sharing can be easily dislodged in favour of unequal sharing through a tenancy in common.[61] Within the context of the family home and in the absence of an express contrary declaration of trust, unequal contributions to the purchase of land represent the primary method of displacing a beneficial joint tenancy.[62] The ease with which a beneficial joint tenancy could be displaced was underlined in *Bernard v Josephs,* where Griffiths LJ stated that it was the default option but applied only in the 'somewhat unlikely event' that no indication as to intention can be found.[63] *McKenzie v McKenzie* illustrated that this equal division could be easily dislodged in favour of unequal shares whether through a resulting trust or

[59] *Stack v Dowden* [2007] UKHL 17 has been widely analysed in the academic community. See N Piska, 'Intention, Fairness and the Presumption of Resulting Trust after Stack v Dowden' (2008) 71(1) *Modern Law Review* 114 and W Swadling, 'The Common Intention Constructive Trust in the House of Lords: an opportunity missed' [2007] 123 *Law Quarterly Review* 511.
[60] *Pettitt v Pettitt* (n 1) 814 (HL).
[61] ibid.
[62] Other factors that rebut a beneficial joint tenancy include words or conduct indicating severance or acquisition of property for business purposes.
[63] *Bernard v Josephs* [1982] Ch 391, 402 (CA).

constructive trust.[64] It was this relationship between the strength of the starting point and the 'solid tug of money' that provided the context to the House of Lords' decision in *Stack v Dowden.*[65]

The facts in *Stack* can be briefly summarised.[66] Miss Dowden and Mr Stack formed a relationship in 1975. In 1983, a property was purchased by Miss Dowden and conveyed into her sole name. This property was acquired using a mortgage acquired in Miss Dowden's name which she repaid alongside assuming sole responsibility for the household bills. Four children were born and, after each maternity leave, Miss Dowden returned to work as an electrical engineer, subsequently becoming 'the most highly qualified electrical engineer in the London area'.[67] Renovations were made to the property by both parties and it was subsequently sold at a substantial profit. A new property was purchased but, unlike the first, it was taken out in joint names, albeit without an express declaration of trust.[68] Miss Dowden contributed approximately £129,000 (using the proceeds of sale of the first property) and alongside Mr Stack, assumed liability under a mortgage amounting to approximately £65,000. This mortgage was repaid with Mr Stack contributing £27,000 and Miss Dowden contributing £38,435. Upkeep costs, such as utilities bills were largely met by Miss Dowden. Both made investments, but kept separate bank accounts. Following the breakdown of their relationship, Mr Stack obtained an order for sale and equal division of the proceeds of the property. Miss Dowden appealed and the Court of Appeal ordered that the proceeds of sale be divided in a ratio of 65:35 in her favour.[69] The basis was that this apportionment represented a 'fair' share following the principles laid down by the Court of Appeal in *Oxley v Hiscock*.[70]

The House of Lords determined that the beneficial ownership was to be divided 65:35 in Miss Dowden's favour. The majority – namely Baroness Hale, Lord Walker, Lord Hope

[64] *McKenzie v McKenzie* [2003] All ER (D) 155 [65] (Robert Hildyard QC).
[65] *Hofman v Hofman* (1965) NZLR 795, 800 (Woodhouse J).
[66] For further analysis of these two cases see A Hayward, 'Finding a Home for 'Family Property'' in N Gravells, *Landmark Cases in Land Law* (Hart 2013).
[67] *Stack v Dowden* (n 8) [74].
[68] It did contain a declaration that the survivor could give good receipt for capital moneys arising from a disposition. Following *Huntingford v Hobbs* [1993] 1 FCR 45 (CA) and *Harwood v Harwood* [1992] 1 FCR 1 (CA) this cannot operate as a declaration of trust and would only bind the parties with regard to dealings with a third party.
[69] *Stack v Dowden* [2005] EWCA Civ 857 (CA), [2005] All ER (D) 169. See J Mee, 'Joint Ownership, Subjective Intention and the Common Intention Constructive Trust' [2007] *Conveyancer and Property Lawyer* 14 and E Cooke, 'Cohabitants, Common Intention and Contributions (again)' [2005] *Conveyancer and Property Lawyer* 555.
[70] *Oxley v Hiscock* (n 7).

and Lord Hoffman – reached this outcome, first, by creating a presumption of beneficial joint tenancy in cases of joint legal ownership and, secondly, by rebutting this presumption in favour of an unequal division of the beneficial ownership.[71] Thus, within the 'domestic'[72] or 'consumer' context,[73] 'equity follows the law' and joint legal ownership prima facie generates joint beneficial ownership.[74] It was envisaged that in the vast majority of cases, the principle of equal beneficial sharing would resolve the dispute as rebutting the presumption of beneficial joint tenancy was a task not to be 'lightly embarked upon'.[75] Here Baroness Hale's opinion highlighted that the home was different to commercial property, and thus mere unequal financial contributions would not dislodge equal sharing through a constructive trust in a domestic context. The court held that departure from equality is permitted only in 'exceptional'[76] or 'unusual'[77] cases and would be achieved after a survey of the whole course of conduct between the parties which would, in turn, assist the court's divination of the parties' 'actual, inferred or imputed' intentions in relation to the property.[78] This would operate through the common intention constructive trust as opposed to a resulting trust;[79] the majority of the House of Lords held that the common intention constructive trust had been developed incrementally by the courts since *Pettitt* and *Gissing* in response to changing social and economic conditions.[80] Conversely, if commercial property was involved, the presumption of resulting trust would be a more appropriate tool.

As 'many more factors than financial contributions may be relevant to divining the parties' true intentions', unequal financial contributions alone were not enough to rebut the presumption of beneficial joint tenancy.[81] Indeed, to assist in the divination of the parties' intentions, the court provided what have now been termed, the 'paragraph 69 factors', which include 'the purpose for which the home was acquired', 'the nature of

[71] On whether the majority intended the creation of a beneficial joint tenancy as opposed to a tenancy in common in equal shares see Lord Neuberger of Abbotsbury 'The Conspirators, The Tax Man, The Bill of Rights and a Bit about The Lovers' (Chancery Bar Association Annual Lecture 10th March 2008) [13] and A Briggs, 'Co-ownership and an equitable non sequitur' (2012) 128 *Law Quarterly Review* 183.
[72] *Stack v Dowden* (n 8) [58], [60] (Baroness Hale).
[73] ibid [52], [54], [58].
[74] ibid [56].
[75] ibid [68] (Baroness Hale).
[76] ibid [33] (Lord Walker).
[77] ibid [68]–[69], [92] (Baroness Hale).
[78] ibid [60].
[79] The common intention constructive trust was, subsequently, emphasised as the primary device in *Abbott v Abbott* [2007] UKPC 53, [2007] All ER (D) 432 (PC) [4] (Baroness Hale).
[80] See the 'extended footnote' of Lord Walker at [15] that explored the historical development of trust principles in this area.
[81] *Stack v Dowden* (n 8) [69].

the parties' relationship' and the parties' 'individual characters and personalities'.[82] In a departure from *Oxley*, the majority rejected the use of fairness and stated that 'the search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it'.[83]

When these principles were applied to the facts of the dispute, the court held that the parties had not been in a 'real domestic partnership', such as would support maintaining equal sharing.[84] Rather, Miss Dowden 'contributed far more to the acquisition' of the property,[85] there was no pooling of assets, 'even notionally, for the common good'[86] and there were 'strictly separate' savings and investments.[87] As Baroness Hale concluded, this was 'strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal'.[88]

Lord Neuberger, in the minority, rejected the creation of a presumption of beneficial joint tenancy within the domestic context and believed that 'the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship'.[89] Advocating the application of principles of contract, land and equity that had been 'established and applied over hundreds of years',[90] he rejected the approach of the majority and instead adopted the 'resulting trust solution'.[91] Lord Neuberger reasoned that the court's role was merely to provide 'clarification and simplification', and that the existing, well-established principles of trusts were flexible enough to be deployed without the need for extensive judicial tampering.[92] Thus, for Lord Neuberger, where property is acquired in joint names and the only information available is financial contribution, the property will be held in the same proportions as the contributions to the purchase price. If additional evidence exists enabling the pinpointing or inference of an intention based on party conduct, the resulting trust can be 'rebutted and replaced, or (conceivably) supplemented, by a constructive trust'.[93] However, this did not mean that the courts would ignore the domestic dimension as Lord Neuberger noted that the

[82] ibid.
[83] ibid [60] (Baroness Hale).
[84] ibid [87].
[85] ibid.
[86] ibid [90].
[87] ibid.
[88] ibid [92].
[89] ibid, [107] (Lord Neuberger).
[90] ibid, [101].
[91] ibid, [110].
[92] ibid [105] (Lord Neuberger).
[93] ibid, [124].

existing framework was not 'static' and could allow differing factual considerations to be taken into account when interpreting intentions as to ownership.[94]

When analysing the parameters of the search for common intention, Lord Neuberger refused to accept imputation of an intention to the parties, as permitted by the majority.[95] He concluded that imputation was not permissible as it would be not only 'wrong in principle and a departure from two decisions of your Lordships' House in this very area' but also 'an exercise which was difficult, subjective and uncertain'.[96] The difficulties involved in this exercise could, therefore, be avoided by defaulting back to established resulting trust principles and when these principles were applied to the dispute, Lord Neuberger stated that there was 'simply no evidence' to justify departing from the 65:35 allocation of the beneficial ownership.[97]

*Stack* provides guidance into the exercise of discretion by the court when quantifying a beneficial interest. The implications of the decision in *Stack* are far-reaching, but for the purpose of analysing the exercise of judicial discretion there are two principal issues: the use of 'context'; and the holistic analysis of the interaction between the parties with a view to better accommodating the domestic nature of these disputes.

## JUDICIAL DISCRETION AND THE USE OF CONTEXT IN *STACK v DOWDEN*

In *Stack*, Baroness Hale stated that 'context is everything'[98] and the majority in the House of Lords make extensive use of the term 'context'.[99] It is argued that the recognition of contexts in law may facilitate and, to some extent, legitimize the exercise of judicial discretion in ownership disputes. It was noted in Chapter One, that specific contexts offer greater potential for judges to exercise discretion. A sensitivity to this fact is important, as in Chapter One, it was noted that over-generalisations of discretion that

[94] ibid [101].
[95] ibid [126].
[96] ibid [127].
[97] ibid [137].
[98] ibid [69].
[99] See A Hayward, 'The 'Context' of Home: Cohabitation and Ownership Disputes in England and Wales' in M Diamond and T Turnipseed, *Community, Home and Identity* (Ashgate 2012) 179. Context and contextual analysis are significant trends in other areas of law. For example, see *Yeoman Row v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713 (HL) and *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945 (HL) for its use in proprietary estoppel and *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 11, [2009] 2 All ER 1127 (PC) and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677 (HL) for its use in the interpretation of contracts.

fail to appreciate how discretion operates in different contexts are prominent. As Lacey[100] and Bell have warned,[101] these over-generalisations frequently fail to recognise how discretion may operate differently depending on contexts and under-emphasise the 'variations in the nature and context of discretionary powers'.[102] By recognising the significance of contexts when understanding the use of discretion, this leads to the conclusion that in some contexts the exercise of discretion may be more prominent as it is perceived to be more effective than rules. As Chapter One discovered this does not mean that rules are absent but rather the 'point on the rules-to-discretion scale' is placed more on the side of discretion.[103]

There is evidence in *Stack* that the House of Lords viewed context as a means to justify a different methodology in trusts of the family home cases. This is apparent by the distinction created by the majority regarding cases within the 'domestic' or 'commercial' contexts. In the former context, Lord Hope stated that the court needed 'a more practical, down-to-earth, fact-based approach'.[104] Through distinguishing the domestic context from the commercial context, Lord Hope intimated that within the former a more fact-sensitive and flexible approach was required as:

> 'cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual co-operation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship'.[105]

The same approach was adopted by Baroness Hale, who was keen to stress the unique nature of domestic property. Within this context, the majority of the House of Lords in *Stack*,[106] and subsequently the unanimous Supreme Court in *Jones v Kernott,* stated that the common intention constructive trust was the primary device to be employed in ownership disputes over the home.[107] Here, there is evidence of separation of contexts and prioritisation of the constructive trust within that context. Thus context, firstly,

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[100] N Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K Hawkins, *The Uses of Discretion* (OUP 1991) 361.
[101] J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 90.
[102] R Baldwin and K Hawkins, 'Discretionary Justice: Davies Reconsidered' (1984) *Public Law* 570, 572.
[103] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1969) 15
[104] *Stack v Dowden* (n 8) [3] (Lord Hope).
[105] ibid.
[106] *Stack v Dowden* (n 8) [60] (Baroness Hale). Affirmed in *Abbott v Abbott* (n 79) [4] (Baroness Hale) and *Fowler v Barron* [2008] EWCA Civ 377, [2008] All ER (D) 318 (CA) [24] (Arden LJ).
[107] *Jones v Kernott* (n 9) [24] (Lady Hale and Lord Walker).

differentiates the approach to be adopted by the court and, secondly, enables a different set of principles to apply.

