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ARTICLES

CONSTRUCTIVE TRUSTS: A NEW MODEL FOR EQUITY AND UNJUST ENRICHMENT

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INTRODUCTION

A COMPREHENSIVE review, or what has been variously described as the classification or mapping or taxonomy, of constructive trusts would require analysis of areas of law as diverse as vendor and purchaser transactions, the perfection of imperfect gifts, fully secret and half secret trusts, breach of fiduciary duty, and accessory liability for breach of trust, among several others.[1] The search for an acceptable, universally acknowledged, principle for the establishment of a constructive trust, which gives coherence to past decisions and provides a clear guide for the future, will certainly prove elusive in relation to the many different areas of law and fact in which constructive trusts arise.

The exercise I wish to undertake is to draw from a particular area of the law some general, and perhaps radical, conclusions about the role of the constructive trust at the interface between equitable trust principles, on the one hand, and restitutionary relief for unjust enrichment, on the other hand. The area of law I have chosen may broadly be described as the acquisition of land by joint enterprise, both in the domestic setting and in the commercial field. At the heart of the analysis is the line of authority about co-habitants' property rights in which *Stack* v. *Dowden*[2] is the most recent judicial milestone. *Stack* was a case between an unmarried couple about the shares in which they owned their home. Ms. Dowden claimed that she was

* Chairman, The Law Commission. This paper is an enlarged version of the annual lecture of the Association of Contentious Trusts and Probate Specialists delivered on 13 November 2007. I am particularly grateful to Nick Piska, and also thank Paul Davies, for stimulating discussion and assistance; and am indebted to Professor Graham Virgo for his very helpful comments (even in disagreement) on aspects of the article.

[1] In some cases the proper analysis may be a liability to account as a constructive trustee rather than the holding of property under a constructive trust: *Paragon Finance plc* v. *DB Thakerar & Co* [1999] 1 All E.R. 400, 409.

[2] [2007] UKHL 17, [2007] 2 A.C. 432.

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entitled to a greater share of the equity than Mr. Stack under a common intention constructive trust, notwithstanding that both had contributed to the purchase price and were registered as joint legal proprietors.

In a case note on *Stack* William Swadling complained that:

> Until a fundamental analysis … is undertaken, we will never properly understand the common intention constructive trust, nor its relationship with the remedial constructive trust, nor the resulting trust, or even proprietary estoppel… Moreover, we still need to know to what category of event this trust responds. Is it unjust enrichment, wrongdoing, or something in the miscellany? But most of all, we need to know whether it should exist at all.[3]

In this paper, I propose to throw my own hat into the ring in attempting to answer those difficult questions. It is important to try to do so because, until we understand how cases like *Stack* are to be categorised in legal taxonomy, we cannot understand how the principles underlying them are to be applied to different facts and we cannot move the law forward in a coherent way, for example by developing or restricting on a principled basis proprietary restitutionary relief.

My conclusion will be that, although not presented as such in the speeches, *Stack* is, on analysis, a radical departure from previous authority in its use of the constructive trust as proprietary restitutionary relief for unjust enrichment rather than the declaration of a pre-existing trust on traditional lines. It is an example of the grant of discretionary relief by way of a remedial constructive trust, and it marks the creation, for policy reasons, of a new ground of restitution for autonomous or subtractive unjust enrichment. I will also conclude that this analysis helps us to understand the clear difference between the roles and spheres of the common intention constructive trust to be found in the cohabitation cases, on the one hand, and proprietary estoppel, on the other hand. Further, it provides a basis for identifying the policy ground for not extending the *Stack* approach to other areas of joint acquisition of property, especially in the commercial field.

The Institutional and the Remedial Constructive Trust: Equity, Restitution and Unjust Enrichment

The analysis must begin with the distinction between the institutional and the remedial constructive trust. Lord Browne-Wilkinson described the distinction in *Westdeutsche Landesbank Girozentrale* v. *Islington LBC*[4] as follows:

[3] W. Swadling, "The Common Intention Constructive Trust in the House of Lords: an Opportunity Missed" (2007) 123 L.Q.R. 511, 518.
[4] [1996] A.C. 669.

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> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust … is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.[5]

The term "constructive trust", in the institutional sense, describes a relationship that is similar to an express trust in terms of obligations and enforcement.[6] The court's function is merely declaratory of existing private rights and is not discretionary.[7] So, a constructive trust in English jurisprudence has come to be characterised as a property institution, capable of binding third parties, and not an equitable obligation or remedy imposed by the court whether by discretion or otherwise.[8] By contrast, the critical features of a "remedial" constructive trust of the kind described by Lord Browne-Wilkinson in *Westdesutsche* are judicial discretion and retrospectivity. It seems fair to assume that Lord Browne-Wilkinson's description was based on the US and the Canadian model. Under that model, in a case of unjust enrichment, and irrespective of any fiduciary relationship with the claimant, the Court has a discretion to grant relief by way of constructive trust if it concludes that other proprietary and personal remedies are inadequate; and if the Court does so, the constructive trust will be deemed to have arisen at the time when the duty to make restitution first arose rather than when the duty is enforced.[9]

The Court of Appeal in *Metall und Rohstoff AG* v. *Donaldson Lufkin & Jenrette Inc*[10] was satisfied there is a good arguable case that circumstances may arise in which the court would be prepared to impose a remedial constructive trust;[11] and Lord Browne-Wilkinson in *Westdeutsche* considered that the remedial constructive trust might be a suitable basis for developing proprietary restitutionary remedies,[12] for example against a defendant who knowingly retains property of

[5] *Ibid.*, at 714G–715A.
[6] D. Waters "The Nature of the Remedial Constructive Trust" in P.B.H. Birks (ed.), *The Frontiers of Liability; Volume 2* (Oxford 1994), 167.
[7] P.B.H. Birks, "Proprietary Rights as Remedies" and S. Gardner "The Element of Discretion" in Birks (ed.) *The Frontiers of Liability; Volume 2*.
[8] C. Rotherham "The Redistributive Constructive Trust: 'Confounding Ownership with Obligation'" (1992) 5 Canterbury Law Review 84.
[9] P. O'Connor, "Happy Partners or Strange Bedfellows: the Blending of Remedial and Institutional Features in the Evolving Constructive Trust" (1995) 20 Melbourne University Law Review 735.
[10] [1990] 1 Q.B. 391.
[11] *Ibid.*, at p 479H (Slade, Stocker and Bingham L.JJ.).
[12] [1996] A.C. 669, at 716G.

