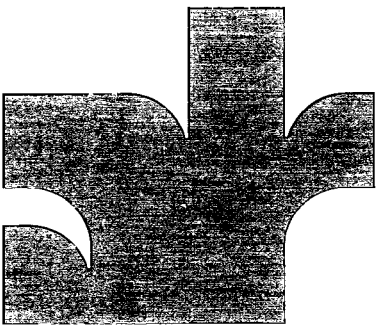

ARTICLES

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DOING EQUITY BETWEEN DE FACTO SPOUSES: FROM CALVERLEY V GREEN TO BAUMGARTNER

1. INTRODUCTION

In some areas of law there are too few legal norms to deal adequately with the disputes which the courts must resolve. Judges are found appealing for the intervention of Parliament. In other areas, there are perhaps too many. A given set of facts may be analysed according to a variety of different principles, many of which lead to different results.

The problems arising from the property disputes of de facto spouses[1] may be thought to fall into the former category. It is not unusual for judges to call for the intervention of Parliament when they feel compelled to a conclusion on the law which is at variance with their views of the merits.[2] The perceived inadequacies of the law in this area have led to statutory intervention in New South Wales[3] and in Victoria.[4]

It is apparent, however, when one surveys the variety of legal categories in which these cases may be analysed that there are indeed a large number of legal norms available to do equity when de facto spouses break up. *Pettitt v Pettitt*[5] and *Gissing v Gissing*,[6] which discussed 'implied, resulting and constructive' trusts,[7] gave birth to a number of different interpretations based on the common intention of the parties. Lord Denning MR founded on Lord Diplock's speech in *Gissing* to develop a 'constructive trust of a new model'. Canadian courts have

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1 The term is used to cover all relationships which resemble marriages. Other terms in use in the literature include 'cohabitees' and 'de facto relationships'. It should be noted however that these relationships vary widely in the extent to which the parties are committed to each other. This is discussed below.

2 Eg *Muschinski v Dodds* (1982) 8 Fam LR 622, 629 (CA) per Samuels JA; *Burns v Burns* [1984] Ch 317, 332, per Fox LJ, 345, per May LJ.

3 De Facto Relationships Act 1984 (NSW).

4 Property Law (Amendment) Act 1988. This differs from the New South Wales legislation in that it is confined to alterations of the parties' interests in real property.

5 [1970] AC 777.

6 [1971] AC 886.

7 This phrase was used by a number of judges in the two cases without specifying what sort of trust was thereby being invoked. None of these trusts require writing.

developed a broad notion of unjust enrichment.[8] In addition to this, cases involving de facto spouses may be analysed in terms of part performance, quasi-contract, testamentary contracts, proprietary estoppel and partnership, amongst others.

Until recently, Australian courts have drawn their inspiration from *Pettitt* and *Gissing*. The decisions of *Calverley v Green*,[9] *Muschinski v Dodds*[10] and *Baumgartner v Baumgartner*[11] however, indicate that the High Court of Australia is charting a different direction — one which seeks to develop solutions based on the financial contributions of the parties. In adopting this approach the court has indicated a clear preference for moving away from solutions based on finding the parties' intentions. Intention remains relevant to the doctrines espoused in the three cases, but generally the enquiry is more narrowly focused. It looks to intentions in regard to the specific contributions or to the existence of a joint endeavour. It does not seek to determine at the time of conveyance the shares which the parties intended to take.

Nonetheless, there is an ambivalence in the High Court's approach. In *Calverley v Green* the court attempted to determine the rights of the parties by close analysis of the parties' financial contributions in the light of equitable principle. So too in *Muschinski v Dodds*; Deane J, while enunciating a new doctrine, was careful to avoid adopting a generalised doctrine of unjust enrichment, and instead expounded his doctrine in narrow compass to deal with the situation arising on the facts of that case. The court's artwork had an eye for detail.

This contrasts with the approach of other jurisdictions which have tended to paint with a broad brush. Instead of analysing each case and sifting the facts in order to determine the application of a variety of legal and equitable principles, one general doctrine has emerged which is then applied to a variety of fact situations. Such has been the nature of the common intention trust developed in *Pettitt* and *Gissing*.

Baumgartner v Baumgartner indicates that the High Court is seeking to develop just such a broad doctrine of unconscionability. Although the Court, which included Deane J, sought to apply *Muschinski* in doing so, it seems that the *Muschinski* doctrine was shorn of most of its limitations. What has emerged is an Australian doctrine of unconscionability, which may become merely another term for unjust enrichment.

The purpose of this article is to examine the approaches developed in *Calverley*, *Muschinski* and *Baumgartner*, both as expositions of equitable principle and as solutions which are sensitive to the social context in which these property disputes arise. It will be suggested that the analysis of the parties' rights in *Calverley v Green* has considerable potential for providing just solutions to many disputes, especially where the parties are joint owners and are jointly liable for a mortgage. Ways will be suggested in which the doctrines of resulting trust and contribution might usefully develop in the future. *Calverley* involves a close analysis of the parties' intentions with regard to their financial contributions. Such an analysis may result in solutions which are more sensitive to the differences

8 *Pettkus v Becker* (1980) 117 DLR (3rd) 257.
9 (1985) 59 ALJR 111.
10 (1986) 60 ALJR 52.
11 (1988) 62 ALJR 29.

between some de facto relationships and marriages than might be the case when broad doctrines are invoked.

Deane J's principle in *Muschinski v Dodds*, as modified significantly by *Baumgartner*, is however the one which appears to be carrying the day in the present High Court. Since this new doctrine of unconscionability has the potential to be applied to a great variety of fact situations, the scope and limitations of this doctrine are important.

Still, the common thread in all three cases is that the remedies will coincide more or less with the financial contributions of the parties. There needs to be a residual doctrine to deal with disputes between de facto spouses which allows a remedy where one party has relied to his or her detriment on the representations of the other. Hitherto, the common intention trust has been used in such situations, although its application has been haphazard. Such cases may be dealt with more effectively and clearly if the High Court discourages the invocation of the common intention trust based on the principles of *Pettitt* and *Gissing*, and instead utilises the doctrine of proprietary estoppel.

2. THE SOCIAL CONTEXT OF THE LAW

It is, perhaps, not surprising that the courts, in applying common law or equitable principles, should find difficulty in resolving these cases in a way which inspires public confidence. For in the social context in which many of these cases fall to be decided there is a pressure on judges to find solutions which are at variance with the legal title in which the property is held, and these solutions are not easily arrived at by applying traditional doctrines.

This pressure comes from three main sources. The first is the widespread expectation present in modern society that people will own their own home. After a certain period of cohabitation, in which a couple have by their joint efforts reduced the mortgage debt on a home, the expectation is that both parties are entitled to a share in the equity. Given this widespread expectation, it can be an unpopular solution for a judge to find that no sharing was intended, and that their relationship in law should be characterised as that of licensor and licensee.

The expectation that cohabitation will give rise to a share in the home is enhanced by the second pressure, the advent of laws giving judges a discretion in dividing the property of married couples. Now, almost irrespective of monetary contributions, a spouse in a marriage of reasonable length can expect to come out with some share of the property acquired during the couple's life together. It is natural that those parties in de facto relationships which closely resemble marriage should expect a similar share of the property deriving from their long 'partnership', whatever the state of the property's legal title and despite the lack of public formalities involved in their cohabitation. The vital legal significance of a formal marriage ceremony is not appreciated by all who live together without marrying.

The third pressure derives from an increased awareness of the very difficult economic position many women find themselves in on divorce or the break-up of a longstanding de facto relationship. This is especially so in role-divided relationships where one partner has been seen as the primary breadwinner while the other has spent considerable time looking after children. The career disruption involved in such role-division is well-known, as is the sacrifice many women make in giving up good jobs

and careers in order to follow their husband (or partner) to a new place of work.[12]

The evidence from all over the common-law world is that despite property distribution laws, many women are plunged into poverty following the break-up of the relationship.[13] The economies of scale involved in living together cannot be maintained when the same amount of income has to be distributed to pay for two homes instead of one. Furthermore, maintenance payments for children are widely regarded as inadequate.

If poverty is a major problem for divorced women who at least have the benefit of discretionary distribution laws, it is even more of a problem for some women involved in long-lasting de facto relationships. It is natural that attention will be focused on the ownership of the home as this may well be the only major tangible asset which the parties own.

These factors suggest the need to be liberal in granting property rights to those who have been in de facto relationships without adequately formalising their legal position in regard to property. The pressure is there to treat de facto relationships substantially in the same way as marriages when resolving property disputes, and to adapt legal doctrines in order to produce similar results to those under statutory distribution schemes such as the Family Law Act 1975 (Cth). Indeed, such a philosophy has been foundational to the De Facto Relationships Act 1984 (NSW).[14]

Resolving disputes between couples in de facto relationships however has its own special complexity. There are wide variations in attitudes between couples in de facto relationships; their level of commitment to each other, their reasons for not marrying, and their financial arrangements all differ. Without question there are many variations among married couples too, not least in commitment and financial organisation. Yet in getting married, people are entering into a contract laid down in basic terms by the state. The terms of that contract, as applied on breakdown by the Family Court, are reasonably well understood. Most couples realise that marriage involves the sharing of property.

It may very well be that a reason why some couples don't marry is to avoid those obligations, at least for the time being. Couples in many de facto relationships speak of not being ready to marry. It is for this reason, amongst others, that there has been considerable debate about giving to de facto relationships similar legal attributes to those in ceremonial marriages.[15] This is an apsect of the social context which cannot be ignored, and in this respect doctrines which look closely at the intentions of the parties in regard to their finances — and their

12 For a discussion of this in the context of married couples see Funder, 'Work and the Marriage Partnership' in McDonald (ed), *Settling Up* (1986) and Prager, 'Sharing Principles and the Future of Marital Property Law' (12977) 25 UCLAL Rev 1.

13 For a comprehensive Australian study see *Settling Up* ibid. See also Weitzman, *The Divorce Revolution* (1985).

14 The Act was based on the NSW Law Reform Commission's *Report on De Facto Relationships* (Report No 36, 1983). In the way the Act has been applied so far, the approach taken by the courts has not been the same as under the Family Law Act. See Wade, 'Discretionary Property Scheme for De Facto Spouses — The Experiment in New South Wales' (1987) 2 AJFL 75.

15 For a good summary of the arguments for and against the legal recognition of de facto relationships see Freeman and Lyon, *Cohabitation Without Marriage* (1983).

relationship — are to be preferred. Potentially, at least, the line of reasoning in *Calverley v Green* meets this need.

3. THE RESULTING TRUST AND THE RIGHT OF CONTRIBUTION

(a) Calverley v Green[16]

Perhaps the major significance of *Calverley v Green* has been to clarify the role of the resulting trust, and to explain how courts should deal with mortgage payments in establishing the entitlements of the parties consistently with equitable principle.