Precisely determining which cases would fall within the domestic context has been a problematic exercise.[108] Although Bridge has suggested that this aspect was clarified through subsequent case law, issues do arise where there is a joint home and business and this point will require further clarification by the courts.[109] Despite these difficulties, it could be argued that the purpose of recognising the domestic context and prioritising the use of the common intention constructive trust within that context was to create, in effect, a discretionary forum for the quantification of beneficial interest. Instead of adopting an approach where the principles applied were sensitive to context, as seen in *Cooke* and *Oxley, Stack* creates an explicit categorisation of property in which a more discretionary approach is permissible. Hopkins characterised this as a 'context-specific' approach as distinct from a 'context-neutral, outcome specific approach' and expressed concerns as to the approach of the majority in *Stack* in differentiating contexts.[110]

In light of the findings of this thesis, it is argued that this 'context-specific approach' was not an overly problematic endeavour for a variety of reasons. The creation of a 'context' in which the principles laid down in *Stack* apply can be conceptualised as the judicial creation of a discretionary jurisdiction through equitable principles rather than through an express grant of discretion by Parliament. However, it does not follow that the recognition of a context would necessarily result in expansive exercises of discretion within that context. As Chapter Two noted, even where the courts interpreted section 17 as granting them a substantive discretion, as seen in cases such as *Rimmer* and *Fribance*, quantification of an interest would follow a relatively structured methodology. It should be noted that the majority approach in *Stack* did not sanction the approach of Lord Denning MR in *Appleton v Appleton* that once the court's discretion was engaged they could decide a dispute based on what was 'reasonable and fair in all the circumstances'.[111] Whilst there was arguably a greater potential for the use of discretion within this domestic context, it did not permit the court to depart from principles that

[108] See *Adekunle v Ritchie* [2007] EW Misc 5 and *Laskar v Laskar* [2008] EWCA Civ 347, [2008] All ER (D) 104 (CA).
[109] S Bridge, 'Jones v Kernott: Fairness in the Shared Home – the Forbidden Territory or the Promised Land?' [2010] *Conveyancer and Property Lawyer* 324, 329.
[110] N Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 *Law Quarterly Review* 310, 311.
[111] *Appleton v Appleton* (n 3) 45-46 (Lord Denning MR).

had been gradually developing in *Cooke* and *Oxley*.[112] Rather, once the case fell within the domestic context, various starting points would be engaged namely absolute ownership in the part of the sole legal owner or a presumption of beneficial joint tenancy in the case of joint legal title. The claimant in each scenario would then need to show a common intention that the beneficial ownership should be held differently, which involved a search for express or inferred intentions. Therefore, it would not represent 'palm tree justice' but rather enabled the courts to use discretion in a structured manner.

It is arguable that the use of context in *Stack* was also not a cause for concern for another reason. There may be difficulties in 'giving legal effect to the context of the case'[113] and cases that involved a joint home and business may generate difficulties,[114] however the courts had in effect been recognising a domestic context for some time and applying within that context an approach which gave greater visibility to discretion. It is arguable that, rather than representing a substantive departure, it had long been implicit in the case law, albeit that in the earlier cases the courts merely did not specifically label this as a set of principles applicable to the domestic context or use the terminology of 'context'. This approach is arguably different to the 'context-neutral, outcome specific' approach identified by Hopkins as the common intention constructive trust had specific application to the home and was developed as a direct response to the rejection of the discretionary jurisdiction used by married couples prior to *Pettitt*. Therefore this property law device did not apply uniformly to all 'sexual, platonic, familial, amicable or commercial relationship[s]'.[115] It was through a gradual process of refinement by the judiciary that the common intention constructive trust was prioritised over the resulting trust as the most appropriate device to resolve family home disputes. The development in *Stack* and *Abbott v Abbott* was that it became the primary device for the resolution of these disputes.[116] The fact that the common intention constructive trust did not operate outside the domestic context illustrates that the courts had been, in effect, applying a set of principles sensitive to context.[117] This viewpoint is supported by Dewar's work, which noted that 'the relevant doctrine as it now stands has no significant application

[112] It should be noted that *Stack* endorsed the holistic approach to quantification adopted in *Oxley* but preferred to use intention as opposed to fairness as a method for quantification. cf *Jones v Kernott* (n 9) [51] (Lord Walker and Lady Hale) where fairness was subsequently permitted.
[113] N Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175, 177.
[114] See *James v Thomas* [2007] EWCA Civ 1212 (CA) and *Curran v Collins (Permission to Appeal)* [2013] EWCA Civ 382.
[115] *Stack v Dowden* (n 8) [107] (Lord Neuberger).
[116] *Abbott v Abbott* (n 79) [4] (Baroness Hale).
[117] cf J Mee, 'Jones v Kernott: Inferring and Imputing in Essex' [2012] *Conveyancer and Property Lawyer* 167, 179.

outside the family home context'.[118] Cumulatively the use of discretion is consistent with the framework of discretion mapped out in Chapter One, namely that specific contexts may permit a greater use of discretion and, despite this occurring, it does not follow that the exercise of discretion operating within that context would be capricious or arbitrary. Rather, there is evidence in *Stack* that the exercise of discretion by the court was structured.

## JUDICIAL DISCRETION AND FACT-SENSITIVITY IN *STACK v DOWDEN*

Another aspect of *Stack* illustrating the courts' increasing use of discretion was close sensitivity to the facts with a view to better accommodating the domestic nature of the acquisition of property. As Chapter Two noted, recognition of the specific facts of the case was a prominent theme in ownership disputes. In *Rimmer,* Evershed MR observed that 'in all cases of this kind the result must always depend on the particular facts in the particular case'[119] and this approach was applied consistently throughout the period pre-*Pettitt.* Although this may appear a truism that could equally apply in many other contexts, the nature of ownership disputes necessitates greater sensitivity to the facts owing to the court's reliance on inferences drawn from conduct. In short, the legal framework requires close sensitivity to the facts at hand and this is often achieved through the exercise of judicial discretion.[120] As it is widely known that rules can be 'blunt instruments', the ability for the decision-maker to look at all the facts in a holistic manner has been regarded as a key virtue of discretionary resolution.[121]

Sensitivity to the facts is a key feature of the judgments in *Stack.*[122] The factors utilised by a court to divine the actual, inferred or imputed intentions of the parties to quantify the beneficial interest indicate a greater potential for the court to exercise discretion that far exceeds the implicit discretion involved in fact-finding.[123] The majority in *Stack v Dowden* provided a non-exhaustive list of factors for consideration by a court when a claimant seeks to rebut the beneficial joint tenancy. These factors included 'any advice or discussions at the time of the transfer', 'the purpose for which the home was

[118] J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 327-328, 331 and J Dewar, 'Give and Take in the Family Home' [1993] *Family Law* 231.
[119] *Rimmer v Rimmer* (n 39) 864.
[120] HK Bevan and FW Taylor, 'Spouses as Co-Owners' [1966] 30 *The Conveyancer* 355, 456.
[121] K Hawkins, *The Uses of Discretion* (OUP 1991) 8.
[122] See *Stack v Dowden* (n 8) [69] (Baroness Hale), [3] (Lord Hope).
[123] See S Gardner, 'The Element of Discretion' in P Birks, *The Frontiers of Liability* (OUP 1994) 186, 193.

acquired', 'the nature of the parties' relationship', 'how the purchase was financed, both initially and subsequently' and 'how the parties arranged their finances'.[124] The court could also have regard to the 'parties' individual characters and personalities'.[125] It was envisaged by the majority that these factors would help a trial judge ascertain the 'true' intentions of the parties as it was believed that more factors than merely financial contributions were relevant when ascertaining party intention.[126]

These factors have generated criticisms in the academic community with Battersby, in particular, referring to them as a 'real cause for concern'.[127] Dixon stated that they were 'the property lawyer's equivalent of a Pandora's box – everything included without only a small hope that this will not lead to endemic uncertainty'.[128] Many of these criticisms resonate with those identified in Chapter One concerning the exercise of discretion and are connected to the fear that the decision-maker will take into account improper considerations or 'personal preferences'.[129] It has been questioned how far the courts are focusing on the parties' general interaction within the home as opposed to the issue of intended property ownership. This broad approach under *Stack* allows *all* factors relevant to intention to be taken into account. As Dixon has noted, this makes it difficult for a trial judge to 'separate a course of dealings between the parties which goes to the acquisition of the land (allowable) from a course of conduct which goes to the success of the relationship or simply reflects the normal obligations of everyday life (disallowable)'.[130]

Similarly, although the factors are there to 'illumine' the parties' shared intentions, case law and academic commentary has suggested that the factors set out in paragraph 69 are 'not necessarily reliable indicators of the parties' intention'.[131] In the High Court decision in *Jones v Kernott*, Nicholas Strauss QC noted that some of the paragraph 69 factors 'have little direct connection with the property',[132] and Lord Neuberger noted in *Stack* that the way parties conduct their 'day-to-day living and finances [was] at least of

[124] *Stack v Dowden* [2007] UKHL 17 [69].
[125] *Stack v Dowden* [2007] UKHL 17 [69].
[126] *Stack v Dowden* [2007] UKHL 17 [69].
[127] G Battersby, 'Ownership of the family home: Stack v Dowden in the House of Lords' [2008] 20(2) *Child and Family Law Quarterly* 255, 264.
[128] M Dixon, 'Editors Notebook' [2007] *Conveyancer and Property Lawyer* 71.
[129] Schneider (n 56) 63.
[130] M Dixon, 'The Never-Ending Story – Co-ownership after Stack v Dowden' [2007] *Conveyancer and Property Lawyer* 456, 458.
[131] See G Douglas, J Pearce and H Woodward, 'Money, Property, Cohabitation and Separation: Patterns and Indications' in R Probert and J Miles, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009) 141.
[132] *Jones v Kernott* (n 9) [19].

itself, not a reliable guide to their intentions in relation to that ownership'.[133] The majority of the House of Lords in *Stack* were cognisant of the difficulty of dividing up property-related and relationship-related factors, yet, sometimes did not fully maintain that distinction. For example, Baroness Hale noted the fact that Mr Stack gave his father's address, rather than that of the property concerned, when directing his post and bank statements. She commented that '[t]he judge made little of this fact, but it might be thought to indicate something about the quality of the parties' relationship', which appears contradictory to the purported search for party intention with explicit connection to intended property ownership.[134]

It is arguable that a clearer approach may have been to place greater emphasis on the fact that the context of the parties' relationship could only be examined insofar as it casts light on the parties' shared intentions vis-à-vis ownership of the property. Lord Neuberger advocated this approach in his minority judgment, stating that evidence of the parties' use and enjoyment of the property represented 'vital background', but did not resolve the issue of intended property ownership.[135] Nevertheless, it is argued that this holistic analysis of the facts of each case, sanctioned by the majority in *Stack* is, in fact, beneficial and these benefits resonate with many of those attributable to the use of judicial discretion. As highlighted in Chapter Four, the common intention analysis adopted in *Gissing* was deficient for a variety of reasons ranging from the lack of precision in their Lordships' reasoning alongside the deficiency of relying upon common intention in the context of an interpersonal relationship. This generated the potential for discretion in the interpretation of these rules alongside the discretion inherent within the finding of facts. The paragraph 69 factors in *Stack* form part of a pragmatic response by the courts to these difficulties premised on the court casting their net further afield in the divination of the parties' common intention. The reason for this is that it has been consistently shown in cases such as *Cooke* and *Oxley* that parties frequently have not reached agreements as to ownership. Where this is the case and in the absence of party agreement as to beneficial ownership, the court is faced with a difficult task and as Arden LJ stated in the subsequent Court of Appeal decision in *Fowler v Barron*, the court 'must just do the best it can'.[136] This predicament which is common in trusts of the family home cases necessitates a more holistic analysis and a wider range of factors upon which a court can draw inferences. It is therefore somewhat strange that the use of

[133] *Stack v Dowden* (n 8) [143] (Lord Neuberger).
[134] ibid [76].
[135] ibid [143].
[136] *Fowler v Barron* (n 106) [2].

the paragraph 69 factors in *Stack* has generated such extensive criticism following *Stack* seeing as they were merely a further development of the approach previously adopted in *Cooke* and *Oxley*. Whilst it is true that the factors may encourage litigation, it should be borne in mind that the majority in *Stack* recognised the need for clarity in the legal framework. For example, the majority emphasised the strength of the presumption of beneficial joint tenancy and that challenges to 'the hundreds of thousands, if not millions, of transfers into joint names' should not occur merely because of unequal contribution to their purchase.[137] Similarly, subsequent cases have refined the scope of the paragraph 69 factors.[138]

Sensitivity to the facts of the dispute also enables a greater recognition of the domestic context and the interpretation of behaviour by parties in interpersonal relationships. In *Stack*, Baroness Hale highlighted the propensity for injustice generated by general principles of property law and that 'an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant'.[139] Baroness Hale noted that:

> 'this recognition developed in a series of cases between separating spouses, beginning with In re Rogers' Question [1948] 1 All ER 328, Newgrosh v Newgrosh (unreported) June 28, 1950, Jones v Maynard [1951] Ch 572 and Rimmer v Rimmer [1953] 1 QB 63'.[140]

Baroness Hale observed that the various opinions in *Gissing*, which entrenched a 'property law approach' to the adjudication of these disputes, also contained 'vivid illustrations of how difficult it is to apply simple assumptions to the complicated, inter-dependent and often-changing arrangements made between married couples'.[141] This statement suggests that the selection of general principles of property law by the House of Lords in *Pettitt* and *Gissing* provided simplicity but failed to adequately respond to the interpersonal nature of disputes. This fact may have encouraged the courts to

[137] ibid [68] See also *Fowler v Barron* (n 106) [18] (Arden LJ).
[138] See, for example, *Holman v Howes* [2007] EWCA Civ 877, [2007] All ER (D) 449 [31] where Lloyd LJ recognised that there were limits to what the court could take into account when surveying the whole course of dealings and thus the planting trees and upkeep of a private road were 'plainly irrelevant'.
[139] *Stack v Dowden* (n 8) [42].
[140] ibid [42].
[141] ibid [42].

exercise discretion in order for the legal framework to be more cognisant of the nature of interaction within the domestic setting.[142]

As Cooke notes 'English law has never been able to take hold of the idea that ownership of land might be determined by a relationship' and, consistent with that view, it is arguable that the House of Lords did not go so far as enabling the relationship alone to determine the outcome.[143] After all, *Stack* emphasised common intention analysis as the method for quantifying beneficial ownership rather than the fact of cohabitation between the parties. However the paragraph 69 factors do direct the judge to exercise discretion in their exploration of the relationship dynamics of the parties when seeking to determine shares. In the subsequent joint legal title case of *Fowler v Barron*, Arden LJ stated that the approach laid down in *Stack* required that 'all the circumstances which may throw light on the parties' intentions' to be reviewed.[144] Furthermore this signalled that an 'arithmetical calculation of how much is paid by each' was no longer determinative.[145] Here there is recognition of the variety of contributions to the home and in addition the need for those contributions to be articulated in a judgment alongside traditional 'purchasing behaviour'.[146] Through the courts' use of discretion, developing a discourse around non-financial contributions may further expose how the allocation of responsibilities between the parties involved in purchasing property may generate arbitrary legal consequences. For example, it exposes the fact that a non-financial contribution may be insufficient to acquire an interest under *Rosset* yet is capable of forming detrimental reliance upon an express common intention and acting as conduct for the purposes of drawing inferences when quantifying shares.