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which the plaintiff has been unjustly deprived. The possibility of such a proprietary remedy was also left open by the Privy Council in *Re Goldcorp Exchange* Ltd.[13] The concept of a remedial constructive trust has, however, generally received a hostile reception in England.

The touchstone for the remedial constructive trust in other countries is usually unconscionable conduct; and for Lord Browne-Wilkinson in *Westdeutsche* that is the underlying test for the recognition of an institutional constructive trust.[14] That approach is also supported by the unconscionability test for "knowing receipt" claims favoured by Nourse L.J. in *Bank of Credit and Commerce International (Overseas) Ltd* v. *Akindele*.[15] Many commentators here, however, regard unconscionability as too vague a concept, dependent on the subjective views of judges, to be used as a principle in its own right.[16] So far as concerns a remedial constructive trust, the combination of that feature of subjectivity, retrospective effect and the Court's discretion are seen as undermining an overriding need for certainty in commercial transactions, and interfering with the rights of third parties, particularly creditors, in a manner inconsistent with settled principles of English property law. The possibility of a remedial constructive trust in English jurisprudence was robustly rejected by Nourse L.J. in *Re Polly Peck International plc (No. 2)*.[17]

Lord Millett was a notably vigorous opponent of the remedial constructive trust. He considered that there are only two situations in which proprietary restitutionary remedies are available. The first is where the claimant can establish a continuing beneficial interest in the asset to which he lays claim. He identified such an interest as usually arising under a resulting trust. The second is where the original transfer is rescinded (for example, for fraud or misrepresentation) and specific restitution of the asset is ordered because monetary compensation would not be an adequate remedy.[18]

Proprietary restitution is a notoriously difficult area. I must necessarily deal with it on a rather summary basis. One of the major difficulties for an equity lawyer is that, whereas the principles of equity are now for the most part settled and clear, the law of unjust enrichment has been developed explicitly as a subject of English law only relatively recently and is far from settled. Those who study and propound it are divided on fundamental issues, such as what is "unjust

[13] [1995] 1 A.C. 74, at 104.
[14] [1996] A.C. at 705–707.
[15] [2001] Ch. 437.
[16] See, for example, G. Virgo, *The Principles of the Law of Restitution* (2nd ed., Oxford 2006), at p.55.
[17] [1998] 3 All E.R. 812, 830–832.
[18] P.Millett, "Proprietary Restitution" in S. Degeling and J. Edelman (eds.), *Equity in Commercial Law* (Sydney 2005), at p.326; Sir Peter Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399.

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enrichment", and, in particular, whether it includes restitution for wrongdoing, and, if not, what it is that makes the enrichment "unjust", and what is the place, if any, for proprietary relief or equitable relief where there has been unjust enrichment. For an equity lawyer seeking to engage with the modern proponents of the law of restitution there is no single "partner for peace", but rather a myriad of factions warring among themselves.

The late Professor Peter Birks made a crucial contribution to the taxonomy of English private law, and the law of restitution in particular. He drew a distinction between wrongs, such as a tort or a breach of duty, for which there already exists a cause of action, and what he called a "not-wrong", such as payment under a mistake, where the cause of action is unjust enrichment.[19] This last category has been called "subtractive unjust enrichment". It has also been called "autonomous" unjust enrichment. Although not accepted universally, this approach has broad support. For the rest of this paper, I shall use the expression "unjust enrichment" as a term of art confined to that category of "not-wrongs". For completeness, I should add that Professor Birks identified two other categories of events giving rise to rights: consent (such as an enforceable contract) and miscellaneous others, but neither of those last two categories will be relevant in my analysis. In relation to the cause of action in restitution for unjust enrichment, Professor Birks asserted the need for a systematic enquiry whether (1) there is an enrichment, (2) it is at the expense of the plaintiff, (3) it is unjust, and (4) there is a relevant defence. This was the approach followed by Lord Steyn in *Banque Financiere De La Cite* v. *Parc (Battersea) Ltd.*[20] A diversity of "unjust factors" are recognised under this approach, but they must be identified in each case, and can be added to on policy grounds.

Professor Birks' later approach was that all enrichments are unjust unless there is some juristic reason for the retention of the enrichment, such as that the enrichment was conferred under a valid contract or gift.[21] This later approach remains highly controversial. It was mentioned, but was left undecided, by the House of Lords in *Deutsche Morgan Grenfell Group plc* v. *IRC*[22], in which Lord Walker gave it some very tentative support.[23]

Aside from unjust enrichment, some have recognised, as a separate limb of restitution, the vindication of property rights. This taxonomy is more controversial among academics. It is illustrated by the decision

[19] See, generally, Birks, *Unjust Enrichment* (2nd ed., Oxford 2005).
[20] [1999] A.C. 221.
[21] Birks, *Unjust Enrichment*, esp. chapters 5–6.
[22] [2007] 1 A.C. 558.
[23] *Ibid.*, at para. [58].

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of the House of Lords in *Foskett* v. *Mckeown*.[24] The question in that case was whether the improper application by a trustee of the claimants' trust money in the payment of premiums under a life policy on the life of the trustee gave the claimants an interest in the policy proceeds themselves. The House of Lords (where Lord Millett delivered the leading speech) decided in favour of the claimants, holding that the case was not one of unjust enrichment, but one in which the claimants were able to show, as a result of tracing, that they had a proprietary interest in the policy moneys which was not dependent on any discretion vested in the court.

Finally, there is an unresolved issue as to whether it is ever appropriate, and if so when, to use equitable or proprietary remedies, including a constructive trust, by way of relief for unjust enrichment, especially when the cause of action is a common law one. Some restitution scholars consider that only personal restitutionary remedies are available for the reversal of unjust enrichment.[25] There is, however, a significant body of opinion and some authority against such a restrictive approach, to which I shall refer later.[26]

We are now in a position to appreciate and to summarise the jurispudential context in which Lord Millett and equity traditionalists have rejected the possibility of a discretionary remedial constructive trust as proprietary restitutionary relief, and also the context in which the line of authority from *Pettitt* v. *Pettitt*[27] to *Stack* has been decided. For them, proprietary restitutionary relief is available where the claimant pursues and establishes a property right which was in existence before judgment. A resulting trust is the quintessential example of such a right, and another is where lawful rescission restores title to the claimant. In addition, equitable relief may be available where there is a cause of action in equity for wrongdoing, such as a breach of fiduciary duty or obligation. Where there is neither a pre-judgment property right nor a cause of action in equity for wrongdoing, there is, for the traditionalist, no scope for equitable or proprietary relief in circumstances in which the common law might support a cause of action for unjust enrichment.