In *Calverley v Green* the plaintiff and defendant, who were living in a de facto relationship, purchased a property at Baulkham Hills, a suburb of outer Sydney, in 1973. The price was $27,250, of which $9,250 was provided as a deposit by the defendant, Mr Calverley.[17] The remainder, $18,000, was borrowed on a mortgage. Initially, Mr Calverley intended to take out the loan himself, but he had difficulty obtaining finance without Miss Green's signature. She therefore joined him in applying for the loan. The house was taken in joint names and the couple were jointly and severally liable for the mortgage payments. In 1978, their cohabitation ceased when Miss Green left the house. She subsequently claimed a share of the property. The case finally went to the High Court where it was decided that the parties held shares in the property in proportion to their contributions to the purchase price.

It was in their explanation of what constituted the contributions to the purchase price that the High Court differed from the trial judge and from an interpretation of the resulting trust common in the English cases. Mr Calverley took responsibility for all the mortgage payments, while Miss Green paid most of the household expenses.[18] Rath J at first instance assumed therefore that Mr Calverley had provided all the purchase money. The New South Wales Court of Appeal analysed it differently, as did the High Court. By joining in the mortgage Miss Green had made a contribution to the purchase price.

The High Court distinguished between contributions made before and after the conveyance. Mason and Brennan JJ in a joint judgment explained:

> 'It is understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of a home. The purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed.'[19]

Thus Miss Green, by being jointly and severally liable for the mortgage payments, had contributed one half of the money borrowed; she had provided $9,000 and therefore was entitled to approximately a one-third

16 For other commentaries see Bailey-Harris, 'Property Division on Separation: Will the Married and the Unmarried Meet at the Crossroads?' (1985) 8 UNSWLJ 1; Bates, 'Property Disputes and Unformalised Relationships: Looking for a Lighthouse' (1986) 60 ALJ 31.

17 The exact amount of the deposit was not entirely clear. The evidence given at trial was that the deposit was $9,000, which left $250 unaccounted for. Gibbs CJ said that it appeared that this amount was paid by Mr Calverley: (1985) 59 ALJR 111, 112, 115.

18 See the judgments of Gibbs CJ (111-112), Murphy J (120) and Deane J (121).

19 Ibid 117.

share of the property on ordinary resulting trust principles. The court found no evidence to rebut this presumption.

What then of the facts that Mr Calverley had paid all the mortgage instalments? Mr Calverley's payment of the mortgage instalments was not relevant in working out the interests of the parties in the property on resulting trust principles as it was merely repayment to a lender. Nonetheless, as Gibbs CJ said, the payments might be relevant on an equitable accounting between the parties.[20]

In drawing up such accounts two types of obligation were said to be relevant. The first was of Miss Green to pay her share of the mortgage instalments. Mason and Brennan JJ explained the application of the doctrine of contribution in this regard. If Mr Calverley made the mortgage payments without intending Miss Green ultimately to have the benefit of them, then he would be entitled to contribution from her for her share of the payments and to an equitable charge to secure the making of that contribution.[21]

The other debt to be accounted for arose from Mr Calverley's obligation to pay an occupation rent.[22] He had been living in the house on his own since Miss Green left. She had approximately a one-third interest in the property. It followed that she was entitled to rent from him for a period in which he occupied her one-third share of the house.[23] Gibbs CJ expressed the hope that the matter could be resolved without further litigation.[24]

(b) The nature of the resulting trust

The High Court's explanation of how the presumption of resulting trust applies when property is bought by means of a mortgage is rather different from that adopted in Britain. There a resulting trust analysis has sometimes been used to explain why the courts are giving effect to the common intention of the parties, and as a means of quantifying the beneficial interests when *Pettitt v Pettitt* and *Gissing v Gissing* have been applied.[25]

The form of this resulting trust however is different and more flexible than the resulting trust as it has been traditionally understood. It was Lord Pearson in *Gissing* v *Gissing* who first developed this new interpretation. He suggested that payments giving rise to a resulting trust could be made subsequent to the purchase, and also could take the form of paying household expenses under an arrangement by which the other pays the mortgage instalments.[26] It follows from this interpretation of the resulting trust that the beneficial interests cannot be quantified until the couple separates. Griffiths LJ explained in *Bernard v Josephs* that the

20 Ibid 114.

21 Ibid 119. *Ingram v Ingram* [1941] VLR 95,102 is cited for the proposition that a charge is available in support of the right of contribution. No authority is given in that case, and it is unclear why a proprietary remedy should be available in this situation, unless indeed it falls within the principles enunciated in *Hewett v Court* (1982) 149 CLR 639, 645-650 per Gibbs CJ, 667-670 per Deane J.

22 Ibid 115 per Gibbs CJ, and 120 per Murphy J.

23 *Bernard v Josephs* [1982] Ch 391.

24 Ibid 115.

25 See eg *Bernard v Josephs* [1982] Ch 391, per Griffiths LJ; *Burns v Burns* [1984] Ch 317, 326 per Fox LJ and 335-336 per May LJ.

26 *Gissing v Gissing* [1971] AC 886, 903.

judge must look at the contributions of each to the 'family' finances and determine as best he may what contribution each was making towards the purchase of the house.[27]

Juridically, this is difficult to recognise as a resulting trust. The common factor with the resulting trust is that the parties' shares are defined by their contributions. The broad assessment of the parties' contributions to the purchase price quantifies the beneficial interests under a resulting trust, according to Griffiths LJ. He does however treat the contributions as merely a guide to the intentions of the parties. It is difficult to reconcile this in other respects with the traditional resulting trust based on the direct furnishing of a whole or part of the purchase price at the time of acquisition.

The explanation of the resulting trust and of the doctrine of contribution in *Calverley v Green* is both consistent with equitable principle, and ultimately a more coherent analysis, than is the English approach.[28] The inclusion of the mortgage instalments as contributions to the purchase price raises the problem of how those contributions are to be quantified. A significant proportion, after all, is interest paid to the lender.

(c) Accounting between co-debtors

Calverley v Green focused attention on the doctrine of contribution in the context of mortgage payments. This doctrine, referred to by Gibbs CJ and Mason and Brennan JJ[29] in *Calverley v Green* was expounded further by Gibbs CJ in *Muschinski v Dodds.*[30]

In that case the plaintiff, Mrs Muschinski, and the defendant, Mr Dodds, had been living together since 1972 in the plaintiff's house. In 1975 they decided to buy land in Picton in New South Wales. There was a cottage there at the time, but it was in a bad state of repair and it was their intention to restore the cottage and use it in an arts and crafts business, while also erecting a prefabricated house in which to live. The parties entered into a contract to purchase the land for $20,000. They were jointly and severally liable under that contract. Mrs Muschinski paid all of the purchase price from the proceeds of sale of her existing home. On the advice of a solicitor, the house was taken by the parties as tenants in common. This was carefully thought out. Although Mr Dodds was contributing nothing to the purchase price of the land, he intended to pay for the cost of the prefabricated house and to make other improvements to the property. Thus, if all had gone as the parties intended, they would eventually have made roughly equal contributions. Unfortunately, permission to build the prefabricated house was refused.

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27 [1982] Ch 391, 403-404. See also May LJ in *Burns v Burns* [1984] Ch 317, 344.

28 In one respect, the High Court muddied the waters in *Calverley.* A previous decision, *Bloch v Bloch* (1981) 55 ALJR 701 did treat mortgage payments as contributions to the purchase price under a resulting trust. See the analysis in Hardingham and Neave, *Australian Family Property Law* (1984) 638-644. Mason and Brennan JJ felt the need to distinguish *Bloch* by saying that the property in that case was bought as a mortgage-free investment, and that justified the inclusion of mortgage instalments. By contrast, where the home is 'to live in', then mortgage instalments should not be taken into account. *Calverley v Green* (1984) 59 ALJR 111, 119. Apart from the difficulty of drawing the distinction, it has no basis in equitable principle. The shares in the property under an express or resulting trust must be quantified at the time of conveyance.

29 (1984) 59 ALJR 111, 115, 119.

30 (1986) 60 ALJR 52.

The defendant did make some improvements to the old cottage to make it habitable, but about two and a half years later, the couple split up permanently.

The High Court accepted the analysis of the trial judge and the Court of Appeal, that the presumption of resulting trust was rebutted on the facts of the case. Although Mrs Muschinski had provided the purchase money it was clearly her intention that Mr Dodds should have an immediate beneficial interest. This had been the focus of much discussion between them since Mr Dodds was unwilling to spend all that money on erecting the prefabricated house if his name was not on the title deeds. The Court therefore rejected the plaintiff's claim that the defendant's joint interest was held in trust for her.

This did not mean, however, that Mrs Muschinski was not entitled to any remedy. The majority of the High Court agreed that the property should be held as tenants in common upon constructive trust to repay to each her or his respective contribution and as to the residue, for themselves in equal shares.[31]

Gibbs CJ differed from Mason and Deane JJ in the pathway by which such a result was achieved. His analysis proceeded on the basis that Mrs Muschinski had a right of contribution from Mr Dodds in respect of her payment of more than one half of the purchase moneys. In so doing, he explained the applicable principles as to when a right of contribution is to be found and cited the statement of the principle in *Chitty on Contracts*:

> 'Joint and several debtors have a quasi-contractual right of contribution among themselves: that is to say, if one has paid more than his share of the debt, he can recover the excess from the others in equal shares, subject to any agreement to the contrary.'[32]

Gibbs CJ went beyond this statement, however, in assuming that the right may be displaced not only by agreement but by the intention of the parties.[33] Applying this doctrine to the case before him, Gibbs CJ found that Mrs Muschinski had a right of contribution for the amount she paid in the purchase of the property over and above her share, under the contract of purchase. Gibbs CJ reached this conclusion inasmuch as there was no evidence of a contrary intent. He acknowledged that the parties did not consider or discuss whether Mrs Muschinski would have a right of contribution if she paid the purchase price in full and if Mr Dodds did not pay as much as he had promised in erecting the prefabricated house. He continued:

> 'There is no evidence from which it could be inferred that at the time when the contract was signed the parties or either of them actually intended that the appellant should not have

31 Per Deane J ibid 69. This is not exactly the same order as Gibbs CJ would have made. The imposition of a constructive trust was proposed by Deane J. Gibbs CJ would have preferred to allow Mrs Muschinski a charge. Nonetheless he concurred in the orders agreed by Mason and Deane JJ (Gibbs CJ ibid 58).

32 *Chitty on Contracts* vol 1 (25th ed 1983) 1213.

33 In support of this he cites Taylor and Owen JJ in *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 488, and *Gadsden v Commissioner of Probate Duties* [1978] VR 653, 660-661.