Whilst it is argued that these factors underpin a positive discretionary approach to quantification, it should be noted that subsequent courts have used the paragraph 69 factors in a manner that goes against the tenor of the majority judgment in *Stack*. Quantification reasoning after *Stack* has often followed the parties' financial contributions. In *Stack*, the majority of the House of Lords decided on unequal division of the beneficial ownership because Ms Dowden had made larger financial contributions

[142] See Dewar (n 118) 330.
[143] E Cooke, 'Community of Property, Joint Ownership and the Family Home' in M Dixon and GLLH Griffiths, *Contemporary Perspectives on Property, Equity and Trusts Law* (OUP 2007) 39, 50.
[144] *Fowler v Barron* (n 106) [41].
[145] *Stack v Dowden* (n 8) [69] (Baroness Hale).
[146] S Gardner, 'Quantum in Gissing v Gissing Constructive Trusts' (2004) 120 *Law Quarterly Review* 541, 544.

to the purchase of the property[147] and the parties had not pooled their resources but kept their financial affairs 'rigidly separate'.[148] Focusing on unequal financial contribution is inherently problematic as a factor as it takes the flexible constructive trust framework back to the principles applicable to the resulting trust. Baroness Hale was also keen to stress that Ms Dowden earned more than Mr Stack. Yet, noting the 'give and take' nature of many cohabiting relationships emphasised in *Stack* it could be questioned whether the ability to contribute more financially renders the case exceptional.[149] The approach utilised in *Adekunle v Ritchie* is also informative on this issue as Judge Behrens endorsed the reasoning of the House of Lords in *Stack* but directed his mind to the resulting trust and then contrasted that outcome with the 'holistic approach' necessary following *Stack.*[150] This methodology could represent what Lord Neuberger referred to as a '*de facto* resulting trust apportionment'.[151] Under this approach, Judge Behrens started with the outcome that would have been received under a resulting trust and then modified the parties' shares in recognition of the fact that these cases are to be determined using the common intention constructive trust. Arithmetical calculations clearly remain significant, and this undermines the view that the court will depart from a presumptive beneficial joint tenancy only in 'exceptional' cases.[152]

Nevertheless, the significance of the paragraph 69 factors is the potential for a court to adopt a broad holistic analysis of the parties' interaction with the property concerned for the purposes of divining their intentions. Whilst at face value this may appear expansive, the courts have already begun structuring their use of discretion in relation to the application of these factors.[153] Although possibly inconsistent with the shift away from financial contributions, this process follows Schneider's theory of rule building discretion; that over time 'cases will gradually sort themselves into patterns' and 'principles for solving them will eventually emerge'.[154]

[147] *Stack v Dowden* (n 8) [88] (Baroness Hale).
[148] ibid [92] (Baroness Hale).
[149] ibid [3] (Lord Hope).
[150] *Adekunle v Ritchie* (n 108) [68].
[151] *Laskar v Laskar* (n 108) [17] (Lord Neuberger).
[152] See, generally, S Wong, 'The Inequity of Equity' [2008] *Singapore Journal of Legal Studies* 326 and R Probert, 'Equality in the Family Home' (2007) 15 *Feminist Legal Studies* 341.
[153] Hayward (n 99) 199.
[154] Schneider (n 56) 64.

## *JONES v KERNOTT*

It has been argued that from *Cooke* onwards the courts have been exercising a form of discretion when quantifying beneficial ownership, which went further than the discretion implicit within fact-finding or applying rules to the facts. Clearly this discretion is broad but it is far from the 'strong' Dworkinian discretion that academics like Dixon might characterise it to be.[155] The approach adopted in these decisions indicates pragmatic responses by the judiciary to ownership of the home and the use of structured discretion that is gradually being refined through judicial pronouncements. The Supreme Court in *Jones v Kernott* provided further evidence of a progressive movement to 'structure' discretion and provide greater clarification on the application of the principles laid down in *Stack*.

Miss Jones and Mr Kernott purchased a family home in joint names in 1984. To finance the acquisition Miss Jones used the proceeds of sale from a caravan alongside an endowment mortgage taken out in joint names. Post-acquisition, Miss Jones paid the mortgage and household expenses using her own income and contributions made by Mr Kernott. They decided to improve the property by building an extension and Mr Kernott undertook some of the labouring work. The parties had two children together. Mr Kernott left the property in 1993. Miss Jones took over the repayment of the mortgage, the endowment policy premiums and the household expenses. She was also primary care-giver for their two children and received limited financial assistance from Mr Kernott. Although the parties placed the property on the market in 1995, it was not sold owing to poor property prices. In order for Mr Kernott to acquire a property in his sole name elsewhere, the parties cashed in a joint life insurance policy. In 1996, Mr Kernott acquired a property elsewhere and in 2006 served a notice of severance in relation to the jointly owned property. Miss Jones applied under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for a declaration as to her entitlement to both the jointly owned property and the property subsequently acquired in Mr Kernott's sole name. However, Miss Jones decided not to pursue an interest in the property solely owned by Mr Kernott and instead focused her claim on the jointly owned property, which by 2008 had significantly increased value of £245,000.

At trial Judge Peter Dedman held that Miss Jones was entitled to a 90 per cent share of the beneficial interest of the jointly owned property, thereby leaving Mr Kernott with a

[155] See Dixon (n 130) 460.

10 per cent share. The basis for this allocation was that the initial intention of the parties to establish a family home had been superseded by a different intention when Mr Kernott left the home in 1993. As there was no clear expression of the parties' intentions, Judge Dedman determined the shares on the basis of what was 'fair and just and divided the beneficial interest in the ratio of 90/10 in favour of Ms Jones'.[156] In the Chancery Division of the High Court, Nicholas Strauss QC believed that a common intention could be attributed to the parties if an actual or inferred intention was unavailable. In short, a court can attribute to the parties 'an intention which they did not have, or at least did not express to each other'.[157] His analysis of the majority view in *Stack* was that this should be performed in limited circumstances and he stated that 'the court should not *override* the intention of the parties, in so far as that appears from what they have said or from their conduct, in favour of what the court itself considers to be fair'.[158] On that basis, Nicholas Strauss QC noted that the approach taken by Judge Peter Dedman was permissible as the judge 'did not override any different intention which, from their words or conduct, could reasonably have been attributed to them' and therefore the approach was 'in accordance with the common intention of the parties'.[159]

The majority in the Court of Appeal overruled the High Court and awarded a 50/50 division of the beneficial interest.[160] The 'total lack of evidence about the parties' intentions' generated difficulties but, based on what information was available, Wall LJ stated that he was unable to infer an intention that equal beneficial sharing was to be varied.[161] The majority held that the passage of time and the fact that Ms Jones assumed all responsibilities for the jointly owned property were insufficient to adjust their beneficial interests in the property. Imputation of intention and fairness were not factors in the approach to be employed as between cohabitants. The former lacked clarity and conflicted with previous House of Lords' authority. Rimer LJ even stated, when referring to Baroness Hale's dicta on imputation, that he did not 'with the greatest respect, understand what she meant'.[162] The latter was impermissible as fairness was a concept used under the Matrimonial Causes Act 1973 in the division of assets between

[156] [2009] EWHC 1713, [2010] 1 All ER 947 (HC) 949 (Nicholas Strauss QC).
[157] ibid 959.
[158] ibid 959 (emphasis added).
[159] ibid 963.
[160] Jacob LJ dissented.
[161] *Jones v Kernott* [2010] EWCA Civ 578, [2010] 3 All ER 423 (CA) [52].
[162] ibid [77]. This resonates with the cautious approach to imputation Arden LJ expressed in *Fowler v Barron* (n 106). See A Hayward, 'Family Values in the Home: Fowler v Barron' (2009) *Child and Family Law Quarterly* 242.

married couples, and did not apply in the trust framework.[163] Accordingly, and following severance of the beneficial joint tenancy, Ms Jones and Mr Kernott held the beneficial interest as tenants in common in equal shares. As Wall LJ noted, if the parties wanted their beneficial interests to alter post-acquisition, they needed to formalise that explicitly through an express declaration of trust as the court could not 'spell such an intention out of their actions'.[164]

The Supreme Court restored the order of the trial judge, thereby supporting a 90:10 division of the beneficial ownership in favour of Miss Jones.[165] The Supreme Court stated that, as equity follows the law, joint tenants at law meant joint tenants in equity. Lady Hale and Lord Walker stated that the rationale behind the presumption of beneficial joint tenancy was not the maxim of 'equity follows the law' but rather recognition that a joint purchase of residential property was 'a strong indication of emotional and economic commitment to a joint enterprise'.[166] This could be displaced if evidence, 'deduced objectively from conduct', revealed a different common intention at the time of acquisition or subsequently.[167] Echoing their views expressed in *Stack*, Lady Hale and Lord Walker reasserted the non-applicability of the resulting trust in cases concerning the joint purchase of property used as a home.[168] Once satisfied that the parties intended unequal sharing and that it was not possible to discern by direct evidence or conduct what shares were intended, 'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property'.[169] In particular, the court emphasised that this survey of the whole course of dealing should have a 'broad meaning' which draws on the paragraph 69 factors used in *Stack v Dowden* and should not be restricted to financial considerations.[170]

Lady Hale and Lord Walker reviewed the distinction between inference and imputation, in particular, the variable interpretations provided by the 'singularly unresponsive'[171]

[163] *Jones v Kernott* (n 161) [55] (Wall LJ).
[164] ibid [62].
[165] The Supreme Court decision has been extensively analysed: see J Mee, '*Jones v Kernott*: Inferring and Imputing in Essex' [2012] *Conveyancer and Property Lawyer* 167, R George, 'Cohabitants' Property Rights: When is Fair Fair?' [2012] *Cambridge Law Journal* 39; and S Gardner and K Davidson, 'The Supreme Court on Family Homes' (2012) 128 *Law Quarterly Review* 178.
[166] *Jones v Kernott* (n 9) [19].
[167] ibid [51] (Lord Walker and Baroness Hale).
[168] ibid [25].
[169] ibid quoting *Oxley v Hiscock* (n 7) [69] (Chadwick LJ).
[170] *Jones v Kernott* (n 9) [51] (Lord Walker and Lady Hale).
[171] ibid [28].

speeches by their Lordships in the much earlier House of Lords' decision of *Gissing v Gissing*.[172] Both recognised that confusion had been injected into the legal framework regarding the permissibility of imputing an intention to the parties, but, ultimately, they were of the opinion that the practical difference between inference and imputation 'may not be so great'.[173] Lord Collins agreed with the joint decision of Lady Hale and Lord Walker, whilst emphasising the exact point at which fairness entered the judicial methodology in these disputes. Lord Collins stressed that the court needed to be satisfied, whether based on party words or inferred through their conduct, that there was a common intention to share unequally; the court could not use fairness as a basis for determining the parties' common intention. Fairness had a residual role and was only operable once the court had determined the existence of a common intention to share unequally, but where it was unable to determine precisely the mathematical division of the beneficial interest. Lord Kerr and Lord Wilson provided further comment on the interface between inference and imputation. Crucially, they were both keen to stress that the courts should not be unduly restricted by inference of intentions and where quantum of the beneficial interest could not be determined on the evidence, the courts should accept that fact fully and, instead, impute intentions to the parties. Lord Kerr believed that Mr Kernott's departure from the property and cashing in the life insurance policy was 'a slender foundation' on which to base that inference.[174]

When applied to the case, it was apparent that Miss Jones and Mr Kernott intended that the property would be their shared family home up until Mr Kernott left in 1993. His departure and subsequent purchase of another property enabled Baroness Hale, Lord Walker and Lord Collins to infer an intention to share unequally in equity. Lord Kerr and Lord Wilson agreed with the final result but believed that inferring a change of intention from conduct was not possible. Instead, as there was insufficient evidence to infer a change to the parties' original intentions, imputation was 'the only course to follow'.[175] In the Supreme Court, Judge Dedman's order was restored and the beneficial interest divided in the ratio of 90/10 in favour of Ms Jones.

When analysing the use of discretion in quantification cases, *Kernott* provides useful insight. Two aspects of the decision indicate a further structuring of discretion consistent

[172] Analysed in Chapter Four.
[173] ibid [34].
[174] ibid [76].
[175] ibid [72] (Lord Kerr).

with judicial developments stemming from *Cooke*: the further clarification of the structured discretion to apply in domestic ownership disputes; and the use of fairness.