This provides the legal analytical framework for the traditionalist to reject the discretionary remedial constructive trust on the added policy grounds that it would introduce uncertainty into commerce, would be capable of interfering with established property rights, and would be inconsistent with settled principles of property law as to priorities between competing property interests.

[24] [2000] UKHL 29, [2001] 1 A.C. 102.
[25] See, for example, Virgo, *The Principles of the Law of Restitution*, p 9.
[26] See below note 84; and R. Chambers, *Resulting Trusts* (Oxford 1997), p.171.
[27] [1970] A.C. 777.

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Joint Acquisition in the Domestic Setting

That analysis will leave you wondering, as it left William Swadling wondering in his case note on *Stack*, what is the place of the common intention constructive trust in legal taxonomy. For the equity traditionalist there can be only one answer: it is an institutional trust giving rise to property rights which pre-date the judgment and in relation to which the judgment of the Court is merely declaratory. It cannot be relief for actionable wrongdoing in equity since the defendant cohabitant has done nothing wrong, save merely to rely upon his or her legal title. At best that type of wrongdoing, even if correctly described as such, might, if the facts are appropriate, give rise to a proprietary estoppel. For the traditionalist, it cannot be relief for unjust enrichment, since in this context that is a common law cause of action capable of giving rise only to a personal remedy.

There is a further policy issue which it is important to bear in mind when considering the domestic joint acquisition cases. Most equity and property lawyers would say that, prior to the Land Registration Act 2002, an institutional trust was the only way in which the claimant spouse's or partner's beneficial property interest in the shared home could bind those, such as mortgagees, who acquired from the defendant interests in the property after its acquisition. Proprietary estoppel would only give rise to a mere equity prior to judgment, and so, notwithstanding the claimant spouse's or partner's actual occupation of the shared home, would not be binding on persons subsequently acquiring a legal or beneficial interest in the home. Those reasons, I suggest, explain why the so called common intention constructive trust was historically the court's preferred legal mechanism for giving effect to the property claims of a spouse or partner who had neither legal title nor entitlement under an express trust.

The starting point is, of course, *Pettitt*, a case decided before the Court had its wide discretionary powers to grant ancillary relief under the Matrimonial Causes Act 1973. In that case, the house was purchased out of the proceeds of sale of a previous house belonging to the wife, and had been conveyed into her name alone. The husband's claim was based on his having done work on the house by way of redecoration and improvement which he said had enhanced its value. In rejecting the husband's claim, the majority of the Judicial Committee, Lords Morris, Upjohn and Hodson, based their analysis on the need to ascertain what the parties intended at the time of the transaction. This laid the ground for a conventional institutional trust approach, in which the trust arose if, but only if, it was the common intention of the parties that the plaintiff would secure a beneficial interest or increased interest, and the plaintiff acted pursuant to that

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common intention to his or her detriment. Lord Morris, in particular, was clear that "there must be evidence which establishes an agreement before it can be held that one spouse has acquired a beneficial interest in the property which previously belonged to the other or has a monetary claim against the other".[28] The majority did not accept the approach of Lords Reid and Diplock that, in the absence of evidence of actual intention, the court could grant the plaintiff such right as the spouses would have agreed if they had thought about it,[29] that is to say "impute to [the parties] a constructive common intention which … would have been formed by reasonable spouses".[30]

In *Gissing* v. *Gissing*,[31]decided only a year after *Pettitt*, the House of Lords held that a wife who had paid for furnishings and the laying of a lawn had no beneficial interest in the matrimonial home, which had been bought in the sole name of the husband. All the members of the Committee, other than Lord Reid, clearly acknowledged that they were compelled to accept and adopt the institutional trust approach of the majority in *Pettitt*. Lord Reid, on the other hand, reiterated his stance in *Pettitt*, namely that he would have preferred an analysis which permitted "an imputation [by the court] of a deemed intention" where the evidence shows that there was no agreement in fact.[32] The distinction he made and emphasised was between inference and imputation. It is a crucial one and central to my analysis of *Stack*. He said as follows:

> [T]here is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the court has power to impute such an intention in proper cases then I am content … But if it were to be held to be the law that it must at least be possible to infer a contemporary agreement in the sense of holding that it is more probable than not there was in fact some such agreement then I could not contemplate the future results of such a decision with equanimity.[33]

That distinction between imputation and inference is, I suggest, one which we can all understand. It marks the dividing line between the constructive trust as a discretionary remedy arising out of the

[28] *Ibid.*, at 804E.
[29] *Ibid.*, at 795 F–G (Lord Reid).
[30] *Ibid.*, at 823F (Lord Diplock).
[31] [1971] A.C. 886.
[32] *Ibid.*, at 897.
[33] *Ibid.*

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judgment of the Court (*i.e.* an imputation approach), on the one hand, and an institutional trust giving rise to an immediate pre-judgment proprietary interest (*i.e.* actual agreement or common intention, express or inferred), on the other hand.

All the members of the Judicial Committee in *Gissing*, other than Lord Reid, were clear that the established law, following *Pettitt*, was that there was no scope for the court to impute any intention if the evidence shows that there was no agreement in fact. Lord Morris said that "[t]he court cannot ascribe intentions which the parties never in fact had".[34] Viscount Dilhorne's starting point was that "*Pettitt* v. *Pettitt* has established that there is not one law of property applicable where a dispute as to property is between spouses or former spouses and another law of property when the dispute is between others".[35] He said:

> One cannot counteract the absence of any common intention at the time of the acquisition by conclusions as to what the parties would have done if they had thought about the matter. If such a common intention is absent … the law does not permit the courts to ascribe to the parties an intention that they never had and to hold that the property is subject to a trust on the ground that that would be fair in all the circumstances.[36]

I turn to Lord Diplock's analysis which, as Lord Walker observed in *Stack*, has played a crucial role in the development of the law in this area. Lord Diplock expressly accepted that, as a result of the majority decision in *Pettitt*, the law was not, as he had thought in *Pettitt*, that, even if the spouses had not applied their minds at all to the question of how the beneficial interest in a family home should be held at the time it was acquired, the court could give "effect to a common intention … which it was satisfied that they would have formed as reasonable persons if they actually thought about it at that time".[37] In order to temper the practical problems and potential injustice that both he and Lord Reid had seen in the stricter approach of the majority in *Pettitt*, he added the following special features to the analysis. First he downgraded the importance of the subjective intentions of the parties by emphasising that it is for the court to determine inferences as to the intentions of the parties on the basis of those which a reasonable man would draw from their words and conduct.[38] Secondly, he pointed to a particular feature of the family home, namely that it is usually purchased with a mortgage, and so is realistically to be viewed as being

[34] *Ibid.*, at 898D.
[35] *Ibid.*, at 899E.
[36] *Ibid.*, at 900F.
[37] *Ibid.*, at 904F.
[38] *Ibid.*, at 906D.