> a right of contribution against the respondent if she paid the purchase price in full.'[34]

In his Honour's view then, there is a right of contribution in the absence of evidence of intention to the contrary, whenever a couple are jointly liable for the contract of purchase of property. In spite of their agreement that Mr Dodds would be responsible for significant expenditure after the purchase of the land, the Chief Justice was able to find a right of contribution on the basis that they did not consider what should happen in the events which transpired — the refusal of planning permission and the cessation of their cohabitation.

Arguably, however, the very nature of the agreement between Mrs Muschinski and Mr Dodds was such that it indicated an agreement that Mr Dodds should not be liable to contribute to the purchase price of the land. His contribution was to be in another form. For this reason Mason and Deane JJ were unable to share Gibbs CJ's view of the facts.[35]

(d) The intentions of the parties

Clearly then, in applying the principles of *Calverley v Green* as developed by Gibbs CJ in *Muschinski v Dodds*, one is still in pursuit of the 'fugitive common intention'.[36] The nature of that search has, however, changed. The court must now separate the intentions of the parties in respect of money paid or borrowed at the time of conveyance from payments made in reduction of the mortgage debt subsequent to the purchase. With regard to the money paid or borrowed at the time of conveyance, there are the following possibilities, all of which depend on the intentions of the parties.

The first is that the property is held on resulting trust, in the proportions in which the money was contributed at the time of the purchase. In rebutting this presumption the important intention is that of each party in respect of his or her contributions. The contributions include liability for money borrowed on mortgage.

Secondly, the presumption of resulting trust may be rebutted. In the absence of an express trust in other shares,[37] this will involve a finding that the intention of each party in respect of his or her contribution to the purchase price is truly reflected in the legal title.

The third possibility is that the resulting trust is rebutted by evidence of a common intention which would give rise to an express oral trust enforced on the principles of *Pettitt v Pettitt* and *Gissing v Gissing* as explained by *Allen v Snyder*.[37a] This is the interpretation of *Pettitt* and *Gissing* which has tended to find favour in Australia,[38] and the possibility was left open in the recent High Court cases. Such a trust would involve a finding that the parties intended to hold the beneficial interests in some proportion other than either their legal title indicates or in accordance with their respective contributions under a resulting trust.

The fourth possibility is suggested by Gibbs CJ in *Muschinski v Dodds*.

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34 (1986) 60 ALJR 52, 57.

35 See below.

36 The phrase is Dickson J's in *Pettkus v Becker* (1980) 117 DLR (3rd) 257, 269 (Supreme Court of Canada).

37 The third possibility below.

37a[1977] 2 NSWLR 685.

38 But see the line of cases beginning with *Hohol v Hohol* [1981] VR 221 discussed below.

This is that although the presumption of resulting trust is rebutted, and although the legal title reflects the parties' intentions, nonetheless one party has a right of contribution in respect of payments made over and above his or her share of the purchase price. Gibbs CJ sees this as a right arising in the absence of evidence to the contrary wherever the parties are jointly and severally liable under the contract of purchase. In his Honour's view, the party with a right of contribution would be entitled to a charge upon the other party's interest in the property for the appropriate amount.[39]

This however does not exhaust the possibilities regarding the money paid at the time of purchase. Two more possibilities are added by the other judges in *Muschinski.* Deane J, with whom Mason J agreed, was unable to interpret the arrangement between the parties as one which gave to Mrs Muschinski a right of contribution on the principles expounded by the Chief Justice.[30] Indeed, such a claim had not been made by her in the courts below. Rather, the remedy which his Honour devised was based on an analogy to the premature failure of a joint venture or partnership and to the frustration of a contract. He imposed a constructive trust, not on the basis of the parties' intentions, but as a remedial device. They would hold the property on constructive trust, to repay out of the proceeds of sale, the capital which each had contributed to the venture. As the result was similar to his own, Gibbs CJ was willing to concur, thus forming a majority. The reasoning however is very different. The 'failed joint venture' will be discussed in detail below, along with its metamorphosis in *Baumgartner.*

A sixth possibility emerges from the minority judgment of Brennan J, with whom Dawson J agreed. He interpreted Mrs Muschinski's intention with regard to her payment of the purchase price as being to make a conditional gift. In this he differed from the lower courts.[41] Brennan J interpreted the evidence as indicating that Mr Dodds was given a beneficial interest in return for his assurances regarding the improvement of the property.[42] The question remained, was this a condition giving rise to forfeiture for non-fulfillment or merely one creating a personal obligation? This, of course, is a question of the intention of the donor communicated to the donee at the time the gift is accepted. On the slender evidence available to him Brennan J concluded that the condition created a personal obligation in equity only. As Mrs Muschinski's claim was for a proprietary remedy only, she could be afforded no relief from the decision of the lower courts that the parties were tenants in common in equal shares.[43]

The payment of the purchase money, then, gives rise to a number of different interpretations. That, in *Muschinski v Dodds,* there should have been three different interpretations of the parties' intentions in the High Court alone reveals a serious problem. This was a case in which the parties gave considerable thought to their legal position. They sought legal advice, and the testimony of the solicitor was available to the court. They considered the possibility of a partnership,[44] but rejected this, and

39 Ibid 57, citing *Ingram v Ingram* [1941] VLR 95. See n 18 above.
40 Ibid 63, 66.
41 (1982) 8 Fam LR 622 (CA).
42 (1986) ALJR 52, 60.
43 Ibid 61-62.
44 See ibid 58 per Brennan J.

settled on being tenants in common. Yet there were three different interpretations of the legal significance of their arrangements. Just analysing the possibilities regarding the payment of the purchase money reveals the kaleidoscope of legal categories available. All are based on evidence of intent. All have grown up because they represent different fact situations in which the law recognises either that the legal title does not represent the intentions of the parties, or should not be allowed to prevail. The difficulty in applying these doctrines does not lie so much in the existence of the many categories as in the willingness of the judges to adopt some of these doctrines on the basis of very slender evidence. Consistent with the High Court's basic approach, greater certainty in this area could be achieved by recourse to presumptions, which could only be rebutted by clear evidence.

In this regard, two principles present themselves in apparent conflict, when the rights of joint owners are sought. The first is the presumption of resulting trust. Parties are presumed, in the absence of evidence to the contrary, to intend to hold beneficial interests in the property which correspond to what they paid towards the purchase price. The second is that those who are jointly liable under a contract for sale intend a right of contribution between themselves where one pays more than his or her fair share of the debt. In the first, the parties gain beneficial interests in the property in proportion to their contributions. In the second, the joint legal title is not subjected to a trust but rather the party who has paid more than his or her share is entitled to the repayment of the excess money paid. Equity treats both of these as principles which will prevail unless there is evidence to the contrary to rebut them. Where the evidence of intention is scant, should the courts presume a resulting trust in which case the beneficial interests will be quantified by their payments, or presume that the parties are joint owners at law subject to a right of contribution?

Gibbs CJ's judgment in *Muschinski* appears to indicate that the resulting trust should be regarded as the primary presumption. It was this presumption which was considered first in the case. It would appear to follow from *Muschinski* however, that where the resulting trust is rebutted by evidence that the parties intended to hold the property in accordance with the joint legal title then a right of contribution would still arise where both parties were signatories to the contract of purchase. This would be subject to contrary agreement.

This is an unfortunate complication. The implication of a right of contribution between parties with respect to a contract for the purchase of property may be appropriate between joint debtors in a commercial context. Where, however, a couple are living together over a period of time, where they are joint owners at law, and where the presumption of resulting trust is rebutted, it is less likely that they should intend to be joint tenants or tenants in common subject to an exact accounting between them for the purchase moneys. The payments necessary to provide a home for them to live in are only a part of the expenses which the couple must meet.

It was only Gibbs CJ who applied the doctrine of contribution to the contract for purchase, although the disagreement of the other judges was on the facts and not the principle. As applied to mortgage payments, the doctrine makes sense. However to apply it to a contract of purchase is to treat such a contract as a debt in the same way as co-sureties or

co-insurers may be liable when a claim is made, or as joint tenants or tenants in common who incur co-ordinate liabilities arising out of the ownership of the property. A contract of purchase, which gives to the parties rights to enforce the transfer of property as well as obligations to take a conveyance or pay damages, is not quite of the same genre as a mortgage liability or other such debt. Applied alongside the other possibilities regarding the purchase of the property, it brings unnecessary complexity.

If presumptions are based on common experience, then it may well be that the courts should start with a presumption expressed in the alternative where property is held in joint names. Either a resulting trust is to be presumed, or the parties intentions should be deemed to be reflected in the title. Deane J suggested in *Calverley v Green* that between these two alternatives, the presumption of resulting trust had little if any practical significance beyond that of determining the onus of proof.[45]

There are good reasons for suggesting that any other claims as to the intentions of the parties should be provable only by clear evidence. This would be one way of dealing with Gibbs CJ's right of contribution in regard to the contract of purchase, although it would involve creating an exception to the present rule by which the right arises subject to contrary intent. Similarly, a finding that the parties intended to hold the property in shares other than in accordance with their contributions or the legal title, should only be made by clear evidence. Such intentions would be enforced as an oral express trust on the principles of *Allen v Snyder*. A rationalisation of the possibilities in regard to the moneys paid at the time of purchase would go some way to bringing certainty and predictability to the law.

(e) Accounting for post-conveyance contributions

In *Muschinski v Dodds* the issue did not arise as to payments in reduction of the mortgage, since Mrs Muschinski was able to buy the land outright. This issue was however important in *Calverley v Green* where originally Mr Calverley did not intend Miss Green to be a signatory to the mortgage. In the events which transpired, Mr Calverley paid all the mortgage instalments. In terms of the parties' domestic arrangements, this was partially, if not totally, offset by Miss Green's payments for household provisions.

In *Calverley v Green* all of the judges assumed that Mr Calverley had a right of contribution against Miss Green for the proportion of the mortgage instalments which he had paid over and above his half-share.[46] On the other hand, two judges assumed that Miss Green was entitled to an occupation rent for her share of the property since Mr Calverley was in sole occupancy after she left.[47] It appears therefore that having ascertained the beneficial interests of the parties in the property in accordance with their financial contributions, the court must go on to apply the rules regarding accounting between co-owners, if indeed both parties are held to have a share of the beneficial ownership in equity.

45 (1984) 59 ALJR 111, 122.

46 Ibid 114-115 per Gibbs CJ, 119 per Mason and Brennan JJ, 120 per Murphy J and 123 per Deane J.

47 Ibid 115 per Gibbs CJ, citing *Bernard v Josephs* [1982] Ch 391, and 120 per Murphy J.

The doctrine of contribution, discussed above, is clearly a starting point.[48] In regard to mortgages the doctrine can only be applied when one party has paid more than his or her fair share of the total debt; it does not arise in respect of each mortgage instalment unless each can be regarded as an independent debt.[49] If the rule were otherwise there would be potentially a multiplicity of actions. It follows that the doctrine is only applicable where the mortgage debt has been discharged, whether or not this involves the sale of the property. Only then can the court say how much each party has contributed to paying off the total debt, taking into account the fluctuating interest rate. In many cases this will give rise to difficult questions of proof, since the parties may not have kept records of the instalments which each paid.