## THE STRUCTURED USE OF JUDICIAL DISCRETION IN *JONES v KERNOTT*

As noted above, in *Stack* the majority of the House of Lords favoured the common intention constructive trust whereas Lord Neuberger preferred the use of the presumption of resulting which could be replaced in instances of common intention. In *Kernott* the Supreme Court emphasised the primacy of the common intention constructive trust. This decision was important for again delimiting the implied trust framework to the common intention constructive trust and therefore seeking to avoid the confusion between the application of that particular trust and the resulting trust in this context. Despite the suggestion by some that it was new development,[176] the Supreme Court in *Kernott* can alternatively be regarded as simply providing a restatement of the principles laid down in *Stack*, elucidating the principles to explain what they 'really meant'.[177] Naturally this process is the hallmark of common law judicial reasoning dependent on a process of refinement and clarification by the judiciary. Thus at paragraph 51, Lady Hale and Lord Walker produced a methodology that was a synthesis of earlier approaches visible in *Stack* and *Oxley* which was to be applied to both joint and sole legal title disputes albeit with different starting points. This endeavour provides evidence of structuring the methodology to be employed by the court and echoed what Lord Hope said in *Stack*:

> '[t]he key to simplifying the law in this area lies in the identification of the correct starting point. Each case will, of course, turn on its own facts. But law can, and should, provide the right framework'.[178]

Following *Kernott* the process can be conceptualised as follows: 'where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests'[179] it resulted

[176] For example, S Panesar, 'Jones v Kernott: non-marital cohabitation - joint ownership - constructive trusts and beneficial interests' [2011] 16(2) *Coventry Law Journal* 123, 56 and J Lee, ""And the waters began to subside": imputing intention under Jones v Kernott' [2012] 5 *Conveyancer and Property Lawyer* 421, 421.
[177] D Hayton, 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems' [2012] *Conveyancer and Property Lawyer* 263, 270.
[178] *Stack v Dowden* (n 8) [3].
[179] *Jones v Kernott* (n 9) [51].

in joint ownership in equity through a beneficial joint tenancy.[180] Where the parties did not have a common intention to share the beneficial ownership equally when the property was acquired or afterwards, this presumption can be displaced.[181] This will be possible via words or conduct viewed objectively by the court and Lady Hale and Lord Walker referred to Lord Diplock in *Gissing*:

> 'the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party'.[182]

Once the presumption has been displaced, the court is required to quantify the shares of the beneficial interest. If, by 'direct evidence or by inference' the court can determine a common intention as to shares, then it must give effect to that allocation.[183] The paragraph 69 factors created in *Stack*, discussed above, can be used. Where this common intention cannot be determined, the parties are entitled to shares that the court determines fair 'having regard to the whole course of dealings between them [the parties] in relation to the property'.[184] The paragraph 69 factors may again be utilised as a guide when interpreting 'the whole course of dealings'. Fairness is a permissible methodology only where the court is unable to find an agreement as to shares. It is not applicable when the court is ascertaining whether to displace the presumption of beneficial sharing. This methodology suggests that *Kernott* merely provided some further elucidation as to the *Stack* framework and certainly did not strike out on a new line.

## JUDICIAL DISCRETION AND FAIRNESS IN *JONES v KERNOTT*

The second aspect of *Kernott* that has generated discussion as to the use of discretion by the court is the term 'fairness'. The use of that term generated comparisons in the academic commentary[185] and media[186] to the approach of the Matrimonial Causes Act

[180] ibid [51].
[181] ibid [19].
[182] *Gissing v Gissing* (n 11) 906.
[183] *Jones v Kernott* (n 9) [51].
[184] ibid [51] echoing Chadwick LJ's formulation in *Oxley*.
[185] M Dixon, 'Land Law' [2012] 65 *Student Law Review* 48, 49.

1973 to married couples which as Waite LJ noted in *Hammond v Mitchell* 'lie[s] almost entirely in discretion' and involves the court using a range of statutory factors and case law principles in the pursuit of a fair outcome.[187] Following *Stack,* comparisons to family law adjudication (an area often typified by the use of judicial discretion) were plentiful with newspaper headlines ranging from 'Unmarried couples come closer to winning legal divorce rights'[188] to 'Unmarried couples granted new legal protection by courts'.[189] Similarly, developments in this area to accommodate the interpersonal dimension have been as a 'family law approach'[190] that demonstrates that 'family law principles have infiltrated trusts law'.[191] Ultimately, these comparisons between the *Stack* approach and that adopted under the Matrimonial Causes Act 1973 may explain the desire of Wall LJ in the Court of Appeal in *Kernott* to stress the difference of these approaches:

> 'The office of the judge, as Bacon famously remarked, "is 'jus dicere' and not 'jus dare'". This is not a case under the Matrimonial Causes Act 1973, and the government has not implemented the Law Commission's proposals relating to unmarried couples. This court must resolve this appeal under the law relating to trusts as explained in *Oxley v Hiscock* and *Stack v Dowden*'.[192]

Nevertheless, after the Supreme Court decision in *Kernott,* this comparison continued with practitioners querying whether that case will become the 'the new *White*'.[193] Dixon further developed this view:

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[186] T Ross, 'Unmarried couples granted new legal protection by courts' *The Telegraph* (London, 9 November 2011) noting that *Kernott* 'brings the rights of unmarried and married couples closer blurring the traditional distinction many thought would require reform by Parliament'.

[187] *Hammond v Mitchell* [1992] 2 All ER 109, 120. When a court is exercising its jurisdiction under the Matrimonial Causes Act 1973 to redistribute assets between married couples, the overarching aim of the court is to ensure a 'fair' division of the property, see *White v White* (n 35) and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 (HL). Furthermore, the court searches for the 'fairest provision for the future' and by downplaying party intention and prioritising discretion, the court need not pay 'too nice a regard to their [the parties] legal or equitable rights' *Hanlon v The Law Society* [1981] AC 124 (HL) 147 (Lord Denning MR).

[188] F Gibb, 'Unmarried couples come closer to winning legal divorce rights' *The Times* (London, 26 April 2007). See also F Gibb, 'Unmarried couples win rights to half of shared properties' *The Times* (London, 25 April 2007).

[189] Ross (n 186).

[190] M Pawlowski, 'Beneficial Entitlement-No Longer Doing Justice' 352, 364.

[191] R Probert, 'Trusts and the Modern Woman' [2001] 13(3) *Child and Family Law Quarterly* 275 286.

[192] *Jones v Kernott* (n 161) [55].

[193] R Bailey-Harris and J Wilson, 'Hang on a Minute! (Or is *Kernott* the New *White*)' (*Family Law Week,* 10 February 2011) <http:www.familylawweek.co.uk/site.aspx?i=ed79632> accessed 2 July 2013.

> 'What Kernott now shouts at us, in a loud and unmistakable voice, is that the identification of shares in family property is not, repeat not, a matter of property law at all. It is an exercise in the redistribution of assets in order to do what is fair in all the circumstances…it is the exercise of an invented judicial discretion structured like the divorce jurisdiction'.[194]

Drawing upon the literature on judicial discretion and the findings of Chapter One, it is argued that these comparisons are inaccurate because they over-generalise and homogenise the nature of discretion. Galligan noted that discretion 'is always a matter of degree; it may be stronger or weaker, greater or lesser' and therefore what may instinctively appear discretionary by the presence of the term 'fairness' may in fact be structured by rules.[195]

A better approach is taken by Miles and Probert who note[196] that the presumption of beneficial joint tenancy 'may seem to resemble' the 'yardstick of equality' created by the House of Lords' decision in *White v White*[197] and further developed in *Miller v Miller*; *McFarlane v McFarlane*.[198] However, they both rightfully point out that a key distinction does exist, namely that a presumption of beneficial joint tenancy is an expression of party intention whereas the approach in ancillary relief is merely the fact that the fruits of the marriage partnership should, in principle, be shared. Thus the quantification principles generated by *Stack* and *Kernott* are fundamentally different to the case law principles applied in ancillary relief. Fairness is a key objective in ancillary relief achieved through the application of statute and case law principles whereas in trusts of the family home cases it provides a residual option for a court when determining shares.

In a similar manner, the paragraph 69 factors laid down in *Stack* and endorsed in *Kernott* have been described as echoing the section 25 statutory factors used to divide assets between married couples.[199] Yet again, this misrepresents the role of these paragraph 69

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[194] Dixon (n 185).
[195] Galligan (n 5) 11.
[196] J Miles and R Probert, 'Sharing Lives, Dividing Assets: Legal Principles and Real Life' in J Miles and R Probert, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing 2009) 12.
[197] *White v White* (n 35).
[198] *Miller v Miller*; *McFarlane v McFarlane* (n 187). See also Lord Neuberger of Abbotsbury (n 71) [11].
[199] Comparison made Douglas, Pearce and Woodward (n 131) 140 and the differences between the two well illustrated in R George, 'Stack v Dowden – Do as we say and not as we do?' [2008] 30(1) *Journal of Social Welfare and Family Law* 49, 58-59.

factors which is fundamentally different to the role played by those listed under section 25. The former are used for the divination of the parties' intentions as to ownership whereas the latter are used to guide the courts search for a fair division of assets. Thus what both *Stack* and *Kernott* permit is a structured discretionary methodology that is consistent with common intention and based on a search for express and inferred intentions and in default the imputation of a fair share 'having regard to the whole course of dealing between them in relation to the property',[200] because such imputation is deemed to be what parties would have intended.

Another perspective in the literature triggering comparisons to family law is the fact that Baroness Hale gave the majority decision in *Stack* and, later as Lady Hale alongside Lord Walker, provided the lead judgment in *Kernott.* As a prominent family lawyer, the role played by Baroness Hale in these decisions has fuelled the view that this area has become closer to family law. In the academic discourse, the opinions of Baroness Hale and Lord Neuberger in *Stack* are often contrasted as a 'family law approach' versus 'a Chancery approach'.[201] However, whilst Gardner noted that some judges 'may cultivate an image as free spirits, or innovators', the idea that Baroness Hale has transposed family law into this area is mistaken.[202] It should be noted that the approach adopted in *Oxley*, pre-dating *Stack* and Baroness Hale's involvement in this area, recognised a myriad of domestic contributions to the home and enabled sensitivity to the nature of the relationship between the parties albeit through property law. The approach in this case caused some consternation amongst property lawyers but was viewed positively in the academic community. Similarly in *Stack*, Lord Hope and Lord Walker both accepted a more fact-sensitive approach that went towards recognising the 'logic of sexual-domestic relationships'.[203] In the unanimous decision of *Kernott*, Lords Kerr and Wilson were prepared to accept that the court could expedite their use of fairness in cases where it was clear that intentions could not be inferred. This modern debate of personalities is reminiscent of that concerning Lord Denning MR analysed in Chapters Two and Three. Those chapters concluded that whilst Lord Denning MR provided expansive interpretations of section 17 he was by no means the only member of the judiciary that favoured the use of judicial discretion.

[200] *Jones v Kernott* (n 9) [51].
[201] J Mee, 'Burns v Burns: The Villain of the Piece', in S Gilmore, J Herring and R Probert, *Landmark Cases in Family Law* (Hart 2010) 197.
[202] See S Gardner (n 123) 194.
[203] A Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 216.

Whilst *Kernott* permitted the use of fairness as a residual option for a court, it should be noted that the discourse surrounding fairness can be traced back to Lord Diplock in *Gissing* and received its fullest articulation by Chadwick LJ in *Oxley*. Baroness Hale in *Stack* was keen to firmly delimit the scope for the application of fairness stating that it was impermissible for a court to override expressed or inferred common intention in favour of a 'fair result'. She stated that:

> 'For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1970] AC 777 without even the fig leaf of section 17 of the 1882 Act'.[204]

Cumulatively, both *Stack* and *Kernott* illustrate that when a court is quantifying a beneficial interest under a common intention constructive trust, the approach undertaken is structured and not an exercise of 'palm tree justice'.

## CONCLUSIONS

Chapter Five revealed that whilst an area may be characterised by bright line rules, nevertheless there is always potential for the courts to exercise discretion. That discretion naturally occurs through the interpretation of facts and the interpretation of rules which is particularly necessary where, as Chapter Four revealed, those rules are ambiguous. As Galligan noted 'the vagaries of language' and 'the diversity of circumstances…guarantee discretion some continuing place in the legal order and make its elimination an impossible dream'.[205]

In contrast to Chapter Five, which demonstrated the courts indicating a preference for rules over the exercise of discretion at the acquisition stage, this chapter has demonstrated that when a court is quantifying a beneficial interest under a constructive trust this balance between rules and discretion is struck differently. The courts have in modern decisions generated a discourse surrounding the use of discretion and academic literature often depicts the modern approach to quantification under a constructive trust as one that is discretionary. Support for the use of discretion has not been unanimous. Dixon was highly critical of *Stack* noting that the House of Lords was 'so generous in

[204] *Stack v Dowden* (n 8) [61].
[205] Galligan (n 5) 1.

the giving of judicial discretion that just about any result in any set of circumstances can be justified'.[206]

However, when analysed from an historical perspective and within the taxonomy of judicial discretion, the criticisms of both decisions regarding the use of discretion may be overstated. Firstly, the endorsement of 'fairness' in *Kernott* has been viewed as sanctioning 'palm tree justice' whereby the shares are quantified on the basis of 'judicial hunch' rather than on the basis of identifiable principles.[207] This observation arguably lacks evidential basis. The imputation to the parties of a 'fair' share is a residual option and is only 'imposed as a "fallback position" if more conventional property law analysis proves fruitless'.[208] Provided there is a rigorous approach to inference of intentions from conduct, this fact compartmentalises the use of fairness, places it within a structured methodology and reveals that the court cannot override the parties' express intentions in favour of what they deem a fair result. Thus, unlike early cases such as *Appleton* that are often used to highlight the dangers of discretion for judicial reasoning, *Kernott* merely clarifies *Stack* and confirms the use of a structured methodology when quantifying shares. Similarly, unlike *Appleton,* the Supreme Court in *Kernott* explicitly states that it is not possible to acquire an interest using fairness. Whilst Fretwell suggests that there may be a movement towards imputation of a beneficial interest on the basis of fairness at the acquisition stage,[209] there is clear reticence by the Supreme Court to pursue this line of development.[210] This is consistent with the argument that the courts have adopted a structured methodology when quantifying beneficial interests that is broad but provides a degree of clarity for the decision-maker. This residual use of fairness can also be regarded as a necessary tool to ensure that a court 'reaches a result' on sparse and conflicting evidence. Pawlowski noted that its use was in fact 'eminently sensible and practical' where express or inferred intentions are not visible,[211] and Mee has also endorsed the approach but with the proviso that the word 'fairness' was used solely rather than a discourse with imputed intentions.[212] Both viewpoints reveal the difficulty involved in adjudicating trusts of the family home cases which renders the residual use of fairness an effective tool to overcome the frequent absence of intentions.

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[206] Dixon (n 130) 460.
[207] Battersby (n 21) 264.
[208] R George, *Ideas and Debates in Family Law* (Oxford, Hart Publishing, 2012) 104 drawing on George (n 165).
[209] K Fretwell, 'The Cautionary Tale of Jones v Kernott' [2012] *Family Law* 69.
[210] See *Jones v Kernott* (n 9) [84].
[211] M Pawlowski, 'Imputed intention and joint ownership - a return to common sense: Jones v Kernott' [2012] *Conveyancer and Property Lawyer* 149, 156.
[212] See J Mee, 'Pettitt v Pettitt and Gissing v Gissing' in C Mitchell, *Landmark Cases in Equity* (Hart 2012).