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purchased "on credit".[39] In such a case, the relevant transaction, in his opinion, is not restricted to the original conveyance.[40] Accordingly, in the case of a matrimonial home, the words and conduct of the parties which would be relevant to throwing light on the parties' intentions are those which are said and occur throughout the time that the mortgage is outstanding.[41] Third, and critically, he suggested[42] that there is nothing inherently improbable in spouses "acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately on 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 as to what would be fair having regard to the total contributions, direct or indirect, which the wife had made by that date". This analysis was a brilliant intellectual sleight of hand which sought to temper the conventional institutional trust approach in *Pettitt* by emphasising some special features of a family home.

As Lord Walker observed in *Stack*,[43] Lord Diplock's speech came to dominate this area of the law. It provided the legal basis for incremental development of the law by courts below the level of the House of Lords, and particularly by the Court of Appeal, away from the institutional approach.

Looking back with hindsight over the development of the case law in this area in the 37 years since *Gissing*, it is worth emphasising again that Lord Diplock's starting point was that, as a result of *Pettitt*, there must be words or conduct of the parties that permit the inference that it was their common intention that the beneficial interest was to be shared in some proportion or other. It is simply impossible to contend that Lord Diplock, let alone any of the others (other than Lord Reid) in the House of Lords in *Gissing*, would have accepted there was scope for a constructive trust where the express evidence was that the parties had not in fact ever formed any common intention as to the sharing of the beneficial interest during their relationship.

The next stage in the jurisprudence is the well known analysis of Lord Bridge in *Lloyd's Bank* v. *Rosset*.[44] In that case the House of Lords found that a wife who carried out decorating work on the family home, which was registered in the sole name of the husband, but made no financial contribution to its purchase, had no beneficial interest in it. Lord Bridge delivered the leading speech, with which all the other members of the Committee agreed. This provided a clear two stage

[39] *Ibid.*, at 906G.
[40] The same point was emphasised by Baroness Hale in *Stack*, para. [57].
[41] [1971] A.C. 886, at 906H.
[42] *Ibid.*, at 909D.
[43] [2007] UKHL, para. [21].
[44] [1991] A.C. 107.

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approach. The first ("the First Stage") is as to the existence of any trust; and the second ("the Second Stage") is as to the quantification of the beneficial interests under any trusts. The First Stage was, again, stated in terms which faithfully mirror the decisions of the majority in *Pettitt* and *Gissing*, namely whether there was a common intention to share the property beneficially.[45] According to *Rosset*, if it is established that, at any time prior to acquisition, or exceptionally at some later stage, the parties *expressly* reached an agreement, arrangement or understanding that the property was to be shared beneficially, it would only be necessary for the claimant to show that he or she acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.[46] On the other hand, where there is no evidence of express discussions between the parties and the court relies on their conduct as to the basis from which to *infer* a common intention to share the property beneficially, Lord Bridge was of the view that it was doubtful whether anything less than direct contributions to the purchase price, either initially or by payment of the mortgage instalments, would justify the inference necessary for the creation of a constructive trust.[47] Such direct financial contributions would, of course, (subject to the rebuttable presumption of advancement) give rise to a resulting trust on established principles.

Up to this point, then, the jurisprudence is clear that a constructive trust (that is to say, a so called common intention constructive trust) of the home of parties living together as a couple cannot arise unless there was an express or inferred agreement or common intention that the property was to be shared beneficially, and, in view of the detrimental reliance of the claimant on that agreement or common intention, it would be unconscionable of the defendant to deny the claimant's property interest or increased interest.

Next is *Oxley* v. *Hiscock*.[48] This was a dispute between an unmarried couple as to the proceeds of sale of a house, which was purchased in the sole name of the defendant male partner, but in relation to which they had agreed at the time of purchase that they should both have a beneficial interest. They had not agreed, however, what their respective shares should be. The Court of Appeal held that the sale proceeds should be divided 40/60 between the claimant and the defendant respectively. Chadwick L.J. delivered the leading judgment, with which the other members of the Court of Appeal agreed. In a detailed analysis, relying in particular on Lord Diplock's speech in

[45] *Ibid.*, at 132E–133A.
[46] *Ibid.*, at 132B–E.
[47] *Ibid.*, at.132H–133A.
[48] [2004] EWCA Civ 546.

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Gissing, and Court of Appeal decisions in *Grant* v. *Edwards*,[49] *Drake* v. *Whipp*,[50] and *Stokes* v. *Anderson*,[51] he concluded that, in the absence of any express evidence of intention, including cases in which the evidence is that there was in fact no agreement or even discussion or consideration about the point, each party "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." And, in that context, "the whole course of dealing between them in relation to the property" includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home".[52]

Chadwick LJ frankly admitted the acute difficulty of reconciling that approach with a traditional, property-based approach.[53] Further, he expressed the view that "there is no difference in outcome, in cases of this nature, whether the true analysis lies in constructive trust or in proprietary estoppel".[54] His reasoning and conclusion raise considerable analytical difficulties, but, because they were in large measure adopted by the House of Lords in *Stack*, it is convenient to address those difficulties in my commentary on that case.

I turn then to the seminal decision of the House of Lords in *Stack*. It is not necessary for my purposes to recite the facts in any great detail. The parties were unmarried, had been in a relationship since 1983 and had 4 children together, and were the joint registered owners of the home. They had both contributed financially to its purchase, but Ms. Dowden's financial contribution was significantly greater than that of Mr. Stack. There had been no discussions between them at the time of purchase as to their respective shares in the property. Mr. Stack claimed a declaration that the property was held by them as tenants in common in equal shares. The House of Lords upheld the decision of the Court of Appeal that he was only entitled to 35%. That outcome has been criticised on the ground of faulty application of the facts to the principles endorsed by the majority in the House of Lords. I am not, however, concerned with that issue. What is of interest, in the context of the impact of *Stack* on the development of the law, is the underlying analysis and identification of the relevant principles.