A further question arises as to when the right of contribution will be available to a party. Since it is subject to the contrary intent of the parties,[50] evidence may be presented to show that this was not their intention. As in other contexts, this may involve the court in more imputation than inference since there is reason to suppose that in most of these cases the parties did not consider anything more than title.

The matter was not argued in *Calverley v Green*, and hence the court avoided firm conclusions on the facts of the case, leaving it to the parties to come to an agreement.[51] Nonetheless, a strong case could be made for saying that Mr Calverley should not have been entitled to contribution from Miss Green. The court did not take into account that Miss Green had borne the main costs of the household, since the housekeeping allowance she received represented an ever decreasing proportion of the total expenditure necessary.[52]

It would be a realistic assumption in cases like this to say that the parties did not intend a right of contribution. Even if their contributions to the household are not equal, one may accept that in relationships of this kind, the parties frequently see themselves as supporting each other, without demanding reimbursement.

If it is accepted that a right of contribution will not normally be implied where the parties have both contributed substantially to the household finances, then the analysis supplied in *Calverley v Green* will go far to resolving the problems arising from 'indirect' contributions to the purchase of property. In cases such as *Calverley v Green* itself, where one party pays the mortgage instalments and the other the household bills, the remedy will be no different than if each had paid exactly half of the mortgage instalments. As such a division of responsibility for paying the bills is not uncommon, this seems a desirable result.

It has been pointed out that the accounting between co-owners should not be limited to a right of contribution for mortgage instalments and an occupation rent.[53] Co-owners are entitled to share in any rents and profits attributable to the property. A co-owner may also be able to claim

48 See further, Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, (2nd edn 1984) ch 10.
49 *Stirling v Burdett*, [1911] 2 Ch 418.
50 (1984) 59 ALJR 111, 119, per Mason and Brennan JJ.
51 Ibid.
52 Ibid 111 per Gibbs CJ.
53 Evans, 'De Facto Property Disputes: The Drama Continues' (1986) 1 AJFL 234 at 241-243.

the cost of improvements and perhaps the other outgoings on the property such as rates and body corporate levies.[54] The accounting between the parties may thus be a complex process in certain situations.

4. MORTGAGE INSTALMENTS AND SUBROGATION

The doctrine of contribution is applicable only where the parties are jointly and severally liable either for a contract of purchase or for a mortgage. The doctrine has no application where property is only in one name and only one person is liable for the mortgage. This will be the case where the parties' cohabitation begins after the property has been purchased but continues for a substantial period when the mortgage debt is being reduced.

The approach adopted in *Calverley v Green* of analysing a party's right to reimbursement for mortgage instalments may however be applied to cases where only one person is liable. This is by means of the doctrine of subrogation, which was discussed by Bagnall J in *Cowcher v Cowcher*.[55] He pointed out that 'he who discharges another's secured obligation, wholly or in part, is entitled to be repaid out of the security the amount of the sum or sums paid by him'.[56] A contributing party, who pays the mortgage instalments, is subrogated to the extent of his or her payments to the rights of the mortgagee. The right of subrogation is however subject to contrary intention. If there is a clear intention that the party paying the mortgage instalments intended to make a gift of them, then the contributor has no right to subrogation or reimbursement. A similar right might be achieved in quasi-contract.[57]

These doctrines do not assist the plaintiff who has met other substantial household expenses such as the purchase of food and clothing, or the payment of gas and electricity bills. These are termed the substantial indirect contributions to the purchase price of which account is taken in the English cases which follow *Gissing v Gissing*.[58]

Nonetheless, such contributions do not necessarily indicate an intention that one party should acquire a beneficial interest in the property or otherwise be entitled to reimbursement.[59] Where there is sufficiently clear evidence of intention there may be an implication of a trust or an estoppel as discussed below. In appropriate cases — where it was only as a matter of convenience that one paid the household expenses while the other paid the mortgage instalments — the doctrine of unconscionability which emerges from *Muschinski* and *Baumgartner* might be invoked.

This doctrine is very different to that of *Calverley v Green*, although

54 Ibid 241. See also Meagher, Gummow and Lehane, above n 48 at ch 25.
55 [1972] 1 All ER 943.
56 Ibid 951, citing *Pitt v Pitt* (1823) Turn & R 180 and *Outram v Hyde* (1875) 24 WR 268.
57 Where a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in it being done, taking the benefit of it when done, he will be taken impliedly to have requested it; *Re Cleadon Trust Ltd* [1938] 4 All ER 518, 534, per Scott LJ citing Smith, *A Selection of Leading Cases* (13th edn 1929) 156. The implied contract theory of quasi-contract may now be superceded by a broader theory of unjust enrichment. See *Pavey & Matthews Pty Ltd v Paul* (1987) 61 ALJR 151 per Deane J.
58 This is discussed in numerous cases, including *Burns v Burns* [1984] Ch 317.
59 Eg *Richards v Dove* [1974] 1 All ER 888, in which the evidence indicated to the judge that no sharing was intended.

it operates from the same basic premise that fairness involves giving to each party benefits in rough proportions to their financial contributions. *Calverley* offers a formulaic approach, which, if it runs into difficulties, does so because of the need still to determine the intentions of the parties in regard to the contributions they made to the family finances. Hence the adoption of stronger presumptions is important. The doctrine of unconscionability which is developing in *Muschinski* and *Baumgartner* views the course of the relationship as a whole and in retrospect.

5. MUSCHINSKI, BAUMGARTNER AND THE ANALOGY TO A FAILED JOINT VENTURE

Deane J in *Muschinski v Dodds*, with whom Mason J agreed, could not accept Gibbs CJ's interpretation of the facts and devised his own solution, rooted in the conscience of the court, imposing a constructive trust by analogy to the failure of a partnership or joint venture. In so doing, he sought to distance himself from Lord Denning's 'new model constructive trust' imposed after examination of all the circumstances, 'whenever justice and good conscience require it'.[60]

Nonetheless, he intended to extend the traditional boundaries of the constructive trust in Australian law. He avoided the distinction which is often made between the constructive trust as a remedy and as an institution, by pointing out that in its origins, the trust was remedial. Over time, the situations when a trust would be recognised became standardised and passed into conveyancing practice.[61] The constructive trust, while sharing some attributes of an express or implied trust, retained its remedial character inasmuch as it was imposed in the absence of intention. In its modern context it is a 'remedial institution' imposed to 'preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle'.[62] He stressed, however, that the constructive trust is not a means for indulging 'idiosyncratic notions of fairness and justice'. It can only be imposed on established equitable grounds or by legitimate processes of legal reasoning.[63]

In the instant case he found that principle underlying the rules applicable to a failed partnership or joint venture. Where partnerships or joint ventures break up without attributable blame the courts consider it inappropriate to let the loss lie where it falls. Rather, the parties are entitled to be repaid their respective capital contributions.

In explaining this rule he made reference to *Attwood v Maude*.[64] In that case the plaintiff and defendant entered into a partnership as solicitors for a term of seven years. Since the plaintiff was much less experienced than the defendant he was required to pay to the defendant a premium of 800*l*. After two years the partnership came to an end and

60 *Hussey v Palmer* [1972] 1 WLR 1286, 1290.

61 Ibid 64. For a jurisprudential commentary on this see Stone, 'The Reification of Legal Concepts: Muschinski v Dodds' (1986) 9 UNSWLJ 63.

62 Ibid 64-65.

63 Ibid 65. This echoes the criticisms made of Lord Denning's approach. Professor Maudsley commented: 'It is possible to read into recent decisions a rule that in cases where the plaintiff ought to win, but has no legal doctrine or authority to support him, a constructive trust will do the trick.' Maudsley, 'Constructive Trusts' (1977) 28 NILQ 123.

64 (1868) 3 Ch App 369.

the plaintiff demanded the return of a proportionate part of the premium. The court, applying equitable principles, held that the plaintiff was entitled to the return of the appropriate portion of the premium since he was not responsible for the dissolution of the partnership. In such circumstances the retention of the premium would be unconscionable.

Deane J found a similar principle at work in the American law of contractual joint ventures.[65] In the event of a premature collapse of the joint venture the parties are entitled to the proportionate repayment of their capital contributions to the extent that joint funds allow. These rules, Deane J argued, were instances of a more general principle of equity which is to be found expressed also at common law in the action for money had and received and in the doctrine of frustration of contracts.[66] This principle he said,

> 'operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.'[67]

In applying this principle to the facts of this case Deane J did not suggest that there was in this case a contractual joint venture or partnership; he preferred to call it a consensual joint venture.[68] Although it was a mixture of a commercial and personal relationship, he saw no reason why the principle drawn from the commercial realm should not be applicable. It was clearly unconscionable for Mr Dodds to seek to retain his half-interest in the property when Mrs Muschinski had contributed approximately 10/11ths of the total amount expended in the purchase and improvement of the house and land.[69]

The result was that Mr Dodds should not be entitled to retain his beneficial interest in half of the property without crediting Mrs Muschinski with her contributions. In an order with which Mason J and Gibbs CJ concurred, he ordered that the parties should hold their respective interests on trust to repay to each his or her respective contribution, and as to the residue to them both in equal shares. The constructive trust was imposed only from the date of judgment of the court. On the basis that Mr Dodds had sought unconscionably to maintain his right to a half-share in the property without accounting to Mrs Muschinski for her capital input, the costs of the case were awarded against him.[70]

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65 Australian law does not have a distinct law of joint ventures as such. According to the High Court in *United Dominions Corporation v Bryan Pty Ltd* (1985) 157 CLR 1, 10-11, the term 'joint venture' does not have a settled meaning. The obligations of the parties must be examined to determine whether there is a partnership, or merely a non-fiduciary contractual relationship.

66 (1986) 60 ALJR 52, 67.

67 Ibid.

68 Ibid, 66.

69 Ibid 68.

70 Ibid 69.

(a) The scope and limits of the doctrine

Deane J's judgment must now be read in the light of *Baumgartner v Baumgartmer*[71] in which the new doctrine was applied. A number of questions remained after *Muschinski* as to the scope and limits of the doctrine, some of which are answered by the High Court's application of the doctrine in *Baumgartner*. The judgments in that case however did not develop *Muschinski* through careful processes of legal reasoning. Rather, the *Muschinski* doctrine was applied to a fact situation which was wholly different from that in the former case; in interpreting the ratio decidendi of *Baumgartner* the effect of the case is to remove from Deane J's judgment most of the limitations which might have been drawn from the analogy of the joint venture. The result is a broad doctrine based on notions of unconscionability which is more applicable to the domestic context in which most disputes between de facto spouses occur. At the same time, the absence of clear legal reasoning in *Baumgartner* leaves lower courts without a clear notion of when the conduct of one party will be deemed unconscionable.