Secondly, the criticism that the use of discretion in *Stack* and *Kernott* represents a new development is also problematic seeing as in many respects the decisions merely build upon the framework created in *Oxley*. Building upon the aforementioned observation as to the overemphasis in the academic discourse on fairness, it is arguable that the sensationalism of the decisions obscured the legal developments involved.[213] Dickson is correct in his view that *Kernott* looked like a significant development but it was in reality a 'fairly predictable confirmation of earlier trends in the case law'.[214] In a similar manner, the use of 'context' in *Stack* has been viewed as a problematic move by some and it is accepted that defining precisely what falls within the domestic and commercial contexts may in fact be difficult. Nevertheless, the development of the implied trusts from *Gissing* onwards has shown an incremental appreciation that cases concerning the family home have been dealt with in a different manner to those between commercial parties. Indeed, in *Crossco No 4 v Jolan Ltd* it was noted that the common intention constructive trust was:

> 'a specific jurisprudential response to the problem of a presumption of resulting trust and the absence of legislation for resolving disputes over property ownership where a married or unmarried couple have purchased property for their joint occupation as a family home'.[215]

The courts in England and Wales have recognised that the common intention constructive trust only applies to the home and this shows responsiveness to the specific context of the dispute at hand. It is apparent that in the recent decisions of *Stack* and *Kernott* there is a further step towards recognition of a form of family property yet implicitly this trend has been visible in the case law since at least *Cooke*. More importantly for this thesis, even with recognition of a 'context specific approach' that affirms that 'each area of discretion has its own characteristics',[216] this does not generate an unfettered exercise of judicial discretion within that context but rather a structured methodology for quantifying a beneficial interest.

Thirdly, the visibility of judicial discretion when quantifying an interest does not mean that ownership disputes are no longer being determined using property law principles

[213] Hayward (n 66).
[214] B Dickson, 'Creativity in the Supreme Court 2011-12' [2013] *Cambridge Journal of International and Comparative Law* 33, 40.
[215] *Crossco No 4 v Jolan LtD* [2011] EWCA Civ 1619 85 (Etherton LJ).
[216] Galligan (n 5) 3.

and are instead being adjudicated in a manner similar to family law. As Gardner notes, 'discretionary resolution is par excellence the technique of family law' and an approach to quantification that uses the term 'fairness' may instinctively appear similar to that adopted under the Matrimonial Causes Act 1973.[217] However, this chapter has demonstrated that to argue that this area is being determined by family law principles is far from true. Rather the discretionary exercise in *Stack* and *Kernott* reveals what the author has termed elsewhere 'enhanced familialisation': that is, a more intensified endeavour to modify general principles of property law to accommodate the domestic dimension of these disputes but which falls short of injecting family law into this area.[218] This is not the supplanting of property law principles with those of family law but rather property law attempting to accommodate the specific nature of ownership disputes. This endeavour is more intensified than the familialisation that Dewar first identified yet nevertheless these principles still fall within property law.[219] Not only is the use of discretion structured, it is also a beneficial development to enable property law to reconcile its treatment of home ownership, possession and purchase with the realities of people's lived experiences.

[217] S Gardner (n 123) 199.
[218] A Hayward, 'Family Property and the Process of Familialization of Property Law' [2012] 23(3) *Child and Family Law Quarterly* 284.
[219] Hayward (n 66).

# CONCLUSIONS

## JUDICIAL DISCRETION IN OWNERSHIP DISPUTES OVER THE FAMILY HOME

Barak observed that 'judicial discretion is, for the most part, a mystery to the general public, to the community of lawyers, to teachers of law, and to judges themselves'.[1] The reasons for this are plentiful ranging from the fact that judges often fail to explain how they exercise discretion, that judicial discretion is sometimes marginalised in academic study in favour of analyses of administrative discretion or that traditional academic views on discretion deny its use on the basis that 'the judge declares the law without creating it'.[2] This observation provided the context to this thesis, the primary purpose of which was to provide a better understanding of how judges exercised discretion within the specific context of ownership disputes over the family home.

In light of the well-documented limitations of the implied trust framework,[3] and endeavours by the courts to use judicial discretion to overcome those limitations,[4] this thesis critically examined the exercise of discretion in this area and the motivations behind its use. Owing to the greater visibility of discretion when courts are quantifying shares under the common intention constructive trust, this thesis also considered whether a greater use of discretion was effective in enabling the legal framework to better accommodate the domestic context. Those questions stimulated a further line of enquiry, namely whether the greater use of discretion and acknowledgment of such use by the courts and academic community would be problematic for the future development of the implied trust framework.

The claim advanced by this thesis is that judges in this specific context have increased their exercise of judicial discretion to enable greater sensitivity to the domestic context and, whilst this may appear a controversial move to some, it is a beneficial modification

[1] A Barak, *Judicial Discretion* (Yale University Press 1989) 3.
[2] ibid 4.
[3] For general criticism of the implied trust framework see Law Commission, *Sharing Homes A Discussion Paper* (Law Com No 278, 2002) para 2.105-2111 and Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007) 154-162.
[4] See Chapter Two and Three for analysis of these attempts in case law decided prior to *Pettitt v Pettitt* [1970] AC 777 (HL).

of the property law framework in this area. Although the degree of discretion exercised varies depending on whether the court is dealing with acquisition or quantification of a beneficial interest, it is nevertheless clear that discretionary resolution is present at both stages and has been used to accommodate the interpersonal dimension of acquisition of real property by parties in an intimate relationship.[5]

The legal scholarship on the use of discretion reveals that discretion represents 'a central and inevitable part of the legal order' and, as a direct consequence, it becomes 'difficult to contemplate the making of a legal decision that does not have at least a measure of discretion'.[6] This thesis explored this particular viewpoint in Chapter One and found that, whilst discretion can exist in various forms,[7] the process of using discretion was present at all stages in the process of adjudication. The potential for the exercise of discretion by a judge is extensive, yet often not fully appreciated. At the fact-finding stage, which Barak termed the 'first area of judicial discretion',[8] courts use judicial discretion when weighing up the veracity of the evidence and making assessments on that evidence. Similarly, judicial discretion is applied to interpret rules. This may involve how those rules are applied to the facts of a particular scenario alongside a process whereby a judge may use discretion to ameliorate ambiguities within the meaning of a particular rule. As Goodin notes, the ability to use discretion may be expressly stated by the rule itself or alternatively assumed by the decision-maker in the deployment of that rule, perhaps with a view to better carrying out the purpose of the rule.[9] The ubiquity of discretion is further confirmed when express conferrals of discretion by Parliament upon the courts are contrasted with judiciary developed rules that are imbued with the potential to use discretion.

This thesis took that understanding and applied it to the specific context of ownership disputes over the family home. It demonstrated that the development of the legal framework, whether applied to married couples pre-*Pettitt* or cohabitants, reveals a continued engagement by the courts with the exercise of judicial discretion. This engagement was evidenced by the varying judicial interpretations of a statutory grant of discretion conferred by section 17 of the Married Women's Property Act 1882. This

[5] J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 327, 331 and 328 and J Dewar, 'Give and Take in the Family Home' [1993] *Family Law* 231.
[6] Barak (n 1) 11.
[7] See RC Post, 'The Management of Speech: Discretion and Rights' (1984) *Supreme Court Review* 169.
[8] Barak (n 1) 13.
[9] RE Goodin, 'Welfare, Rights and Discretion' (1986) 6(2) *Oxford Journal of Legal Studies* 232.

statutory grant of discretion enabling a judge to decide 'any question between husband and wife as to the title to or possession of property…as he thinks fit' added to the inherent discretion possessed by a judge whenever they were interpreting facts or applying rules. The discourse surrounding the use of this discretion was highly visible in the post-World War II period, through the debate as to the precise scope of this statutory discretion, the legitimacy of the courts using this discretion expansively and whether the wording of section 17 permitted courts to vary property rights between spouses. As noted in Chapter Four, the House of Lords' decisions in *Pettitt v Pettitt*[10] and *Gissing v Gissing*[11] rejected the expansive interpretations of section 17 and endorsed general principles of property law as the medium to resolve disputes between separating couples, whether married or unmarried. Chapters Five and Six again demonstrated the visibility of discretion in this area yet highlighted a key distinction in its use dependent on whether the court was analysing the acquisition of an interest by the claimant or quantifying that interest. Whilst discretion is visible in the rules applicable to acquisition of an interest under *Lloyds Bank v Rosset*,[12] for example, through the process of fact-finding and interpreting the requirement of beneficial ownership being determined by common intention, the courts have clearly refrained from an expansive exercise of discretion when parties were acquiring an interest. Despite calls for relaxing the acquisition rules laid down in *Rosset*,[13] modern case law reveals a clear resistance to depart from the 'bright-line' formula of *Rosset*.[14] In contrast, there is far greater evidence of discretionary resolution of disputes where the courts are quantifying a beneficial interest under a common intention constructive trust. At this stage and following *Stack v Dowden*,[15] a wide range of factors can be taken into account when a court is determining quantum of an interest. In light of *Jones v Kernott*,[16] a court may now impute to the parties a fair share. Whilst the extent of discretion exercised by the court has varied over time, nevertheless the visibility of judicial discretion and a continued discourse surrounding its correct use is beyond doubt.

This thesis analysed some of the motivations behind the use of discretion in the period before the House of Lords' decision in *Pettitt.* The justifications for this arrogation of discretion were varied ranging from judicial recognition of the limitations of resulting

[10] [1970] AC 777 (HL).
[11] [1971] AC 886 (HL).
[12] [1990] UKHL 14, [1991] 1 AC 107 (HL).
[13] See *Stack v Dowden* [2007] UKHL 17 [63] (Baroness Hale), [26] (Lord Walker). Echoed in the Privy Council decision of *Abbott v Abbott* [2007] UKPC 53 [3]-[6].
[14] S Gardner, 'A Woman's Work…' (1991) 54 *Modern Law Review* 126, 129.
[15] *Stack v Dowden* (n 13) [69] (Baroness Hale).
[16] [2011] UKSC 53.

trusts and advancement to a need for pragmatism when trying to delineate beneficial ownership following complex (and often contested) interactions between spouses. In the absence of statutory powers to redistribute assets between married couples,[17] the courts arrogated themselves a substantive discretion under section 17, particularly as 'some judges considered that doctrinal purity would produce unfair or unsatisfactory results'.[18] This discretion enabled the courts to modify the outcome that would have been generated had the presumptions of resulting trust and advancement applied which as early as 1945 were seen as outcomes potentially capable of causing injustice between spouses.[19] For that ability, it was viewed by Milner as an 'admirable medium'.[20] Through the more fact-sensitive exercise that discretion enabled, the courts were willing to recognise the evidential difficulties inherent in matrimonial ownership disputes.[21] These ranged from that fact that discussions as to ownership sometimes occurred decades prior to the legal dispute, that matrimonial ownership disputes often involved highly contested evidence,[22] and more importantly, that there was a disconnect between what the law required of parties and what can be expected within an interpersonal relationship. The potential to use judicial discretion enabled courts to be more sensitive to the domestic context and interaction between spouses when acquiring the matrimonial home.

The motivations behind the exercise of judicial discretion in the modern case law were to some extent similar to those expressed in the pre-*Pettitt* period although it is arguable that there may have been initially a greater reluctance to exercise discretion in the modern period owing to the fact the cases concerned cohabitants rather than married couples.[23] As Chapter Four argued, the common intention analysis prioritised by the House of Lords in *Gissing* was deficient both theoretically in terms of how the legal framework was expressed by their Lordships,[24] and also practically in terms of how that

[17] See G Miller, 'Maintenance and Property' (1971) 87 *Law Quarterly Review* 66, 67.
[18] WT Murphy & H Clarke, *The Family Home* (Sweet & Maxwell 1983) 35.
[19] See *Hichens v Hichens* [1945] P 23 (CA) 25 where Goddard LJ remarked: '[a]s everybody knows, it is often difficult to decide questions of property between husband and wife according to their strict rights'.
[20] A Milner, 'Policy Orientation in Matrimonial Property Law' (1959) 22 *Modern Law Review* 207, 207.
[21] *Re Rogers' Question* [1948] 1 All ER 328 (CA) 328 (Evershed LJ) and *Rimmer Rimmer* [1952] 2 All ER 863 (CA) 866 (Evershed MR).
[22] ibid 328 (Evershed LJ).
[23] The distinctions between the two relationships was highlighted in *Bernard v Josephs* [1982] Ch 391 (Ch) and in *Midland Bank v Cooke* [1995] 4 All ER 562 (CA). cf *Eves v Eves* [1975] 3 All ER 768 (CA).
[24] C Rotherham, 'The Property Rights of Unmarried Cohabitees: The Case For Reform' [2004] 68 *Conveyancer and Property Lawyer* 268, 272.

analysis applied to disputes where agreements as to ownership were frequently absent.[25] Modern case law illustrated the 'limitations of property law'[26] and, as Briggs notes, the acute difficulty involved when 'the unattainable precision of property law collides with the casual inarticulacy of home sharing'.[27] As Chapter One illustrated 'indeterminacy of the legal materials'[28] or areas where societal views rapidly change and require law to keep abreast of those changes, are contexts in which the use of discretion is often beneficial.[29]

In spite of the 'perfectly laudable' aims that motivated the use of discretion,[30] the visibility and expansive use of discretion by the court has stimulated extensive criticisms of both the pre- and post-*Pettitt* case law. Consistent with many of the criticisms of the expansive use of discretion identified in Chapter One, the main criticisms explored in this thesis were as follows. Firstly, the use of discretion was viewed as enabling the courts to 'mete out some variety of "palm tree justice"' thereby permitting the judge to dispense an individualised notion of justice.[31] These criticisms were expressed in the pre-*Pettitt* academic commentary.[32] As Rosen noted, 'the objections to decisions unfettered by any rules and disregarding established rights are manifest'.[33] Some judges found the express language of statutes conferring discretion problematic. For example, when Harman LJ was told that he had a discretion to decide a dispute on the basis of how 'he thinks fit' he stated that 'this smacks altogether too much of palm tree justice to suit my taste'.[34] This criticism was also expressed in case law following *Pettitt*[35] and again in the modern framework.[36] After *Stack*, Battersby queried whether the use of the 'domestic context' and an extensive list of factors for a court to consider when divining