Stack was in substance a decision about the Second Stage since it was common ground that the parties were each entitled to a share in

[49] [1986] Ch. 638.
[50] [1996] 1 F.L.R. 826.
[51] [1991] 1 F.L.R. 391.
[52] [2004] EWCA Civ 546, at para. [69].
[53] *Ibid.*, at para. [70].
[54] *Ibid.*, at para. [71].

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the home, and the only question was the extent of their respective beneficial interests.[55] There are, nevertheless, two aspects of *Stack* concerning the First Stage which are of interest and relevance to my analysis. The first is that there is no mention in the speeches in the House of Lords of any requirement that the claimant must have relied to his or her detriment on an actual (express or inferred) agreement, arrangement or understanding as to sharing the beneficial interest in the property. I suggest that the reason for this is clear. For the House of Lords in *Stack,* detrimental reliance is not at the heart of the jurisdiction, or at any event is not the principal driving force for the constructive trust remedy in this type of case. Nor could it be if, as we shall see, the right to relief does not depend on there having ever been an express or inferred agreement, arrangement or understanding. There is much to be said, as a pure matter of social policy, for not imposing a requirement of detrimental reliance to establish a claim to a share or a greater share in the home in these cases, but it marks an important divergence from *Pettitt, Gissing*, and *Rosset*. Secondly, Lord Walker considered that Lord Bridge was too restrictive in *Rosset* in stating that, in the absence of evidence of express discussions between the parties, it is doubtful whether anything less than direct contributions to the purchase price will justify the inference of an agreement, arrangement or understanding that the property is to be shared beneficially. Lord Walker's view was that the court can take into account significant indirect contributions.[56] His view has subsequently been confirmed by the Privy Council in *Abbott* v. *Abbott*.[57] I suggest that this introduces into the First Stage a significant measure of judicial discretion resting on a substantially subjective evaluation of whether the indirect contributions were of such a nature and value that it would be fair to presume the parties agreed, even if they did not in fact. As an approach, it is to be contrasted with the traditional analysis of an immediate resulting trust arising from specific financial contributions which are not by way of gift.

Whether *Stack* is regarded as a First Stage or a Second Stage decision, the conclusion of the majority was that the starting presumption is that equity follows the law, and the parties will be rebuttably presumed to have intended that their beneficial interests should mirror their legal interests. This conclusion is to be welcomed. In the case of joint legal owners, who live together as a couple, it is likely to reflect reality. That is precisely what a legal presumption should do. Further, the presumption advocated by the majority in

[55] [2007] UKHL 17, para. [71].
[56] *Ibid.*, para. [26].
[57] [2007] UKPC 53.

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Stack will make the law in this area more simple and accessible and will lead to greater certainty.

For my purpose, what is particularly important and interesting is the analysis of what is required to rebut the presumption at the Second Stage. In short, the majority endorsed in substance the analysis of the cases by Chadwick L.J. in *Oxley*: that is to say, each partner is entitled to a share which the court considers fair having regard to the whole course of dealing between them in relation to the property. Notwithstanding that conclusion, and also what Lord Walker said about the potential relevance of indirect contributions at the First Stage, both Lord Walker and Baroness Hale seem to have been concerned to continue to maintain the institutional trust analysis. In para. [61] Baroness Hale stated that the search is for what the parties must, in the light of their conduct, be taken to have intended; and that the *Oxley* approach does not enable the court to abandon that search in favour of the result which the court itself considers fair.[58] Lord Walker was presumably referring to that qualification when, in para. [36] of his speech, he expressed approval of Chadwick L.J.'s summary "subject to the qualifications in paras 61 et seq of Lady Hale's opinion".

Lord Walker also appears to have in mind the "institutional" constructive trust when he said that he is now rather less enthusiastic about the notion that proprietary estoppel and the "common interest" (*sic*) constructive trust can or should be completely assimilated, and he contrasted the "mere equity" of the claim to a proprietary estoppel with the process of identifying "the true beneficial owner or owners and the size of their beneficial interests" under a common intention constructive trust.[59]

I respectfully suggest that the conclusion and reasoning of the majority in *Stack* are manifestly not reconcilable with an institutional constructive trust which gives rise to an identifiable property right before judgment. In the view of the majority, no distinction is to be made between actual, inferred or imputed intention. As Baroness Hale put it: "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".[60]

[58] Baroness Hale said at para. [61] that the following passage in para. 4.27 of the Law Commission's Discussion Paper "Sharing Homes" (Law Com No. 278) may be "the preferable way of expressing the same thought" as Chadwick L.J. in *Oxley* at para. [69] (quoted above): "If the question really is one of the parties' "common intention", we believe that there is much to be said for adopting what has been called a "holistic approach" to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended."

[59] *Ibid.*, para. [37].

[60] [2007] UKHL 17, para. [60].

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If neither actual agreement, nor common intention, express or inferred, nor detrimental reliance, are required to give rise to the constructive trust, it is quite impossible to say at any particular point of time before judgment (where none of those exist) that a certain, distinct and quantifiable property interest has arisen. It is impossible to disagree with Lord Neuberger that an imputed intention is not the same as, but rather is to be contrasted with, express or inferred intention, and that a power of the court to declare a constructive trust in these cases on the basis of imputed intention is a departure from *Pettitt* and *Gissing*.[61] The approach in *Stack* marks, in effect, the adoption by the House of Lords of Lord Reid's preferred approach in *Gissing*, which was rejected by the other members of the Committee in that case.

The majority in *Stack*, and in particular Lord Walker and Baroness Hale, appear to have attempted to give legitimacy to their approach by introducing the fiction of an actual agreement or common intention, where there was none in fact, and so providing consistency with *Pettitt* and *Gissing*.[62] The use of a fiction in modern times to legitimise legal analysis is unsatisfactory. It brings to mind the former theory that the law of quasi-contract rests on an implied promise on the part of the recipient third party to repay, which has now been completely exploded.[63] Fictions prevent the coherent development of the law in accordance with principle, and indicate an immaturity of legal development.