Baumgartner was a case brought from the New South Wales Court of Appeal,[72] which had decided the issue on the principles of *Allen v Snyder*. The parties lived together in a de facto relationship for four years. When the relationship first began in 1978, Mr Baumgartner, the appellant, lived in a home unit. About a year after the couple began cohabiting he bought land in his own name. Building was commenced and in 1980 the home unit was sold and the couple moved into the new property. The respondent, who in the course of the relationship changed her name to Baumgartner, contributed all her earnings to a common pool. From this the mortgage instalments were paid on the home unit and later on the new property. The other household expenses were paid from the common pool also. The evidence of the parties' intentions in respect of the property was unclear and conflicting in certain respects. This led the judge at first instance to deny the respondent's claim that there was a trust. This was overturned by the New South Wales Court of Appeal which decided that the parties did intend to hold the property as tenants in common in equal shares.

The High Court decided that the respondent was entitled to a share of the property, but not for the reasons given by the Court of Appeal, and not in the same shares. The leading judgment was given by Mason CJ, Wilson J and Deane J jointly. Toohey J and Gaudron J delivered concurring judgments. The High Court held that the Court of Appeal was wrong to overturn the trial judge's findings on the lack of intention to create a trust, since this depended on an assessment of the credibility of witnesses.[73]

They proceeded rather on the basis that it was unconscionable for the appellant to deny the respondent a share of the property, given that over a four year period the parties had pooled their resources to meet all the family expenses, including property. The land was acquired and the house was built in the context of and for the purposes of the relationship. The earnings were pooled for their mutual security and benefit.[74] They concluded that the parties should hold the property in

71 (1988) 62 ALJR 29.
72 [1985] 2 NSWLR 406.
73 (1988) 62 ALJR 29, 33.
74 Ibid 34.

the proportions, approximately calculated, of their contributions to the family finances. Working on figures agreed by the parties, they concluded that the appellant and respondent had contributed to the household in 55% and 45% shares respectively. Apparently exercising a discretion associated normally with statutory distribution schemes, they included in her contribution a sum of $3,000 which is what she would have earned in a 3 month period if she had not been at home giving birth to their child and caring for him.[75] The appellant was, however, given credit for the equity which was built up in the home unit before the couple began to cohabit, for the mortgage payments made subsequently and for furniture which the respondent removed from the home when she left.[76]

The decision was based on Deane J's judgment in *Muschinski* but did not attempt a new exposition of the principle. One must still look to *Muschinski* therefore, for the legal exposition of the doctrine, while analysing its application in *Baumgartner* to determine how the High Court might apply *Muschinski* in the future.

Much still remains unsettled about the scope and limits of the *Muschinski* doctrine. The questions which arose from Deane J's judgment in that case concerned the meaning of 'joint relationship or endeavour', the situations in which retention of beneficial ownership will be deemed unconscionable, the meaning of attributable blame, the remedies available, and the sort of contributions which may be included.

(b) Joint relationships or endeavour

The first question involves identifying the nature of the joint relationship or endeavour which will attract the operation of the doctrine. Clearly, *Muschinski v Dodds* was a case where, although there was no contractual joint venture as such, there was a strong commercial element to the endeavour, and one in which Mr Dodds had agreed to make a financial contribution approximately equivalent to that of the plaintiff.

Deane J's language roamed wider than this however, by speaking of a 'joint relationship'. The principle would apply where 'money or other property contributed by one party on the basis and for the purposes of the relationship' would be enjoyed in circumstances which were not intended by the contributing party.

Clearly, *Baumgartner* indicates that there is no need for a commercial element, since the doctrine was applied to the purchase of land and the building of a home for the family to live in. The question still remains whether any substance remains in the analogy of the partnership or joint venture. Does the doctrine only apply to cases where the parties pool their resources in pursuit of a common goal, as in *Baumgartner*, or where

75 Ibid 31, 34.

76 Ibid 35. The mathematics of this however, are mysterious. Mr Baumgartner was allowed the proceeds of sale of his home unit, minus the amount of the mortgage instalments paid from the pooled earnings during the period of cohabitation. This assumes that paying mortgage instalments is like putting money in a savings bank. Even still, he should only have been required to restore half the instalments. Mortgage payments, however, do not convert directly into the equity on sale. Most of each instalment constitutes interest, and is as irrecoverable as rent. If he lost out here, Mr Baumgartner benefited from the other two adjustments. He was allowed credit for all the mortgage instalments paid since she left, subject to an occupation rent. He was also given credit for the entire value of furniture which she removed from the house despite the fact that the court was prepared to assume they were purchased from joint funds.

a financial arrangement has been made between the parties which has not been fulfilled, as in *Muschinski*? Clearly in both these cases there was an element of joint endeavour, in which both parties either contributed resources or agreed to do so. The joint pursuit of an agreed financial goal to which both parties contribute is the essence of the analogy with the partnership and joint venture. In both *Muschinski* and *Baumgartner* the financial goal was the ownership of property.

Deane J's doctrine has been applied, however, where there has been no element of joint endeavour, but where in essence one party has made a gift to the other by building a house on her land without contemplating the later breakdown of their relationship. This was the position in the New South Wales case of *Nichols v Nichols*.[77] In this case Needham J applied Deane J's reasoning in *Muschinski v Dodds* to a situation where a wealthy Sydney businessman built a luxurious home on Lord Howe Island for the benefit of his mistress and their twin sons.

The plaintiff, a married man, began a sexual relationship with the defendant in 1969. The twins were born in 1972, and in 1973 the plaintiff purchased a flat in Sydney for the defendant and their two sons to live in. The wife was not aware of the relationship until 1980. After finding out, she came to an arrangement with the plaintiff that he would live with her for a few months of the year and the remainder with the defendant. The couple had discussed living together on Lord Howe Island where she had grown up. The defendant's father transferred some land to her in 1980 with the intention that this land should be used to build a home for the two of them. Building commenced in March or April 1981 at the plaintiff's expense. In December 1981 the defendant moved into the house with the children, although at that stage the house was still unfinished. In all, the plaintiff spent nearly $200,000 on the house, which was by the standards of the island large and luxurious. On February 26 1982, however, the defendant informed the plaintiff that she was in love with another man and that their relationship was over.

Needham J, applying *Muschinski v Dodds*, said it would be unconscionable for the defendant to rely on her sole legal title. She could not keep the property which had been built at the plaintiff's expense in circumstances which had not been contemplated by the parties. The home was built with the intention that he would live with her in the home, at least for part of the year, and perhaps permanently if the plaintiff obtained a divorce. On the other hand, it was also the plaintiff's intention that he should provide a home for the defendant and their two sons to live in.

Needham J decided that the house should be sold, and that the plaintiff was in principle entitled to the proceeds of sale. However, to give effect to his intention to provide her with a home she was entitled to retain from the proceeds of sale enough to provide a house adequate to meet the family's needs according to the ordinary standards of living on the island. Surprisingly, Needham J's reasons for decision did not refer to the fact that the land was in fact hers, and its value was not specifically restored to her. Furthermore, the definition of what was a house adequate to meet the family's needs was left to the lawyers to resolve.

77 [1987] DFC 95-042.

This case indicates how Deane J's doctrine may now be applied in situations which are far removed from the 'consensual joint venture' of *Muschinski*. *Baumgartner* and *Nichols* suggest that all that is left of the analogy is Deane J's statement that the remedy would be available where money or property contributed by one party for the purposes of the relationship would otherwise be enjoyed in circumstances which were not intended by the contributing party. As Toohey J suggested, this notion of unconscionability has many features in common with the broad doctrine of unjust enrichment applied in Canada.

(c) Unconscionability

Both *Baumgartner* and *Nichols* reveal the potential flexibility of Deane J's doctrine and raise questions about the meaning of unconscionability; the essence of the doctrine is to prevent the retention of property where to do so would be unconscionable. It is apparent from Deane J's judgment, however, that a finding of unconscionability giving rise to a constructive trust by analogy to the breakdown of a joint venture produces different results from such a finding in other areas of equity where notions of unconscionability are invoked. In other areas, a finding of unconscionable conduct will lead to the setting aside of a contract or gift[78] or the imposition of a constructive trust to give effect to an agreement.[79] Either the contract is set aside or it is not. Either the oral trust is enforced (in spite of the absence of writing) or it is not.

By contrast, Deane J's judgment may be interpreted to say that the remedy depends on the extent of the unconscionability. *Muschinski v Dodds* was a case where there was an analogy to be drawn with the frustration of a contract. Both the personal relationship and the commercial venture collapsed before the bargain could be fulfilled. Deane J suggested the result might have been different if their relationship had continued over a long period of time:

> 'If the personal relationship had survived for years after the collapse of the commercial venture and the property had been unmistakenly devoted to serve solely as a mutual home, any assessment of what would and would not constitute unconscionable conduct would obviously be greatly influenced by the special considerations applicable to a case where a husband and wife or persons living in a de facto situation contribute, financially and in a variety of other ways, over a lengthy period to the establishment of a joint home. In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, homemaking and family care.'[80]

This could mean one of two things. Firstly it could mean that in certain cases it will not be unconscionable for a party to insist on his or her legal title, leaving the other without a right to reclaim capital contributions. Alternatively, it may mean that the extent of the repayment of capital contributions will depend on the level of the recipient's non-

78 See eg *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.
79 Eg the enforcement of a fully secret trust, *McCormick v Grogan* (1869) LR 4 HL 82, and the enforcement of an oral agreement, *Bannister v Bannister* [1948] 2 All ER 133.
80 (1986) 60 ALJR 52, 68.80a

financial contributions to the relationship through such means as family care.

The former interpretation is perhaps more consistent with the operation of notions of unconscionability in other contexts. The latter interpretation however finds support in Deane J's general statement of the equitable principle where he says:

> 'The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit to the extent that it would be unconscionable for him so to do.'[80a]

Later in his judgment Deane J says that

> 'the extent to which the relevant principle operates to qualify legal entitlement is only that to which it appears that it would be positively unconscionable for one person to retain the benefit of property contributed by the other party'.[81]

He continues by suggesting that in some circumstances the major contributor should obtain a correspondingly greater share of the surplus remaining after the repayment of the respective contributions.

If this latter interpretation is right then it suggests that the remedy is really in the discretion of the court to set the level of relief according to the extent to which retention of a benefit is unconscionable. This may involve considerations similar to those which are laid down by the De Facto Relationships Act.