[25] See, generally, J Eekelaar, 'A Woman's Place – A Conflict between Law and Social Values' [1987] *Conveyancer and Property Lawyer* 93, S Gardner, 'Rethinking Family Property' (1993) 109 *Law Quarterly Review* 263, N Glover and P Todd, 'The Myth of Common Intention' (1996) 16 *Legal Studies* 325.
[26] S Bridge, 'Cohabitation: Why Legislative Reform is Necessary' [2007] *Family Law* 911.
[27] A Briggs, Co-ownership and an Equitable Non Sequitur' (2012) 128 *Law Quarterly Review* 183, 183.
[28] J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 97
[29] NS Marsh, 'Principle and Discretion in Judicial Process' (1952) 68 *Law Quarterly Review* 226, 236.
[30] K Gray and S Gray, *Elements of Land Law* (5th edn, OUP 2009) 903.
[31] A Milner 'Beneficial Ownership of the Matrimonial Home' [1959] 37 *Canadian Bar Review* 473, 474.
[32] AG Guest, 'The Beneficial Ownership of the Matrimonial Home' [1956] 20 *The Conveyancer* 467, 476.
[33] L Rosen, 'Palm Tree Justice' [1966] 110 *The Solicitors' Journal* 239, 239.
[34] *Re Caribbean Products (Yam Importers) LtD* [1966] 1 All ER 181, 184.
[35] See M Cullity, 'The Matrimonial Home – A Return to Palm Tree Justice: Trust Doctrines based on (a) Intent and (b) Unjust Enrichment' [1977-1979] 4 *Estates and Trusts Quarterly* 277, 306.
[36] *Springette v Defoe* [1992] 2 FCR 561, 567 (Dillon LJ).

intentions took the implied trust framework back to the Denning Court of Appeal and 'palm tree justice' which he viewed characterised that era.[37]

Secondly, a prominent criticism was that judicial discretion injected unpredictability and uncertainty in this area. This fear motivated the House of Lords in *Pettitt* to prioritise general principles of property and, as Lord Hodson noted, reject 'the uncertain and crooked cord of discretion' in favour of instead 'the golden and straight metwand of the law'.[38] It is clear that the expansive use of discretion can generate unpredictability and uncertainty in the law and this is manifested in various ways. In the pre-*Pettitt* case law, Guest remarked that it is 'not easy for counsel to advise with any certainty on the division of the proceeds of sale of the matrimonial home'[39]. Similarly in *Stack* and *Kernott,* there was a concern that practitioners would be unable to advise clients as to their legal entitlements.[40] Speaking extra-judicially, Lord Neuberger believed that the approach of the majority in *Stack* would not avoid 'long and costly disputes between co-owners' but instead represented 'an invitation to an expensive and time consuming exercise at all stages – disclosure, witness statements and court hearing'.[41] In short, discretion was unpredictable and unnecessarily expansive which made it hard for parties to bargain in the shadow of the law.

Thirdly, academics argued that the courts were using discretion as a means of circumventing property law, in particular, the application of the presumption of resulting trust and general compliance with land formalities. This was viewed by some as exceeding the judicial remit: for example, the majority decision in *Stack* was branded by Gray and Gray as 'naked judicial legislation' involving the transmission of 'social agenda into judge-made law'.[42] Further concerns over the democratic legitimacy of judicial development were raised when *Stack* and *Kernott* were conceptualised as creating a species of family property[43] or a judicially-created 'Co-Owners Causes Act'.[44] The re-emergence of discretionary decision-making has generated comparisons with the

[37] See, generally, G Battersby, 'Ownership of the family home: Stack v Dowden in the House of Lords' [2008] 20(2) *Child and Family Law Quarterly* 255 building upon G Battersby , 'Oxley v Hiscock in the Court of Appeal' [2005] 17(2) *Child and Family Law Quarterly* 259.
[38] *Pettitt v Pettitt* (n 10) 808.
[39] AG Guest, 'The Beneficial Ownership of the Matrimonial Home' [1956] 20 *The Conveyancer* 467, 476.
[40] Battersby (n 37).
[41] Lord Neuberger of Abbotsbury 'The Conspirators, The Tax Man, The Bill of Rights and a Bit about The Lovers' (Chancery Bar Association Annual Lecture 10th March 2008) [18]
[42] K Gray and S Gray (n 30) 903.
[43] See, generally, J Mee, 'Burns v Burns: The Villain of the Piece', in S Gilmore, J Herring and R Probert, *Landmark Cases in Family Law* (Hart 2010).
[44] A Ralton, 'Co-owners, The Transfer, The Intent and *Stack*' [2007] *Family Law* 712, 713.

how the courts decide disputes between married couples under the Matrimonial Causes Act 1973, leading academics to question whether the implied trusts have become mechanisms to cater for the future needs of parties as opposed to giving effect solely to party intentions as to ownership.[45]

Ultimately, all these criticisms were premised on the presumption that a growing use of discretion posed challenges to the general coherence of the trust framework. Increased use of judicial discretion was not just an affront to 'abstract theoretical purity and logic' (creating anxiety among what Mee termed 'anorak-clad property-law scholars') but also posed serious challenges to the stability, coherence and rationality of the law.[46] Dixon stated 'the question of the acquisition and/or quantification of property rights for cohabiting couples is about real money, real distress, real confusion and the loss or gain of a real home for real people, many with children'.[47] Mee further developed this viewpoint and encapsulated many of the criticisms surrounding a greater use of discretion:

> 'The creation of more sweeping (and more invasive) rules, involving a higher level of discretion, has the effect of diminishing predictability, potentially involving more people in litigation and the threat of litigation, setting family members against each other in a context of heightened tension, and risking remedies being unjustly granted in favour of claimants who can exploit the open-endedness of the law to present an unmeritorious claim in a plausible way'.[48]

Some of these concerns are valid, particularly those centred on the predictability of the framework post-*Stack*. Yet, this thesis has demonstrated that the exercise of discretion by the courts in ownership disputes over the family home can be conceptualised in a manner that is legitimate, beneficial and therefore an effective development of property law in this area. Through utilising the scholarship on the use of judicial discretion, this thesis offers a more nuanced understanding of judicial discretion in this context, that avoids the dichotomy of viewing property law as inflexible and family law as just.[49]

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[45] See AJ Cloherty and D Fox, 'Proving a Trust of a Shared Home' (2007) *Cambridge Law Journal* 517, 519 and S Singer, 'What Provision for Unmarried Couples Should the Law Make when their Relationship Breaks down?' [2009] *Family Law* 234, 235.
[46] Mee (n 43) 191.
[47] M Dixon, 'Editors Notebook' [2011] *Conveyancer and Property Lawyer* 87, 88.
[48] Mee (n 43) 194.
[49] J Mee, 'Property Rights and Personal Relationships: Reflections on Reform' (2004) 24 *Legal Studies* 414, 418.

With that understanding, it seeks to demonstrate the gradual process undertaken by the courts to structure and rationalize their exercise of discretion in this area, evident in both the pre- and post-*Pettitt* case law. By situating many of the aforementioned criticisms of discretion within the broader context of how the implied trusts framework operates and analysed in light of how the judiciary use discretion in the determination of ownership disputes, the analysis demonstrates a compromise between a 're-affirming [of] the ever present need for certainty in the law' and the exercise of 'a reasonable judicial discretion in a field of law which particularly calls for a certain humanity and flexibility of approach'.[50] In light of the findings demonstrated in the chapters of this thesis, five arguments will be advanced to provide a new understanding in this area premised on the fact that where the use of judicial discretion is further analysed, it can be viewed as beneficial; with the consequence that arguments for a 'return to orthodoxy' are misplaced.

### (1) Evidence of a Structured Exercise of Judicial Discretion in Ownership Disputes over the Family Home

Chapter One demonstrated that the use of discretion is often misunderstood.[51] There is frequently a focus on expansive exercises of judicial discretion and this focus overlooks the more restrictive and also inherent exercises of discretion when a court is adjudicating a dispute. As noted above, there was evidence of what Bevan and Taylor termed the 'judicial conflict between "rule" (or presumption) and "discretion"[52] and this polarisation of discretion and rules was prevalent in the case law before *Pettitt* and in the modern framework. However building upon the taxonomy of discretion developed in Chapter One, this thesis has shown that historically where discretion has been assumed by the courts it is often followed by a process of structuring by the courts; that is, a process of creating methodologies to be applied through judicial discretion.[53] This may encompass processes for a court to adopt when exercising discretion or, even as Hawkins notes, more subtle, 'decision routines'.[54]

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[50] AF Wootton, 'Judicial Discretion in the Division of Matrimonial Assets' (1959-1963) 1 *University of British Columbia Law Review* 452, 460.
[51] See, for example, MP Baumgartner, 'The Myth of Discretion' in K Hawkins, *The Use of Discretion* (OUP 1991) 129, S Wexler, 'Discretion: The Unacknowledged Side of Law' (1975) 25 *University of Toronto Law Journal* 120 and AAS Zuckerman, 'Ownership of the Matrimonial Home-Common Sense or Reformist Nonsense' [1978] 94 *Law Quarterly Review* 26.
[52] HK Bevan and FW Taylor, 'Spouses as Co-Owners' [1966] 30 *The Conveyancer* 355, 442.
[53] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977) Chapter Four on 'structuring' of discretion.
[54] K Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins, *The Uses of Discretion* (OUP 1991) 11, 45.

In the pre-*Pettitt* period, this structuring of the judicial discretion conferred by section 17 was apparent from *Rimmer v Rimmer* onwards.[55] Whilst section 17 was originally conceptualised in *Re Rogers' Question* as a merely procedural provision that enabled parties to bring a dispute to court,[56] the Court of Appeal in *Rimmer* conceptualised the use of discretion in a substantive manner. Drawing upon the dicta of Bucknill LJ in *Newgrosh v Newgrosh*, Evershed MR viewed section 17 as permitting 'palm tree justice' yet, as Chapter Two demonstrated, other members of the Court of Appeal in that case took a more conservative approach and, in practice, the exercise of discretion did not correlate with Evershed MR's viewpoint. From that point onwards, the Court of Appeal restricted and also structured the use of discretion. Whilst it was still arguable that a broad exercise of discretion was permitted from a literal reading of section 17, prerequisites were developed before the court could exercise discretion and patterns emerged in how the courts determined these disputes. Before the court could resort to equal division of beneficial ownership of the matrimonial home through their exercise of judicial discretion, the claimant required a substantial pre-existing beneficial interest and courts were then required to give effect to any agreements between the parties as to precise shares.

*Hine v Hine*[57] and *Appleton v Appleton*[58] saw the Court of Appeal expand the use of discretion to the issue of acquisition of an interest rather than quantification thereby overlooking the prerequisites before the discretion under section 17 was engaged. However, these cases alone do not negate evidence of the courts structuring and restricting their exercise of discretion in cases where a party could demonstrate a pre-existing proprietary interest. This thesis has shown that when viewing this case law, some academics and also members of the judiciary focussed on the expansive and unstructured use of section 17 typified by *Hine* and *Appleton* and, to some extent, overlooked the fact that what appeared to be an expansive discretion was often structured.[59] Yet, there is also evidence of a more convincing contrary view which supports the claim of this thesis. For example, Bevan and Taylor questioned the meaning of 'palm tree justice' and asserted that the exercise of judicial discretion under section 17 was not 'capricious' and there was not one ""sole Arabian tree" under which the

[55] *Rimmer v Rimmer* (n 21).
[56] *Re Rogers' Question* (n 21). See also *Gaynor v Gaynor* [1901] IR 217.
[57] *Hine v Hine* [1962] 3 All ER 345 (CA).
[58] *Appleton v Appleton* [1965] 1 All ER 44 (CA).
[59] See Chapter Three and the approach of the House of Lords in *Pettitt.*

judges may dispense simple justice'.[60] Similarly, Megarry observed that even in *Rimmer*, where the use of discretion looked expansive it was 'not a true palm tree case'.[61]

Concerns expressed in the ambiguous phrase 'palm tree justice' also feature in the modern discourse. As Dillon LJ observed, '[t]he court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair'.[62] Yet by recognising the fact that courts frequently structure their exercise of discretion, it is argued that the court in implied trusts cases does not exercise a general discretion, palm tree or otherwise. Rather, when quantifying a beneficial interest the courts have developed a structured methodology to apply when dealing with these disputes. The principles of *Stack* and *Kernott* deploy a structured discretion delimited to a specific context.[63] Furthermore, within the domestic context of the family home, there is evidence of a structure which developed through a process of judicial refinement from *Midland Bank v Cooke*[64] and *Oxley v Hiscock*.[65]

*Stack* produced a framework for the quantification of interests under a common intention constructive trust. Where property was transferred into joint names, the starting point would be a presumption of beneficial joint tenancy. Similarly, where property was transferred in the name of one party but the other had acquired an interest under the *Rosset* principles the claimant started from the point of owning none of the beneficial ownership. In both instances, the claimant must demonstrate that beneficial ownership differs from legal ownership. When quantifying shares, the court would search for express agreements as to the size of the parties' beneficial ownership and, where that proved inconclusive, search for an inferred agreement established through the court having regard to the whole course of dealings between the parties. In a departure from *Stack*, in *Kernott* the Supreme Court explicitly sanctioned fairness where a search for express or implied agreements as to shares failed.