Does this mean that, in my view, the decision in *Stack* lacks legitimacy and is to be regarded as erroneous? It does not. I welcome the decision as a legitimate extension of the law to satisfy social justice. I do not feel compelled to accept the resulting trust analysis of Lord Neuberger as the only legitimate alternative analysis. As Baroness Hale observed: "The law … has moved on in response to changing social and economic conditions".[64] The question is, what is the proper analysis of that movement in the law? Can and must the law still be shoe-horned into the conventional institutional trust model, or does *Stack* show that there is different jurisprudence at play?

In his speech in *Stack* Lord Hope showed that in Scotland, in this area of property disputes between cohabiting couples, resort has more recently been had to restitutionary remedies and to the law of unjust enrichment.[65] Lord Walker referred to Lord Hope's explanation of the

[61] *Ibid.*, paras. [124]–[127].
[62] *Cf.* N. Piska, "Intention, Fairness and the Presumption of Resulting Trust after *Stack* v. *Dowden*" (2008) 71 Modern Law Review 120.
[63] Lord Goff and Gareth Jones, *The Law of Restitution* (7th ed., London 2007), para. 1–011; *Lipkin Gorman* v. *Karpnale Ltd* [1991] 2 A.C. 548.
[64] [2007] UKHL 17, para. [60].
[65] *Ibid.*, paras. [9]–[10].

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development in Scotland of the law of unjust enrichment, and to similar developments in some Commonwealth jurisdictions. He observed, however, that neither side in the case had urged it on the Committee, and he thought it would be "unwise for the House to make a significant change of course in advance of the Law Commission's proposals [on the financial consequences of relationship breakdown between cohabitants]".[66] The Law Commission's report was published in July 2007[67], but it does not assist the analysis of the relative merits of the common intention constructive trust, on the one hand, and proprietary restitution for unjust enrichment, on the other.

Let us examine *Stack* by reference to the analysis of restitution which I described earlier in this paper: namely, (1) vindication of existing proprietary interests, (2) relief for wrongdoing, (3) relief for unjust enrichment, (4) rights arising from consent, and (5) rights arising from miscellaneous other events.

Taking the last two categories first: consent here is irrelevant since, for the reasons I have given, imputed consent is not consent in fact; and the miscellaneous category is only relevant if the right does not fall within any other category.

As to the first category, for the reasons I have outlined Ms. Dowden's entitlement to more than half of the beneficial interest in the property had nothing to do with vindicating her existing (*i.e.* pre-judgment) proprietary rights: on the proper analysis of the speeches of the majority, there was no institutional trust in relation to that excess. The result of the case was to confer on her proprietary rights by the judgment of the Court in the light of all that had happened. In that respect, there is an analogy with proprietary estoppel. I would add that it is not necessary or appropriate to make a distinction, after *Stack*, between cases in which there was an actual agreement or common intention and those in which the Court imputes a common intention. The House of Lords has presented the applicable doctrine in these cases as a unified one. Nor did *Stack* give effect to, or create, a cause of action for wrongdoing. Mr. Stack had not committed any breach of a civil law duty to Ms. Dowden.

I suggest that the relief in *Stack* was in response to unjust enrichment. There was an enrichment of Mr. Stack, at the expense of Ms. Dowden since he was the joint owner of the property but she contributed financially more than half of the purchase price of the property. On the later approach of Professor Birks, that is to say, all enrichments are unjust unless there is some juristic reason for the retention of the enrichment, the enrichment of Mr Stack was plainly

[66] *Ibid.*, para. [23].
[67] Law Com No. 307.

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unjust. On the facts, Ms. Dowden did not intend to make a gift to Mr. Stack of the benefit of her contributions. On the other, more traditional approach[68], the following specific unjust factor or factors may be identified from the *Pettitt* to *Stack* case law. Mr. Stack, relying on his joint legal title, sought to retain the financial benefit of the disproportionately large contributions by Ms Dowden which she never intended should enure for his financial benefit on sale. Mr. Stack relied on the absence of a valid and enforceable contract or a valid express trust adjusting the parties' beneficial interests to reflect the disproportionate contributions of Ms Dowden. Mr. Stack thereby acted unconscionably[69] since the intimate nature of their relationship was both the cause of Ms. Dowden's contributions and the reason why she never sought or acted on legal advice in relation to them to protect her interests. The key to the decision, therefore, is the intimacy of the personal relationship between the parties.[70]

It is at this point that issues of policy intervene. It is well established that the categories of unjust enrichment are not closed.[71]

I suggest that this analysis of the jurisprudence underlying *Stack* is supported by clear and sufficient analogies with existing categories of unjust enrichment. There are echoes here of the concept of vitiated and qualified consent underlying the unjust enrichment cases, and an affinity with established unjust factors such as mistake, absence of consideration, and unconscionable conduct. In *Vedatech Corporation* v. *Crystal Decisions (Japan) UK*[72] Jacob J. said that: "The principle of unjust enrichment is in large part founded on conscience".[73] That statement has been criticised and may be overstating the position, but what is clear is that unconscionable conduct in relying on legal rights, without any wrongdoing, can, as a matter of policy, be a sufficient unjust factor in certain circumstances: for example, in cases of presumed undue influence.[74] Analysis on the basis of unjust enrichment also helps to explain the nature and extent of contributions towards the shared house that have to be taken into account. They must be proximate causes of the defendant's enrichment through his or her interest in the property.

[68] Adopted by Lord Steyn in *Banque Financiere De La Cite* v. *Parc (Battersea) Ltd* [1999] A.C. 221.
[69] Below, n.76.
[70] The same result could be achieved by treating the relationship between husband and wife and others living together as a couple as fiduciary; but that would be contrary to established law, policy and principle. It would import into such relationships a wide range of fiduciary duties and obligations that are inappropriate.
[71] *CTN Cash and Carry Limited* v. *Gallagher Limited* [1993] EWCA Civ 19 (esp. Sir Donald Nicholls V-C); *Woolwich Equitable Building Society* v. *IRC* [1993] A.C. 70 (which established the right of the citizen to recover money paid as taxes to the Revenue pursuant to an ultra vires demand).
[72] [2002] EWHC 818.
[73] *Ibid.*, para. [74].
[74] See *Pesticcio* v. *Huet* [2004] EWCA Civ 372, para. [20] (Mummery L.J.); and *cf.* the *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196 line of authority.