This is a very different result to other cases of unconscionability. The result in such cases is 'all or nothing'. The idea that the remedy should be scaled according to the extent to which retention of a benefit is unconscionable is not well established in equitable principle, although it echoes the modern law of proprietary estoppel in which the remedy is 'the minimum equity to do justice'.[82]

In avoiding, for the time being, a general doctrine of unjust enrichment, Deane J sought to enunciate a narrower doctrine, involving the reimbursement of contributions where a quid pro quo has not been satisfied. *Baumgartner* indicates that the notion of premature breakdown or frustration is not essential to the doctrine. *Baumgartner* was not a case where the respondent would have necessarily been given a share of the property if the relationship had continued for a longer time. The appellant had only conceded at trial that he would put her name on the title if they got married, and Rath J at first instance favoured his evidence.[83] Separated from the context in which the *Muschinski* doctrine was expounded, we are left wondering when a finding of unconscionability will be made.

The court in *Baumgartner* explains the notion of unconscionability as applied to the facts of that case. After noting that the parties pooled their resources and that there was no evidence of a gift on her part, or that she contributed her earnings as a form of rent, the majority comment:

> 'The case is accordingly one in which the parties have pooled

80aIbid 67.
81 Ibid 58.
82 Per Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179.
83 (1988) 62 ALJR 29, 32.

> their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child . . . In this situation the appellant's assertion that the Leumeah property which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.'[83a]

The ratio decidendi of *Baumgartner* might best be defined by saying that it is unconscionable to deny a partner's claim to a share of the equity in rough proportion to his or her contribution where the parties have pooled their resources for the purpose of their relationship which includes the acquisition of property, and where there is no evidence that the claimant's contribution amounted to rent or the payment of living expenses. *Baumgartner* must stand therefore either for the proposition that a constructive trust will be imposed where resources are pooled despite the intentions of the party having legal title, or that it will be imposed unless the legal owner can prove affirmatively that the money provided was a gift or rent.

Baumgartner does not give much guidance as to when a finding of unconscionability will be made outside of the circumstances of a pooled fund. *Nichols* is of course an example where no pooling occurred and neither was there the premature breakdown of a joint endeavour.

It is submitted though that the notion of unconscionability must be treated with caution as applied to de facto relationships. As was noted earlier, couples live together without getting married for a great variety of reasons. Sometimes no long-term commitment is intended; in other cases, as in *Baumgartner*, one or both parties is unsure about whether he or she wants the commitment of marriage. In still other cases, one or both parties may intend a long term relationship while seeking to avoid the legal consequences of marriage.

There are difficulties in assessing unconscionability in de facto relationships without taking into account the reasons why the couple did not get married, and how they perceived their relationship. Even financial contributions are, in this respect, equivocal. The High Court quite rightly focused on the pooling of resources for the purposes of the relationship and the absence of evidence that the contributions were a form of rent. Nonetheless, the trial judge apparently accepted Mr Baumgartner's evidence that he only intended to put her name on the title if they made the commitment of marriage.

In the circumstances where one party hands over substantially all her paycheck to a pooled fund it is no doubt legitimate to grant a share of the beneficial interest. Such a result would not necessarily be just when no such pooling occurred. Despite the pressure, noted earlier, that cohabitation should give rise to beneficial ownership in a home, there may be circumstances where to give a party such a share would in itself be unconscionable. The intentions of the legal owner may have been that he or she did not wish to share the equity in the home, and that the

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83aIbid 34.

other party's contributions to the household were intended only as assistance with living expenses and some of the costs of home ownership in lieu of rent. Frequently, such intentions in regard to the acceptance by one party of the other's financial contributions are more implicit than explicit, but where the relationship has been founded on this sort of basis, courts should be cautious before declaring such intentions on the legal owner's part unconscionable.

If *Baumgartner* is subsequently applied to such a relationship then the courts may be making value judgments which do not adequately respect individual autonomy, and which assume that de facto relationships both can and should be treated the same as marriages as far as property rights are concerned. The doctrine of unconscionability emerging from *Baumgartner* therefore needs to be defined carefully. The approach taken by *Calverley v Green* which looks to the intentions of the parties in respect of specific types of contributions may be preferable at least as a starting point. When this analysis has been made, the court is in a better position to determine whether there is any need to invoke a residual doctrine of unconscionability or estoppel in order to do equity.

As Toohey J noted, the High Court's doctrine of unconscionability has much in common with the doctrine of unjust enrichment as expounded by the Supreme Court of Canada in *Pettkus v Becker*.[84] Indeed, shorn of the limitations which Deane J imposed in *Muschinski* involving the analogy with the breakdown of a joint venture, it may be that we are now seeing the emergence of a generalised doctrine of unjust enrichment in a domestic context. It remains to be seen whether the courts, in applying this doctrine of unconscionability, will look to the Canadian cases on unjust enrichment for guidance.

(d) Attributable blame

A further question arises as to the meaning of 'attributable blame'. The principle which was expounded in *Muschinski* operates where the breakdown of the relationship or joint endeavour occurs without attributable blame.[85] Presumably the relevant fault here is that of the claimant who will be denied a remedy if he or she is held responsible for the breakdown of the relationship. This requirement is derived from the analogy with partnerships and joint ventures; in *Attwood v Maude* it was stated that a fixed term partner claiming the return of a proportion of his premium would not succeed if he is himself in breach of the partnership articles, and is himself the author of the dissolution.[86] A similar principle operates in the American law of joint ventures.[87]

This requirement does not transfer easily to the context of de facto relationships where the reasons for the breakdown of relationships are varied and complex. The Family Law Act 1975 has abandoned any question of fault either as a requirement for obtaining a divorce or in the allocation of property on breakdown. The attribution of blame does

84 (1980) 117 DLR (3d) 257.
85 (1986) 60 ALJR 52, 67 per Deane J.
86 (1868) 3 Ch App 369, 372.
87 A party may only regain his or her share of the capital advanced for the joint venture if he or she is not responsible for unilaterally terminating the relationship. *Pennington v Simmons* 138 So 2d 189 (La App 1962); *Roundup Cattle Feeders v Horpestad* 603 P 2d 1044 (1979).

not readily assist the burial of dead marriages. There is then difficulty in explaining and applying 'attributable blame' in this context. It is understandable in commerce where the relationship will be governed by a contract or by partnership articles. No such legal obligations are to be found governing the relationship of the parties in a quasi-marital relationship other than those applicable between all citizens.

It has been suggested that conduct which could be characterized as equitable fraud could disentitle a claimant to benefits.[88] Equitable fraud, however, is not a concept which has any meaning when what is being discussed is the breakdown of a quasi-marital relationship. It is not a concept which roams at large and which can be invoked to censure any conduct of which a court disapproves.[89] The notion of attributable blame must remain something of a mystery then. Its utility in the context of the breakdown of most de facto relationships is questionable.

Baumgartner sheds little light on the meaning of attributable blame, since the analogy with the doctrine of frustration of contracts is abandoned, and as *Muschinski* is applied by the majority it neither matters whether the relationship has broken down nor how it did so. The unconscionability arises not from the failure of one party to fulfil his or her side of the bargain, but from the denial of a share in the beneficial ownership of property which has been acquired, at least in part, from pooled resources. Only Gaudron J mentioned the requirement of a breakdown without attributable blame, and she was content to assume that no blame attached to either party.[90] It is likely that the notion of blame will quietly disappear as a meaningful requirement.

(e) Remedies

A question further arises as to the nature of the remedy to be granted when the doctrine is invoked. In *Muschinski v Dodds* it was to repay to each, his or her capital contributions, and this was supported by a constructive trust. *Baumgartner* of course goes beyond *Muschinski* in that the remedy isn't the repayment of capital contributions at all but rather is the granting of a beneficial interest. It was unclear why a constructive trust was necessary in *Muschinski*, unless it was to allow for enforcing the sale of the property. The same result could have been achieved by a charge.

The order was framed so that the imposition of the constructive trust was dated only from the time of the publication of the judgments. This was so that third parties should not be prejudiced. While this was no doubt appropriate, it reduced the significance of the trust. It is submitted that the imposition of a constructive trust is not a necessary result of the adoption of Deane J's principle.[91] Consideration should instead be

88 Evans, above n 53 at 246-247.

89 See further Meagher, Gummow and Lehane, above n 48 at ch 12.

90 (1988) 62 ALJR 29, 37.

91 A constructive trust was claimed in the case and a constructive trust would be available in similar circumstances in the United States since joint venturers are treated as fiduciaries. *Allen v Kent* 136 A 2d 540 (1957). Joint venturers do not form a category in which such a relationship will be presumed in Australia; *United Dominions Corpn v Brian Pty Ltd* (1985) 157 CLR 1. There was no suggestion of a fiduciary relationship between the parties in *Muschinski v Dodds*, although in any event Deane J considered that the finding of a fiduciary relationship is not essential to the imposition of a constructive trust; [1986] 60 ALJR 52, 66.

given in each case as to whether a proprietary remedy is necessary to support the repayment of the capital contributions in a case where no beneficial interests are being conferred.

(f) Non-financial contributions

Baumgartner in particular raises questions as to the extent to which the court will take into account non-financial contributions by a spouse to the household. *Baumgartner* builds on the statements of Deane J in *Muschinski*, already noted, that homemaking and family care would be relevant factors in assessing whether the retention of benefits is unconscionable in long-lasting relationships.

Mason CJ and Wilson and Deane JJ took this further in *Baumgartner* by giving Mrs Baumgartner credit for the 3 months she was off work having a baby.[92] Although it is not explicit in the judgment, the $3,000 credit was presumably calculated on the basis of her normal monthly earnings. In dicta their Honours went much further than this, especially in their discussion of how the parties' entitlements should be calculated. The court indicated a broad approach of saying equality is equity.[93] This is ironic given the court's repudiation of equality as a presumption when dealing with ceremonial marriages.[94] In fact, the Court did make allowances for the disparity in the parties' financial contributions. They noted the fact that, even taking into account what Mrs Baumgartner would have earned but for her pregnancy, Mr Baumgartner contributed nearly 25% more.[95] There was nothing to indicate that this was offset by Mrs Baumgartner's greater contribution in other areas.[96]

Gaudron J also indicated her support for at least inquiring whether non-financial contributions should be taken into account.[97] Taken as a whole, the court appears to favour that such contributions to the household should be considered in at least two ways. Firstly, in calculating contributions to a pooled fund, financial credit should be given for temporary absences from work associated with the life of the family. Secondly, non-financial contributions may, in certain circumstances, offset a deficiency of financial contributions and may allow the court to treat the contributions as equal.

Baumgartner indicates that the court is favourably disposed to making discretionary judgments involving the assessment, in monetary terms, of a party's contributions as homemaker. While this will no doubt be welcomed by many, it does raise the problem of assessing the role of the homemaker, especially where there is a considerable disparity in

92 (1988) 62 ALJR 29, 31, 34.