Structuring of the exercise of discretion can again be seen here. Fairness, which often generates concerns as to embodying 'palm tree justice', fits within this particular structure and represents a residual possibility rather than a starting point. The application of fairness is limited and follows only after a full analysis of express and inferred

[60] Bevan and Taylor (n 52) 456.
[61] RE Megarry, 'Rimmer v Rimmer' [1953] 69 *Law Quarterly Review* 11, 13.
[62] *Springette v Defoe* [1992] 2 FCR 561, 567 (Dillon LJ).
[63] See Chapter One.
[64] *Midland Bank v Cooke* (n 23).
[65] *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 3 All ER 703 (CA).

intention. More importantly, the clear viewpoint emerging from the Supreme Court is that the courts cannot enable a claimant to acquire an interest in the property purely on the basis of fairness.[66] Even where fairness is used by the courts as a residual method for quantification, it is arguable that the determination of what constitutes a 'fair share' is limited by reference to the phrase 'the whole course of dealing between them (the parties) in relation to the property'.[67] This division between acquisition and quantification is consistent with pre-*Pettitt* case law where the Court of Appeal was more willing to use discretion expansively in instances where it was indisputable that the party had acquired an interest. Thus the structuring of discretion limits the scope for 'palm tree justice' and therefore, the courts, through a process of refinement and clarification, have limited and restricted their exercise of discretion.

Even if it is accepted that the courts have developed a structured use of discretion when quantifying shares under a common intention constructive trust, it could still be argued that this area of law remains unpredictable and uncertain. It can be argued that owing to the 'primarily facilitative' nature of property law, that is, the role played by legal principles to facilitate the creation and transmission of proprietary interests, the courts should avoid the expansive use of discretion in the determination of ownership disputes.[68] These are persuasive arguments but analysis drawing upon the literature on discretion problematises the claim that rules provide certainty whereas discretion undermines certainty. Kaufman asserted that '[c]ertainty is a close affiliate of stagnation' and that 'law serves as a vibrant and capacious vehicle for social advancement, capable of accommodating the variegated demands posed by an ever more sophisticated society'.[69] Similarly, Dickinson states that the goal of certainty through the use of rules is an 'illusory fetish'[70] seeing as rules cannot envisage 'the happening of every occurrence in space and time'.[71] Whilst these viewpoints could be considered extreme, the view that certainty is acquired solely by rules and not through the structured use of discretion may require revisiting when applied to the specific context of family home disputes. A clear and readily identifiable discretionary approach which is

[66] cf *Jones v Kernott* (n 16) [66] where Lord Collins cast doubts on fairness influencing the acquisition stage noting that for the acquisition of a beneficial interest 'the search is not, at least in theory, for what is fair'.
[67] ibid [51]. See Gardner's views on this point following *Oxley v Hiscock* in S Gardner, 'Quantum in Gissing v Gissing Constructive Trusts' (2004) 120 *Law Quarterly Review* 541, 544.
[68] P Birks, 'Before We Begin: Five Keys to Land Law' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP, 1998) 457.
[69] I Kaufman, 'The Anatomy of Decision Making' [1984] 53 *Fordham Law Review* 1, 15.
[70] J Dickinson, 'Legal Rules: Their Function in the Process of Decision' (1931) 79(7) *University of Pennsylvania Law Review* 833, 837.
[71] ibid 836.

'confined' through context and 'structured' through rules may prove more effective than a more rigid system of rules.[72] Furthermore, as will be noted below, gauging the efficacy of the implied trust framework through reference to certainty may overlook other values that property law may wish to prioritise. Certainty is undoubtedly an important value but it needs to be weighed against other values that can underpin property law in this context including an appreciation of the domestic context of the acquisition of property by parties in an intimate relationship. As Marsh notes the subject matter of disputes may necessitate a more fact-sensitive approach with 'flexibility being purchased at the price of some uncertainty'.[73]

### (2) The Role of Judicial Discretion in the Incremental Development of Trusts Principles

The academic literature in trusts of the family home sometimes depicts judicial pronouncements as depicting an era.[74] The judicial developments prior to *Pettitt* have been viewed as characterising a period of 'palm tree justice'.[75] *Pettitt, Gissing* and *Rosset* have been viewed as signalling the legal framework returning to rules and becoming more rigid.[76] In contrast, *Oxley* and *Cooke* have been conceptualised as marking a more discretionary approach to trusts of the family home. This methodology provides simplicity but can produce a misinterpretation of how the common law develops. It has the potential to polarise rules and discretion in exactly the same way as unhelpful truisms like 'where the law ends, discretion begins'.[77] These are oversimplifications of a more complex picture involving the dynamic interplay between rules and discretion. The visibility of discretion does not mean the absence of rules or vice versa. Hawkin's assertion neatly encapsulates this idea:

> 'Discretion is heavily implicated in the use of rules: interpretative behaviour is involved in making sense of rules, and in making choices about the relevance and use of rules. At the same time, it is clear that rules enter the use of discretion: much of what is often thought to be free and flexible application of

[72] Davis (n 53) Chapters Three and Four.
[73] NS Marsh, 'Principle and Discretion in Judicial Process' (1952) 68 *Law Quarterly Review* 226, 236.
[74] Mee (n 43) 195.
[75] G Battersby (n 37) 264.
[76] See, generally, Gardner (n 14).
[77] Davis (n 53) 3.

> discretion by legal actors is in fact guided and constrained by rules to a considerable extent'.[78]

This thesis has demonstrated the clear coexistence of rules and discretion in the context of ownership disputes over the family home. In light of *Kernott*, the exercise of judicial discretion has been structured via rules and through a judicial methodology to be employed when a court is divining 'common intentions'. Thus, it is argued that periods where discretion is more prominent than rules are natural and a more nuanced understanding of this area would appreciate the interface of rules and discretion operating behind that characterisation. The balance between rules and discretion may not be equal as seen when the acquisition principles under *Rosset* are compared with the quantification principles following *Kernott*.

It is argued that the existence of periods in which discretion is more prominent than rules is also consistent with common law development. Several academics, such as Cohen,[79] Galligan[80] and Rose,[81] have noted the relationship between rules and discretion in the incremental development of the common law. Fluctuations whereby a particular period may be perceived as overly discretionary may trigger a movement by the courts towards creating more certainty and structuring their use of discretion. This thesis has demonstrated evidence of this occurring within the context of the family home. As Chapter Three revealed, cases such as *Hine* and *Appleton* saw the Court of Appeal stretch the exercise of discretion to the question of acquisition of a property right and thereby formulate very broad interpretations of the discretion permitted by section 17. Nevertheless the extent of discretion visible in these decisions was restricted through subsequent cases in favour of a clearer and more predictable framework. This process of structuring discretion can equally be seen in the modern framework where the House of Lords in *Stack* laid down an expansive discretionary framework which was subsequently clarified and refined in *Kernott.*

The shifting balance between rules and discretion is an important process for the future development of the common law seeing as 'normal law proceeds in an inductive,

[78] Hawkins (n 54) 13.
[79] MR Cohen, *Law and Social Order* (1933) 261.
[80] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986).
[81] C Rose, 'Crystals and Mud in Property Law' [1987-1988] 40 *Stanford Law Review* 577.

incremental way'.[82] Although Schneider notes that 'it is not possible to say a priori what mixture of rules and discretion will best serve in any particular situation', it is argued that this process of finding the optimum balance offers the chance for judicial creativity and innovation. This has benefits for the unique and complex context of the family home as the use of discretion can modernise an area and 'help keep the law in touch with the people it seeks to regulate and assist, with the social circumstances in which they live'.[83]

### (3) The 'Inevitability' of Judicial Discretion in the Specific Context of Ownership Disputes over the Family Home

This thesis has shown that the courts have at times in the development of the trusts framework acknowledged the distinctive nature of ownership disputes over the home. Early acceptance of the different nature of these disputes was noted in Chapter Two when the Court of Appeal in *Rimmer* stated that general legal principles required modification when applied to transactions between spouses.[84] This thesis has shown that, through close sensitivity to the facts, the courts have endeavoured to reflect that dimension through the exercise of discretion. A frequent observation made by the court is that 'in all cases of this kind the result must always depend on the particular facts in the particular case'.[85] In contrast to this, there have been cases that deny the distinctive nature of these disputes and this approach can be seen in *Pettitt* where the House of Lords stated that general principles of property law applied. There was no specific regime applicable to parties in an interpersonal relationship. The observation that the domestic context is different and that the disputes are different, but nevertheless must be determined by general principles of property law, renders these ownership disputes highly complex for a court to determine. In the modern framework Gardner depicts this difficulty as evincing a 'clash of cultures'[86] between the 'individualistic' nature of the doctrines and the mutualist ethos of home-sharing.[87]

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[82] MDA Freeman, 'Towards a Rational Reconstruction of Family Property Law' (1972) *Current Legal Problems* 84, 105.
[83] CE Schneider, 'Discretion and Rules: A Lawyer's View' in K Hawkins, *The Uses of Discretion* (OUP 1991) 47, 64.
[84] *Rimmer v Rimmer* (n 21) 869 (Romer LJ).
[85] ibid 864 (Evershed MR).
[86] S Gardner, 'Fin de Siècle chez *Gissing v Gissing* - *Midland Bank Plc v Cooke* [1995] 4 All ER 562' (1996) 112 *Law Quarterly Review* 378, 383.
[87] S Gardner (n 25) 297 and subsequently echoed in S Gardner, 'Family Property Today' (2008) 124 *Law Quarterly Review* 422 and S Gardner and K Davidson, 'The Supreme Court on Family Homes' (2012) 128 *Law Quarterly Review* 178.

The attempts by the House of Lords in *Pettitt* and *Gissing* to create a framework cognisant of that fact have been criticised; indeed following *Pettitt* there was 'widespread disapproval' of the decision.[88] Chapter Four identified many of the criticisms of *Gissing* and these criticisms reveal the clear scope for discretionary resolution by the courts. Academic commentary has often noted that the exercise of discretion can be viewed as 'inevitable' and that the drive towards discretionary resolution is consistent with the ever-changing nature of cases coming before the courts.[89] This thesis has argued that, when combined with this natural tendency to use discretion in decision-making, the implied trust framework is a specific context where the exercise of discretion may be of particular value to resolve the complex factual and legal nature of these disputes.

The exercise of discretion has been viewed as particularly appropriate where rules are ambiguous.[90] It is fully accepted that rules can be clear and therefore leave limited scope for the exercise of judicial discretion and this means that most often discretion will be used solely in the process of fact-finding. As Kaufman notes 'the majority of holdings are not obfuscated by tempting dicta, confused facts or an offhand attitude toward past authority'.[91] Yet Chapter Four has shown that the framework laid down in *Gissing* provides a clear lack of guidance for the courts which modern case law is still seeking to comprehend.[92] Coupled with that ambiguity is the fact that the courts must apply common intention analysis to instances where agreements as to ownership are conspicuous by their absence.

It is trite to say that 'common intention' is widely known to be deficient as the doctrinal foundation for the common intention constructive trust. As early as 1959, Milner stated that reliance on the intentions of the parties was 'notoriously unproductive'[93] and this viewpoint on the reliance on agreements between parties has gradually fortified to staunch criticism.[94] Common intention is often a myth and problematic in its application to the facts both in terms of what the term precisely means but more importantly how it applies to parties in an interpersonal relationship. The artificiality of this approach has

[88] Zuckerman (n 51) 41.
[89] J Handler 'Discretion: Power, Quiescence, and Trust' in K Hawkins, *The Uses of Discretion* (OUP 1991) 33.
[90] J Bell, 'Discretionary Decision Making' in K Hawkins, *The Use of Discretion* (OUP 1991) 88, 97.
[91] Kaufman (n 69) 11-12.
[92] See *Jones v Kernott* (n 16) [28] (Lady Hale and Lord Walker).
[93] Milner (n 20) 208.
[94] Glover and Todd (n 25).

been comprehensively criticised in the academic literature, but nevertheless the courts have been required to apply this analysis and perpetuate the myth that it exists. As Mee observed:

> '…the courts find themselves in a bind. The essential problem is that an approach which conscientiously focuses on genuine intentions would provide a remedy in a very limited set of circumstances, while an approach which moves beyond real intentions seems to involve impermissible judicial law-making'.[95]

This observation gains further force when the various judicial statements are made that the court must provide a result.[96] This thesis argues that in this specific context the exercise of judicial discretion is not only irresistible but appropriate, and that judges should not be overly censured for the need to produce a result.