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In summary, then, the analysis in a *Stack* type of case of the cause of action for unjust enrichment[75] would be as follows. The starting presumption, in a case where both parties are joint legal owners, is that they intended that they would be joint beneficial owners. If that presumption is not rebutted, no question of unjust enrichment arises. Their rights to joint beneficial ownership would be based on mutual consent. The presumption may be rebutted by evidence that it was not the intention of the partner who made a larger contribution (the claimant) to confer on the other partner (the defendant) a financial benefit on realisation of the value of the home. That is to be distinguished, of course, from joint enjoyment of the home physically while the relationship endured. The presumption being a strong one[76], the claimant would have to adduce convincing evidence, as in cases of rectification,[77] that there was no intention to confer on the defendant such a financial advantage. If the presumption was rebutted, then the Court would examine the contributions of both partners, direct and indirect, to ascertain the extent to which the defendant would be unjustly enriched if the claimant was limited to a joint beneficial interest.

What are the consequences of this analysis of *Stack*? So far as concerns the title of this paper, it has important implications for the constructive trust as proprietary relief. First, it provides an example of equitable and proprietary relief for unjust enrichment. Those who deny and oppose the fusion of law and equity[78] would say that this either shows that my analysis of *Stack* as a case about unjust enrichment must be incorrect or the House of Lords has made an egregious error. I do not agree. The Courts have in practice shown a more relaxed approach to the inter-play between equity and the common law than the non-fusionists would tolerate in theory. In the case of breach of contract, for example, it is now well established that the Court has a discretion to grant damages on the *Wrotham Park* basis, that is to say an amount equal to the notional fee that would have been negotiated for a relaxation of the obligation, rather than damages for an identifiable financial loss.[79] *Wrotham Park Estate Company Limited* v. *Parkside Homes Limited*[80] was a case concerning compensation in lieu of an injunction for breach of a restrictive covenant. In *AG* v. *Blake*[81] the House of Lords held that an account of

[75] The context would be a claim for a declaration of entitlement to a specified share of the beneficial interest in property or its proceeds of sale and, in some cases, an order for sale.
[76] *Stack*, paras. [68] and [92].
[77] *Thomas Bates Ltd* v. *Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505, 521.
[78] The "fusion fallacy" criticised in R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity: Doctrines and Remedies* (4th ed., Sydney 2002).
[79] *Experience Hendrix LLC* v. *PPX Enterprises Inc* [2003] EWCA Civ 323, *WWF World Wide Fund for Nature* v. *World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286.
[80] [1974] 1 W.L.R. 798.
[81] [2000] 4 All E.R. 385.

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profits can be ordered, in the court's discretion, as a remedy for breach of contract. More recently, the Court of Appeal in *Halpern* v. *Halpern (No.2)*[82] has lent encouragement to achieving practical justice by underplaying the divisions between common law and equity.[83]

So far as concerns specifically proprietary relief in equity as a remedy for a common law cause of action, it must be noted that such relief for a common law cause of action is not unknown. It is, for example, provided in cases where the claimant is entitled to rescind a transaction for duress or fraud or misrepresentation. In such a case, the equitable title to property which has passed pursuant to the transaction is restored retrospectively to the claimant, at least to the extent necessary to support a tracing claim.[84]

Those who seek to impose a rigorous division between equity and the common law, and in particular between personal restitutionary remedies and proprietary ones, in order to impose a principled and coherent structure are fighting an uphill and, in my view, ultimately doomed struggle. The judges at the front line will always be trying to achieve what Mance L.J. in *Experience Hendrix LLC* v. *PPX Enterprises Inc*[85] called "practical justice" on the facts of each case.

The constructive trust imposed in *Stack*, not being an institutional trust, is a discretionary remedial trust. It need not be seen, and it should not be seen, however, as the full-blown retrospective remedial constructive trust of the US and Canadian model.[86] That would be inconsistent with our jurisprudence and, in particular, our settled rules defining priorities between property interests. There is no difficulty, however, in a model analogous to the power of the court to award a property interest for proprietary estoppel. In that case, the right to the relief is a mere equity prior to judgment, which will take its priority in relation to other property interests in accordance with settled law and statute. This creates no difficulty in the *Stack* context so far as concerns dealings with the shared home in favour of third parties prior to judgment. The overwhelming majority of properties, in relation to which the issue is of relevance, are registered land. The Land

[82] [2007] 3 All E.R. 478.

[83] *Ibid.*, especially para. [20]; see also A. Burrows, "We Do This at Common Law But That in Equity" (2002) 22 Oxford Journal of Legal Studies 1 and *Remedies for Torts and Breach of Contract* (3rd ed., Oxford 2004), p.204.

[84] *El Ajou* v. *Dollar Land Holdings plc* [1993] 3 All E.R. 717, 734D; *Shalson* v. *Russo* [2005] Ch. 281, paras. [120]–[127], and see A. Burrows, *The Law of Restitution* (2nd ed., Croydon 2002) at pp.64ff. William Swadling, however, has begun a self-confessed attack on the idea that rescission of a contract of sale can have any proprietary consequences: "Rescission, Property, and the Common Law" (2005) 121 L.Q.R. 123.

[85] [2003] EWCA Civ 323, para. [42].

[86] Nor is it the same as Lord Denning's "new model" constructive trust: A.J. Oakley, *Constructive Trusts* (3rd ed., London 1997), pp.69–73; J. McGhee (ed.), *Snell's Equity* (31st ed., London 2005) para. 24–07. That model was based on broad concepts of justice and conscience and a wide judicial discretion.

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Registration Act 2002 now provides that a mere equity has effect from the time it arises as an interest capable of binding successors in title,[87] and, in the case of a person in actual occupation, has precisely the same protection, as against subsequent dispositions of a registered estate, as a beneficial interest under a trust.[88]

The remedial constructive trust is discretionary relief for the unjust enrichment. The Court could award common law damages in the usual way. It is difficult to envisage circumstances in the *Stack* type of case in which it would be appropriate to award common law damages rather than proprietary relief; but the ability of the Court to choose between them, as it can choose between money and proprietary relief for proprietary estoppel, should be seen as an advantage rather than a disadvantage.