93 'Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common, subject to any adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind.' (1988) 62 ALJR 29, 34 per Mason CJ and Wilson and Deane JJ.

94 *Mallett v Mallett* (1984) 156 CLR 605. The High Court retreated somewhat from this position in *Norbis v Norbis* (1986) 60 ALJR 335. The Full Court of the Family Court should not lay down binding principles as to how a discretion should be exercised, but it may give 'guidelines' (per Mason and Deane JJ).

95 (1988) 62 ALJR 29, 34.

96 Ibid 35.

97 Ibid 37.

financial contributions. Equitable principle will certainly give no guidance, since the court's inspiration comes from statutory jurisdictions. Lord Denning's new model constructive trust is certainly a precedent for remedies which do not coincide with financial contributions, but the High Court has been at pains to disavow this line of authority.[98] As suggested above, the court should also look closely at the nature of the parties' relationship before formulating remedies which draw on the reasoning associated with the dissolution of marriages.

6. THE FUTURE OF THE COMMON INTENTION TRUST

Muschinski and *Baumgartner* clearly signal a new approach to the resolution of property disputes between de facto spouses, and they share in common with *Calverley v Green* an approach which looks closely at the financial contributions of the parties. This is very different to the approach taken in *Allen v Snyder* in which the dominant issue is to determine whether there was a common intention to create a trust. Such an intention need not correspond at all with the financial contributions of the parties.

Calverley v Green and *Muschinski v Dodds* clearly left open the possibility that a trust founded on the principles of *Allen v Snyder* might be applicable.[99]

It may appear at first sight that *Baumgartner* constitutes a disapproval of this line of cases. Commenting that the New South Wales Court of Appeal had been influenced by *Allen v Snyder*, Mason CJ and Wilson and Deane JJ remarked that in so deciding the court had not had the benefit of the High Court's decision in *Muschinski v Dodds*.[100] This remark, and the later disapproval of the dicta of Glass JA in *Allen v Snyder* was limited to the question of whether a constructive trust can arise on the basis of financial contribution, irrespective of a subjective intention to create a trust.[101]

The court did not deny the central proposition of *Allen v Snyder* that an oral declaration of trust can be enforced where a party has taken conveyance of the property as a trustee, and it would be fraudulent to deny the trust. Nor did the High Court comment on the line of cases following *Hohol v Hohol* in which a constructive trust has been imposed because a party has relied to his or her detriment on the common intention.[102] The common intention trust then remains as yet another legal category in which the arrangements of the parties can be analysed.

The common intention trust is of course founded on the decisions of the House of Lords in *Pettitt v Pettitt* and *Gissing v Gissing* which have given rise to a number of interpretations. *Allen v Snyder* and *Hohol v Hohol* represent the two interpretations which have gained currency in Australia. The first treats the common intention trust as a species of express trust, although Fullagar J in *Thwaites v Ryan*[103] suggested that

98 In particular, Deane J in *Muschinski v Dodds*.
99 *Calverley v Green* (1985) 59 ALJR 111, 115, 118.
100 (1988) 62 ALJR 29, 32.
101 Ibid 33.
102 *Hohol v Hohol* [1981] VR 221; *Higgins v Wingfield* [1987] VR 689. *Grant v Edwards* [1986] Ch 638 is a decision of the English Court of Appeal which adopts similar reasoning to *Hohol*.
103 [1984] VR 65.

the courts have often been willing to find the requisite common intention on much more slender evidence between couples in a quasi-marital relationship than would satisfy them otherwise of an oral trust. Subject to this, it is consistent with equitable principle that the court should enforce a trust which was not in writing in order to prevent fraud.[104] The second explains the common intention trust in terms of a constructive trust arising out of detrimental reliance on a common intention.[105] It is unclear in the cases whether this is something different to the express trust enforced to prevent fraud or not. As will be discussed, the reasoning has many similarities to estoppel.

Since the High Court has left open the finding of a trust based on common intention the question remains whether it really is a useful approach to the resolution of disputes between cohabiting couples. The High Court has clearly indicated its preference for an approach which looks to the financial contributions of the parties, even if, as *Baumgartner* indicates, they will interpret contributions flexibly.

Socially, the common intention trust has been useful because it has contained the potential to at least afford a remedy to a party who has been encouraged to have an expectation of a beneficial interest, but who has not made large financial contributions to the household. This will often occur in role-divided relationships, especially where the couple care for children.

It is arguable, however, that the common intention trust is not an appropriate means to do equity in such cases, and that the better approach to these cases is to invoke proprietary estoppel. This seems to be the principle lying behind the line of cases following *Hohol v Hohol* and it would be simpler for Australian courts to apply estoppel principles directly, rather than climbing the twin peaks of *Pettitt* and *Gissing* to get there![106]

It is only as an express trust that the common intention trust can be explained consistently with equitable principle where the result does not reflect the contributions to the purchase price or the legal title. Clearly, where there is evidence that a trust was intended then it should be enforced. Nonetheless, a 'common intention' has often been found in situations where the evidence would not normally be sufficient to give rise to a trust. The difficulty with the doctrine is that, as a means of doing equity between the parties, the trust is a constricting concept. There is not a ready correlation between the requirements for a trust, and the intentions of the parties concerned. Furthermore, the trust, as traditionally understood, rests uneasily with the realities of purchasing a home whereby usually the great majority of the purchase price is borrowed on the security of a mortgage and repaid over a period of many years.

The first limitation on the usefulness of the common intention trust arises from the insistence in *Pettitt v Pettitt* and *Gissing v Gissing* that the time for ascertaining the beneficial interests of the parties is at the

104 *Rochefoucald v Boustead* [1897] 1 Ch 196; *Bannister v Bannister* [1948] 2 All ER 133; *Last v Rosenfeld* [1972] 2 NSWLR 923.

105 See cases cited at n 102 and discussed below.

106 The metaphor comes from the judgment of Nourse LJ in *Grant v Edwards* [1986] Ch 638.

time of purchase.[107] The beneficial interests under a trust cannot be left in the air. This may not be an absolute rule. Viscount Dilhorne and Lord Diplock discussed the possibility that a fresh agreement could arise after the conveyance to vary the original beneficial interests in the home.[108] Nonetheless it has been said in England that such evidence will only be found in exceptional circumstances;[109] but whatever the position in England, there are good reasons for suggesting that the common intention trust in Australia is limited in its nature doctrinally to situations where the requisite intention was formed at the time of purchase.

Fullagar J in *Thwaites v Ryan* was strongly of the view that the trust is limited to agreements at the time of the conveyance.[110] In his view, the principle which gives rise to the remedy of a constructive trust comes into play when a person accepts property in a fiduciary capacity. In such an instance, having received the property as trustee ab initio, and never at any stage having been full beneficial owner, he or she is not allowed to deny the existence of the trust by reference to the lack of writing.[111]

Where the alleged common intention is formed after the time of the conveyance, the juridical analysis must be different. The legal owner may, of course, make a declaration of trust, but if voluntary it will not be enforced. Alternatively, there may be consideration, and hence a contract to create a trust. If such a contract is to be enforced, and it is not in writing, then the claimant will be dependent on proving part performance. In Australia, at least, that is not an easy burden to discharge, since *Maddison v Alderson*[112] remains authority. The claimant would thus have to show an act of part performance unequivocally referable to some such contract as alleged.[113] Alternatively, a claim might be founded on an estoppel. As has been suggested above, another approach to this problem would be to find that a party who paid mortgage instalments had a right of subrogation against the legal owner.

The need for the beneficial interests to crystalize generally at the time of purchase means that the court must go back, sometimes many years, in pursuit of that common intention. As is well recognised, such a search is very unsatisfactory. In many cases it is most unlikely that a clear intention has ever been formulated. In other situations, of course, it may be possible to infer the parties' actual intentions at the time of purchase. There may be words expressed, or conduct indicative of the parties' intentions. These however are often in their nature vague, especially in regard to the quantification of the beneficial interests. Oral statements

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107 *Pettitt v Pettitt* [1970] AC 777, 800, 807, 816; *Gissing v Gissing* [1971] AC 886, 898, 900, 902.

108 Ibid 901, 906, 908.

109 *Bernard v Josephs* [1982] Ch 391, 404 per Griffiths LJ. In *Austin v Keele* (1987) 61 ALJR 605, 609, the Privy Council, hearing an appeal from New South Wales, remarked that there is no reason why the common intention trust of *Gissing v Gissing* should be confined to cases where the intention was formed at the time of acquisition. However, this followed from the reinterpretation of the common intention trust as based on proprietary estoppel, discussed below.

110 [1984] VR 65, 91-95.

111 This view has been rejected by Marks J in *Butler v Craine* [1986] VR 274, 284-287. He followed *Hohol v Hohol* [1981] VR 221 in which reasoning akin to proprietary estoppel is apparent (see below). There would be no need for the intention to be at the time of purchase where the remedy is based on an estoppel.

112 (1883) 8 App Cas 467.

113 *Millett v Regent* [1975] 1 NSWLR 62; *Riches v Hogben* [1986] 1 Qd R 315.

are bound to be unreliable. The court may, of course, seek to infer intentions from conduct;[114] however this is more likely to reveal that some sharing was intended than to indicate what share each party was intended to have. It is at the level of quantification that the actual common intention trust is at its most artificial.

The insistence, then, on the parties' intentions at the time of purchase is problematic in the social context in which these cases fall to be decided. It excludes cases where the cohabitation began after purchase, but where both parties contribute to the reduction of the mortgage. It is inadequate to address the reality that contributions to building up the equity in a property may be made over a twenty year period or longer. During this period, the contributions of the parties may vary greatly and so inferences derived from their post-conveyance contributions may be hard to draw.

Further, it cannot take into account a couple's shifting attitudes to the relationship, which may have an impact on their intentions concerning the property. What begins as casual cohabitation may develop into a quasi-marital relationship. Parties who begin by maintaining financial independence in their relationship may change their attitudes when a child is born to them. In such cases, the focus on the couple's intentions at the time of purchase distorts the reality of the situation.

The focus on the common intention of the parties, with its attendant difficulties, has distracted attention from other possible solutions including that of estoppel. It is suggested that the common intention trust should now decline in prominence and be reserved for cases where there was a clear intention at the time of the conveyance that one party should be a trustee in whole or in part for the other. If this occurs then this form of trust will go the same way as the trust for third party beneficiaries of a contract, which was so popular in getting round the doctrine of privity.[115] Although courts showed a willingness to find a trust quite readily in a number of cases, they eventually interpreted the requirements for a trust more strictly and insisted on clear evidence that a trust of the benefit was intended.[116]

7. THE USE OF ESTOPPEL

The doctrine of equitable or proprietary estoppel[117] is in fact more appropriate to resolving disputes between de facto spouses than the common intention trust,[118] wherever the parties' intentions do not coincide with their contributions. An estoppel of this kind will arise wherever a legal owner of property has induced another to rely to his or her

114 Kirby P suggested in *Baumgartner v Baumgartner* [1985] 2 NSWLR 406, 417 that the courts are on much safer ground inferring intentions from conduct since 'there are special dangers in placing undue weight upon declarations recalled months or years later when the processes of memory are likely to be distorted both by personal advantage and emotion, bitterness or disillusionment'.