Furthermore, this thesis argues that this pragmatism may even provide a less artificial and more candid account as to the process of judicial reasoning in these cases. Indeed, where the use of discretion is principled, structured and its application clearly articulated, it can be viewed as beneficial. For example, it is arguable that the residual role of fairness may provide a degree of predictability and also assist in judicial reasoning. By accepting the inability to infer an intention as to shares and instead use fairness, the courts may to some extent provide greater clarity of judicial reasoning. Practitioners will know whether a case proceeded on the basis of fairness as opposed having to advise a client using an authority that was clearly motivated by providing fair shares to the parties yet was framed in the language of inference. The residual possibility of using fairness may, to a limited extent, improve judicial reasoning and illustrate a degree of judicial candour which is necessary for an area known for its 'doctrinal fudging'.[97] This may go some way to addressing Milner's criticism that courts 'only verbalis[e] the minimum number of facts on which to base their decisions' which may 'obscure the actual issues involved and present the outward appearance at least of deciding the cases without reference to the innumerable unstated factors involved'.[98] It is clearly far better for a court to acknowledge the absence of a common intention as to

[95] J Mee, 'Jones v Kernott: Inferring and Imputing in Essex' [2012] *Conveyancer and Property Lawyer* 167, 179.
[96] See *Pettitt v Pettitt* (n 10) 799, 804 (Lord Morris) and *Gissing v Gissing* (n 11) 898 (Lord Morris).
[97] J Miles, 'Property law v family law: resolving the problems of family property' (2003) 23 *Legal Studies* 624, 624.
[98] A Milner, 'Wedding presents' (1960) 23(4) *Modern Law Review* 440, 440.

shares than to manipulate the use of inferences.[99] As Chapter One indicated where an area draws upon discretion, it is important for the courts to 'place on record the circumstances and factors that were crucial to his determination'.[100] Yet where inferring a common intention results in the creation of a 'pure fiction', the open acceptance of fairness underpinning a decision clearly has advantages.[101] This acceptance of reality which, in turn, results in exposing the limitations of common intention analysis is a recurring theme in trusts of the family home scholarship and adds support to a judicial approach that explicitly states the steps undertaken in judicial reasoning.[102]

### (4) The Development of Property Law and the Exercise of Judicial Discretion

Chapter One demonstrated that the presence of discretion can affect how an area of law is conceptualised by the academic community.[103] The visibility of discretion can result in an area being viewed in a negative manner and, as Schneider notes, 'where an area of law…seems poor in rules and rich in discretion, they [the academic community] begin to wonder whether it is really law'.[104] A similar argument can be seen in light of *Stack* and *Kernott* as the exercise of discretion when quantifying shares has caused academics to query whether this framework 'fits' within property law and is underpinned by the values that property law prioritises. Thus, an argument made in modern legal scholarship is that these cases depart from property law so much that a return to orthodoxy is required. Arguments have been made to prioritise the use of proprietary estoppel[105] or to reject the common intention constructive trust and solely employ the presumption of resulting trust.[106] In addition, Dixon has argued that the discretion used has turned this area into a parallel divorce jurisdiction whereby 'the identification of shares in family property is not, repeat not, a matter of property law at all'.[107] This thesis disputes these

[99] This viewpoint is clearly apparent from the speeches of Lord Kerr and Lord Wilson in *Jones v Kernott* (n 16).
[100] M Rosenberg, 'Judicial Discretion of the Trial Court, Viewed from Above' (1970-1971) 22 *Syracuse Law Review* 635, 665.
[101] O Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33(6) *Modern Law Review* 630.
[102] On this point see Gardner (n 25) and J Roche, 'Kernott, Stack and Oxley Made Simple: A Practitioner's View' [2011] 75(2) *Conveyancer and Property Lawyer* 123, 137 calling for the courts to 'explain, clearly and in detail, how they have reached their actual results'.
[103] See J Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *Modern Law Review* 467.
[104] Schneider (n 83) 48.
[105] MP Thompson, 'Establishing an Interest in the Home' [1990] *Conveyancer and Property Lawyer* 314.
[106] JW Harris, 'Doctrine, Justice, and Home Sharing' (1999) 19 *Oxford Journal of Legal Studies* 421 and Glover and Todd (n 25).
[107] M Dixon, 'Land Law' [2012] 65 *Student Law Review* 48, 49.

viewpoints and argues that the use of discretion within this context may prove beneficial for the future development of property law.[108]

Naturally there is some evidence for a comparison with family law and inherent terrain of these disputes may suggest that this area appears to have departed from property law.[109] For example, Harding noted that the use of inference under the common intention constructive trust can make the court's methodology look like a redistributive discretion.[110] However, this thesis argues that the 'family law' versus 'property law' dichotomy is unhelpful[111] and is premised on a fallacy that property law is 'narrow and rigid' whilst family law is 'flexible and just'.[112] A far better view for this area is that the courts are applying property law principles albeit with specific recognition of the particular context of the family home. This is categorically not 'family law' as the courts are not using the common intention constructive trust as an equivalent regime to the Matrimonial Causes Act 1973 for cohabitants. Irrespective of comparisons made in the case law, the common intention constructive trust is not responding to 'needs', 'compensation' or 'sharing' and the paragraph 69 factors created in Stack to divine the parties intentions do not align with those in section 25 of the Matrimonial Causes Act 1973. Where the parties' common intention is clear, whether expressly or through inference, there is no possibility of the court imputing fair shares on the basis that it would provide a more appropriate result.[113]

Similarly, the fact that Lady Hale, a prominent family lawyer, handed down the majority judgment in *Stack* and the lead judgment in *Kernott* is hardly conclusive evidence that this area is shifting towards family law. In *Stack,* Baroness Hale's views were supported by three other members of the House of Lords. In *Kernott*, not only did the Supreme Court agree, both Lords Kerr and Wilson advocated an approach that encouraged a greater use of fairness in ownership disputes than that which Lady Hale envisaged. Even

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[108] A Hayward, 'Finding a Home for 'Family Property'' in N Gravells, *Landmark Cases in Land Law* (Hart 2013).
[109] M Dixon, 'Editor's Notebook: The Still Not Ended, Never-Ending Story' [2012] *Conveyancer and Property Lawyer* 83, 86.
[110] See, generally, M Harding, 'The Limits of Equity in Disputes over the Family Home' in J Glister and P Ridge, *Fault Lines in Equity* (Hart 2012) and N Hopkins, *Informal Acquisition of Rights in Land* (Sweet and Maxwell 2000) 124.
[111] See R Probert, 'Family Law and Property Law: Competing Spheres in the Regulation of the Family Home' in A Hudson, *New Perspectives on Property Law, Human Rights and the Home* (Routledge Cavendish 2003) 37 and Murphy and Clarke (n 18) v. See M Dixon, 'Editors Notebook' [2011] *Conveyancer and Property Lawyer* 87,87 who noted that it was 'impossible to have a public debate about the property rights of unmarried couples without raising a storm'.
[112] Mee (n 49) 418.
[113] *Jones v Kernott* [2009] EWHC 1713, [2010] 1 All ER 947, 959 (Nicholas Strauss QC).

if the basis for this view that the implied trust framework resembles family law is attributable to the perception of an absence of rules in family law, this again requires further reflection seeing as there has been a clear shift in modern family law towards the structuring of the exercise of discretion.[114]

This thesis has demonstrated that modern developments when a court is quantifying a beneficial interest reveal the capacity of the common intention constructive trust to evolve to accommodate the domestic context through the use of discretion, thereby diminishing the harm that would arise if property principles applied. It is better to view this area as a context-specific, sub-set of property law whereby the courts are developing principles to accommodate the domestic context of acquisition of the family home.[115] Although both *Pettitt* and *Gissing* demonstrated that the court was to apply general principles of property law, subsequent interpretation of the common intention constructive trust has shown that it has no application outside the family home context. *Stack* and *Kernott* recognise this fact and further encourage this process by giving that trust sole prominence and rejecting in nearly all cases the use of the presumption of resulting trust in this context. However, both judgments fully indicate that this is property law in a process of development. It is therefore better to understand this tendency as the familialisation of property law; that is, the modification of general principles of property law to accommodate the specific needs of family members.[116] By using this label, it avoids the view of property law being supplanted by family law and suggests a cautious advancement of using the common intention constructive trust to better accommodate the domestic context.

Property law can accommodate the interpersonal dimension of these disputes and viewing this area as a development of property law is not new. Gray and Symes were undeniably correct when they noted that land law 'exerts a fundamental influence upon the lifestyles of ordinary people'.[117] As a result property law has 'become an instrument of social engineering'[118] which 'embodies a broad range of value judgments'.[119] Modern

[114] J Dewar, 'Reducing Discretion in Family Law' (1997) 11 *Australian Journal of Family Law* 309 and J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart 2013) 114.
[115] Dewar (n 5).
[116] ibid 331.
[117] KJ Gray and PD Symes, *Real Property and Real People: Principles of Land Law* (Butterworths, 1981) 4. This more dynamic vision of land law, that recognizes other foundational values than mere 'efficiency', is presented by H Dagan, *Property: Values and Institutions* (OUP, 2011).
[118] Gray and Symes (n 117) 4.
[119] ibid 5.

academic thinking on property law often views this area as a balance of values in pursuit of the goal that 'private property performs a social function'.[120] By recognising that the courts are using property law to develop a structured discretion when quantifying shares, this thesis argues that the courts are seeking to recognise what Bottomley has termed 'context and logic of sexual-domestic relationships'.[121]

### (5) The Legitimacy of the Courts developing Property Law in this Context

This thesis identified a key debate in trusts of the family home concerning whether the judiciary should be pushing forward legal development in this area through the modification of property law. There have frequent calls for reform in this area, in particular following *Burns v Burns*,[122] where Lowe and Smith stated:

> 'Whatever the merits of saying that it is up to Parliament to change the law there is little to be said for a doctrine of law that is itself artificial (in the sense that the parties will rarely have truly agreed to share property even where there are direct contributions to the purchase price) which causes injustice in cases such as this'.[123]

Judges have also called for reform.[124] The exercise of judicial discretion plays a role in this discourse and it is arguable that the discretionary methodology employed in *Stack* represented 'judicial activism' and academics have queried whether the courts should be modifying property law to enable it to accommodate the domestic nature of the parties' relationship.[125] Indeed, Harding has suggested that the government's unwillingness to introduce cohabitation reform means that the courts should be even more reluctant to be activist in this area.[126]

However, it is indisputable that the exercise of judicial discretion whether through the interpretation of rules or the creation of a framework permitting a broader use of discretion naturally involves an element of law-making. Academic commentary in the area of judicial discretion and also in the context of trusts of the family home shows an

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[120] C Rotherham, *Proprietary Remedies in Context* (Hart 2002) 244.
[121] A Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 216.
[122] *Burns v Burns* [1984] 1 All ER 244 (CA).
[123] N Lowe and A Smith, 'The Cohabitant's Fate' (1984) 47 *Modern Law Review* 341, 345.
[124] See *Curran v Collins (Permission to Appeal)* [2013] EWCA Civ 382 (Toulson LJ).
[125] Gray and Gray (n 30) 903.
[126] Harding (n 126) 213.

acceptance of this fact. Cappelletti has argued that when interpreting precedent 'the judge is inevitably both an interpreter *and* a law-maker'.[127] Mee, who is generally critical of judicial intervention in this area fully accepts that principled development of property law is permissible.[128] Furthermore, Hopkins has noted that the 'courts do and should make policy decisions as part of a law-making role'.[129] If these views are accepted, and recognising that the exercise of discretion can result in creativity and innovation without necessarily amounting to the extreme state of 'palm tree justice', the incremental development of property law in this manner can be viewed as legitimate.

This thesis argues that, in the absence of cohabitation reform that would enable litigants to avoid recourse to the implied trust framework, *tentative* judicial reform is necessary in this area owing to the clear deficiencies of the implied trusts. Even if cohabitation reform is introduced, further development of trust principles would still be necessary seeing as the litigants in a dispute may fall outside the reach of those provisions. By exercising discretion in a cautious manner the courts can incrementally modify property law principles and this process has been accepted by Baroness Hale in *Stack* when she noted that 'the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament'.[130] It is clear that some would view this as an illegitimate usurpation of Parliament. Yet the case for tentative and principled modification of property law can be made, particularly where it is based on an understanding of how judicial discretion is exercised in the development of the law and it is accepted that the common intention constructive trust was created by judges in the House of Lords in *Gissing*.

## JUDICIAL DISCRETION IN OWNERSHIP DISPUTES OVER THE FAMILY HOME

The claim advanced in this thesis is that when viewing the development of the implied trusts in this area as a continuum, the court have consistently used judicial discretion to resolve ownership disputes over the family home. Whilst there is an extensive body of scholarship on judicial discretion generally, it argues that there has been a relative lack

[127] M Cappelletti, 'The Law-Making Power of the Judge and its Limits: A Comparative Analysis' [1981-1982] 8 *Monash University Law Review* 15, 64.
[128] Mee (n 43).
[129] N Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31(2) *Legal Studies* 175, 177 although note Hopkins' central thesis that, in light of the policy implications of *Stack v Dowden*, the House of Lords should have exercised more caution when giving context 'legal effect'.
[130] *Stack v Dowden* (n 13) [69].

of academic analysis of how judicial discretion operates within the specific context of the implied trusts. Through an analysis of case law, it argues that the judiciary and academic community have, at times, misinterpreted the nature of judicial discretion in this context. There has been a tendency to view discretion as always expansive and this represents what Dickinson terms the 'false issues and misleading lines of approach' that can sometime occur when analysing judicial discretion.[131] The new understanding offered by this thesis is that, through drawing upon the academic literature on the use of discretion, the courts have exercised judicial discretion in a structured manner to accommodate the nature of acquisition of property by parties in an intimate relationship without irreparably undermining the concerns of modern property law. When viewed in this manner, these developments can be seen as beneficial.

It is clear that the courts will further develop this framework through the exercise of discretion and subsequently refine these rules. In terms of quantification of a beneficial interest, this process has already occurred in *Jones v Kernott*.[132] When viewing the acquisition of an interest, it is argued that a greater appreciation of how judicial discretion is exercised, even in a framework characterised by rules, may prove beneficial. It is clear that judges accept the fact that they do possess discretion yet the discourse concerning the acquisition rules typecasts the use of discretion in a negative light. This thesis has shown that discretion need not always be expansive and, furthermore, it is an inherent element of the interpretation of rules, particularly those that are indeterminate or ambiguous. The open-texture of the requirement of common intention provides further scope for the use of judicial discretion. Acknowledging this role played by judicial discretion, and its value within this context, may provide another pathway from which to reconsider the acquisition principles laid down in *Rosset*. In particular, the courts may consider the recognition of a substantial indirect financial contribution for the purposes of acquisition seeing as a degree of support for this approach can be found in case law decided before 1969 alongside *Pettitt* and *Gissing*.

The relationship between rules and discretion needs to become a core and explicit theme in future discourse in this area and, to assist in that process of understanding the exercise of discretion in this context, it is of imperative importance that the courts clearly articulate the stages involved in their use of discretion. Discretion can be viewed as beneficial in accommodating the interpersonal dimension of the acquisition of property by parties in a domestic relationship but its exercise by a court is not immune from the

[131] Dickinson (n 70) 868.
[132] See *Thompson v Hurst* [2011] EWCA Civ 537.

criticisms of improper considerations influencing its use. It is therefore important to interrogate the 'confined' and 'structured' nature of judicial discretion in this context and shift the discourse away from pejorative views of discretion.[133] Galligan's observation in the context of administrative discretion resonates with this perspective: '[t]he important task is to identify those constraints, to classify them and understand their legal status'.[134] The same methodology needs to be applied to an analysis of rules as it is important to focus on how discretion is involved in the interpretation of that rule and the translation of that rule into action.[135] It is hoped that this thesis can provide a useful foundation for analysing the future direction of the law and may help stimulate a more nuanced debate surrounding the exercise of judicial discretion in ownership disputes over the family home.

[133] Davis (n 53).
[134] Galligan (n 80) 39.
[135] Hawkins (n 54) 11.

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