This analysis of a new model discretionary remedial constructive trust undermines the case of those restitution lawyers who maintain that it is a fundamental tenet that proprietary relief cannot be given for unjust enrichment, classically in the case of a payment under a mistake where the recipient has committed no wrongdoing. The more justifiable and logically sustainable starting point is that the recipient of a mistaken payment should not be entitled to keep the payment or any benefit arising from it, including the increase in value of an asset acquired with it, provided that the proper rights of third parties, including creditors, are recognised and there is no other factor which would make it unjust to grant proprietary relief to the claimant. Under the new model this would be achieved. Change of position would, in any event, be a defence. Rights of third parties would be protected in the usual way by applying the ordinary rules for the priority of legal and equitable interests and recognising the right to proprietary relief as a mere equity. The right to proprietary relief would be discretionary and would not be retrospective. The rights of the general body of creditors on an insolvency would, therefore, not be adversely affected in an inappropriate way.

Other Joint Acquisitions

Correct and precise identification of the policy underlying the *Stack* category of unjust enrichment is important because it discloses the extent to which the *Stack* approach is applicable to different factual situations. In *Adekunle* v. *Ritchie*[89] HH Judge Behrens, sitting in the Leeds County Court, applied the approach in *Stack* to a dispute over a house owned by a son (the defendant) and his deceased mother. They

[87] Sec. 116.
[88] Secs. 29 and 30, and sched. 3 para. 2.
[89] [2007] B.P.I.R. 1177.

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had both contributed to the purchase and the outgoings. Judge Behrens applied the approach in *Stack* on the simple ground that Baroness Hale had not expressly limited her approach to cases in which cohabiting couples were living together in either a platonic or sexual relationship.[90] I have sympathy with the dilemma of Judge Behrens. For the reasons I have given, however, I respectfully suggest that the correct approach is to identify precisely the policy, and the unjust factor or factors, which underpin the cause of action for unjust enrichment, and then to see whether they are applicable on analogous but different facts.

For those reasons, I suggest that there can be no justification for a constructive trust in joint acquisitions of commercial property where the defendant has secured for itself a larger interest than was intended, but has not broken a trust or fiduciary duty (which would give rise to a conventional institutional constructive trust) and the facts do not give rise to proprietary estoppel.

In so far as the Court of Appeal indicated otherwise in *Banner Homes Group plc* v. *Luff Developments*,[91] where the leading judgment was given by Chadwick L.J., the views that it expressed were not part of the essential reasoning of the case, went beyond earlier authority, and cannot be justified as a matter of policy. In that case the first respondent was interested in acquiring a development site, but wanted to share the risk of the acquisition with a partner. It therefore entered into negotiations with the claimant to form a joint venture for the purpose of acquiring the site. The parties reached agreement in principle to acquire the site through a new company which they would own in equal shares. On the basis of that understanding the first respondent acquired the second respondent, an off-the-shelf company, with the intention that it should be the vehicle for the joint venture. Subsequently, the first respondent had second thoughts about the proposed joint venture and began to look for a different partner. It did not, however, inform the claimant of its doubts because it feared the claimant would itself bid for the site if the joint venture was abandoned. It was not until after the second respondent had acquired the site, with funds provided by the first respondent, that the first respondent informed the claimant that it was withdrawing from the joint venture. The Court of Appeal held that the circumstances gave rise to a constructive trust in favour of the claimant over one half of the shares in the second respondent held by the first respondent. Chadwick L.J. described[92] what he called "the *Pallant* v. *Morgan* equity" (named after *Pallant* v. *Morgan*[93]) as an example of the

[90] para. [65].
[91] [2000] 2 All E.R. 117.
[92] *Ibid*., at 137G quoting Millett J. in *Lonrho plc* v. *Fayed (No 2)* [1992] 1 W.L.R. at 9H.
[93] [1953] Ch. 43.

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intervention of equity "by way of constructive trust, not only to compel a defendant to restore the plaintiff's property to him, but also to require a defendant to disgorge the property which he should have acquired, if at all, for the plaintiff".

The decision in *Banner Homes* on the facts of that case cannot be doubted on the basis of well-established principles and decided cases. The respondent owed fiduciary obligations to the claimant and, in acting as it did, was in breach of those obligations. In the course of his judgment, however, Chadwick L.J. implicitly assimilated to a significant degree the common intention constructive trust in the domestic setting and principles of proprietary estoppel, as he later did expressly in *Oxley*, and he imported into the commercial field the perceived broad principles of conscience identified in that process. I suggest, however, that apart from the conventional institutional constructive trust for breach of trust or other fiduciary duty, and proprietary estoppel, the only other possible cause of action in the *Banner Homes* type case would be for unjust enrichment. Unlike the *Stack* type of case, however, at present I can see no policy reason for any such cause of action for unjust enrichment in the *Banner Homes* commercial setting.

Proprietary Estoppel

This analysis of *Stack* helps to highlight why, contrary to the view expressed by Chadwick LJ in *Oxley*, there is no assimilation between the constructive trust in the *Stack* type of case and proprietary estoppel. They are performing quite different legal functions.

In the 2006 ACTAPS lecture Lord Neuberger described the essential requirements of proprietary estoppel as: (1) a statement or action (which can include silence or inaction) by one party, who ought to appreciate that the other party may act in reliance on it; (2) an act by that other party taken in reasonable belief that he has, or (more normally) will have, an interest in land, induced by the first party's action or statement ; and (3) detriment to the other party if the first party is able to resile from the belief so induced. The court will satisfy the equity by the minimum award necessary to do justice.[94] None of those conditions is necessary for the claimant to succeed in a cause of action for unjust enrichment in the *Stack* type of case. Further, the remedy of a declaration of constructive trust for unjust enrichment performs a quite different function from relief for proprietary estoppel. As I have explained, the cause of action for unjust enrichment in *Stack* does not depend on any actual agreement, or

[94] *Crabb* v. *Arun District Council* [1976] Ch. 179, 198.

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common intention of the parties or any statement by the defendant or any detrimental reliance by the claimant on any such agreement, common intention or statement. The relief by way of constructive trust is not designed to compensate the claimant for any loss suffered, or to fulfil any expectation, since there may have been neither. It is designed quite simply to strip the defendant of his or her unjust enrichment. There is therefore no scope for any such concept as limiting the relief to the minimum necessary to do justice.

Conclusion

This analysis of *Stack* marks it out as the truly ground-breaking case that it is. It provides a principled basis for the decision and its application to other areas. It provides jurisprudential legitimacy for the creation of a new ground of restitution based on unjust enrichment to give effect to a sound policy, and the application of discretionary remedial proprietary relief to reverse unjust enrichment. In doing so, it does not involve any undermining of the institutional constructive trust in its traditional settings or settled principles of property law concerning priority of interests.

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