115 *Les Affreteurs Reunis, SA v Leopold Walford (London) Ltd* [1919] AC 801; *Re Flavell* (1883) 25 ChD 89.

116 *Re Schebsman* [1944] Ch 83. But see *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1987) 8 NSWLR 270.

117 *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Ramsden v Dyson* (1886) LR 1 HL 129; *Crabb v Arun DC* [1976] Ch 179.

118 For another advocate of this view see Davies, 'Informal Arrangements Affecting Land' (1980) 8 Syd LR 578.

detriment on the belief that he or she either has, or will be given, an interest in the land.

The recent High Court decision in *Waltons Stores v Maher*[119] suggests that proprietary and promissory estoppel should be seen not as distinct doctrines but as different illustrations of the same equity.[120] In the words of Brennan J, this arises where the party raising the equity 'has acted or abstained from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation'. This assumption may concern the present or the future, and be of fact or of law.[121]

Be that as it may, the modern doctrine of proprietary estoppel has developed from the confluence of two lines of cases. The first is where the legal owner has encouraged another to spend money on the property.[122] The other line of cases involve situations where a party mistakenly believes that the land is his or her own and the true owner, knowing of the mistake, fails to correct it.[123] In recent years these two lines of cases have been brought together; an estoppel will arise wherever it is unconscionable for a party to insist on his or her strict legal rights. The claimant must have relied to his or her detriment on the faith of the expectation created.

The High Court in *Walton Stores v Maher* has made it clear that where an equitable estoppel arises, the court has a broad discretion to grant relief.[124] It is this which distinguishes estoppel from contract. Estoppel is based on unconscionability and not on the fulfillment of expectations per se. In *Crabb v Arun DC*, Scarman LJ said that the remedy is the 'minimum equity to do justice'.[125]

Nonetheless, there have been a number of cases where the court has ordered an outright transfer of the property to the plaintiff,[126] or otherwise substantially fulfilled the expectations of the representee.[127] These

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119 (1988) 76 ALR 513. In this case, Waltons Stores were held to be bound by an agreement for a lease, even though they had not signed the agreement and physically exchanged contracts. The High Court (Mason CJ, Wilson J, Brennan J, Deane J and Gaudron J) varied in their interpretation of the facts and thus of the applicable law. Mason CJ, Wilson J and Brennan J proceeded on the basis that an equitable estoppel had arisen.

120 Ibid per Mason CJ, Wilson J and Brennan J. Gaudron J expressed an inclination towards similar views.

121 Ibid 536. Mason CJ and Wilson J's 'common thread' is phrased in somewhat similar terms, 524.

122 *Plimmer v Wellington Corporation* (1884) 9 App Cas 699, where the plaintiff built a jetty on public land — and extended it over a number of years — with the active encouragement of the government. When the land was taken over by the government, the Privy Council held that compensation was payable, since the plaintiff had acquired an interest in land by estoppel.

123 *Hamilton v Geraghty* (1901) 1 SR (NSW) Eq 81 in which a man, believing himself to be the owner of certain land, had a house built for himself on it. The legal owner, realising the mistake, did nothing to halt the building work. An estoppel thus arose. When the man was unable to pay the builders they were allowed to take over his rights and were given a charge over the property.

124 Per Mason CJ and Wilson J at 524, per Brennan J at 535.

125 *Crabb v Arun DC* [1976] Ch 179, 198.

126 *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Pascoe v Turner* [1979] 1 WLR 431.

127 Eg *ER Ives Investments v High* [1967] 2 QB 379; *Jackson v Crosby (No 2)* (1979) 21 SASR 281; *Greasley v Cooke* [1980] 1 WLR 1306; *Riches v Hogben* [1986] 1 Qd R 315; *Re Basham (Dec'd)* [1986] 1 WLR 1498.

cases may be explained by saying that on the facts the fulfillment of the expectation was the minimum remedy to do justice. In other cases the remedy has fallen short of the expectation.[128]

Proprietary estoppel is often associated with cases where the claimant has expended money on another's property. However, while this is a common application of the principle, proprietary estoppel is not limited to such situations. All that is necessary is that the legal owner has induced an expectation that the other either has or will have an interest in that property. In the High Court's terminology in *Walton Stores v Maher*, the legal owner must have induced an assumption as to the legal relationship between himself and the other party, from which it would be unconscionable to depart.

For example, in *Crabb v Arun DC*[129] the plaintiff subdivided his own property and sold one part in the expectation that he would be granted a right of way along a road and over some land belonging to the council. The detriment did not involve improving the land claimed at all. Similarly, in *Greasley v Cooke*[130] a housekeeper remained in the house looking after a mentally ill daughter without payment on the strength of representations that she would be able to stay in the house for life. The English Court of Appeal held that an estoppel had arisen and she was allowed to stay in the house as long as she wished. It seems too that the property in question need not even be land.[131]

An estoppel has been found where the relevant promise was to buy land in the future, and where there was not a memorandum sufficient to satisfy the Statute of Frauds. In *Riches v Hogben*[132] the Full Court of the Supreme Court of Queensland found an estoppel where a mother promised her son and family that she would buy them a house if they moved with her to Australia. There was no specific property in existence at the time the representation was made. This has been criticised on the basis that it collapses the distinction between estoppel and contract, and gives rise to numerous other conceptual difficulties.[133] Nonetheless, the decision might be justified in the light of the High Court's decision in *Walton Stores v Maher*.

Equitable estoppel may appropriately be applied in a variety of situations involving de facto spouses. It may be appropriate to a situation where one party has encouraged an expectation in the other that he or she has or will be given an interest in the property, and the other in reliance on this has paid household bills or cared for children of the family. Where the parties are tenants in common, jointly liable for the mortgage or otherwise have both contributed to the purchase price of the property, it is likely that the parties' legitimate expectations can be satisfied by resort to the principles discussed in *Calverley v Green*.

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128 *Re Whitehead* [1948] NZLR 1066; *Raffaele v Raffaele* [1962] WAR 29; *Dodsworth v Dodsworth* (1973) 228 EG 1115; *Maharaj v Chand* [1986] AC 898 (PC).

129 [1976] Ch 179.

130 [1980] 1 WLR 1306.

131 In *Olsson v Dyson* (1969) 120 CLR 365 Kitto J discussed the possibility of an estoppel in regard to the attempted assignment of a legal chose in action. See also Thompson, 'From Representation to Expectation: Estoppel as a Cause of Action' [1983] CLJ 257, 272-275.

132 [1986] 1 Qd R 315.

133 Nicholson, 'Riches v Hogben: Part Performance and the Doctrines of Equitable and Proprietary Estoppel' (1986) 60 ALJ 345.

Where, however, the cohabitation has begun after the conveyance of the property into one name only, then the intentions and expectations of the parties may best be satisfied by reference to the High Court's new doctrine of unconscionability, or, where appropriate, by use of the doctrine of equitable estoppel. Clearly, the fact of cohabitation and the sharing of household expenses would not be at all sufficient to give rise to an estoppel. An expectation of an interest, or at least a licence,[134] would be necessary.

Nonetheless, the plaintiff's claim would not need to be based on any given words spoken at a specific moment in time. In this lies a distinction between estoppel and an oral express trust on the principles of *Allen v Snyder*. In the latter, there will usually be an agreement or declaration at a given moment in time that the property is to be held on trust. The need for this standard requirement has not always been observed in the cases.

The essence of equitable estoppel is that in some way or another the legal owner has induced the other to believe that he or she will have a share of the property.[135] This would be difficult to prove in cases where conversations were only vaguely remembered, but as *Plimmer v Wellington Corporation* illustrates,[136] it is sufficient to give rise to an estoppel that this was the assumption which underpinned the parties' relationship — an assumption which the legal owner shared and upon which the plaintiff relied.

The other advantage of estoppel over the common intention trust is that the extent of the beneficial interest need not be specified. For example, in *Morris v Morris*[137] the plaintiff sold his home unit and spent some $28,000 in building an extention to the home of his son and daughter-in-law. It was intended that he should live there are part of the family, but there was no discussion of the duration of the arrangement. When the son's marriage broke up and the plaintiff found it necessary to leave the home, McLelland J found that an equity arose for the plaintiff. It was satisfied by giving him an equitable charge over the property for his expenditure with interest from the date of the commencement of the proceedings.[138]

Where the remedy is the minimum equity to do justice it need not be proprietary. In a number of cases, only a licence to remain in the property has been given.[139] Indeed, if the detrimental reliance is not great, and the period of cohabitation not extensive, a remedy allowing for the reasonable reimbursement of expenditure may suffice. This is more satisfactory than giving effect to the parties' common intentions, which

134 Eg *Morris v Morris* [1982] 1 NSWLR 61; *Greasley v Cooke*, [1980] 1 WLR 1306.

135 In *Walton Stores v Maher* Mason CJ, Wilson J and Brennan J held that the silence and inaction of the appellants was sufficient to induce the expectation that exchange of contracts was a formality, in the circumstances of that case. See above n 119 at 526, 542.

136 (1884) 9 App Cas 699. There was never an explicit statement by the government in this case that the owner of the wharf should have an irrevocable licence. Nonetheless, the Privy Council concluded that this was the underlying assumption.

137 [1982] 1 NSWLR 61.

138 Other cases where the extent of the beneficial interest was not specified include *Plimmer v Wellington Corporation* (1884) 9 App Cas 699 and *Greasley v Cooke* [1980] 1 WLR 1306.

139 *Greasley v Cooke* ibid; *Maharaj v Chand* [1986] AC 898.

so often are difficult to discern and bear little relationship to the detriment suffered.

Recent cases in England and Australia suggest that the usefulness of estoppel is becoming recognised, and indeed the common intention trust is being reinterpreted along these lines. *Hohol v Hohol*[140] was the first of a line of cases in Australia which explained the principles of *Gissing v Gissing* in terms which bring together the notions of common intention and detrimental reliance.

Hohol v Hohol was a decision of O'Bryan J in the Supreme Court of Victoria. The case concerned an unmarried couple who had lived together and represented themselves as man and wife over a period of twenty-five years. During this time they raised four children. O'Bryan J, basing his decision on Lord Diplock's judgment in *Gissing v Gissing*;[141] explained the principles for the imposition of a constructive trust as follows:

> 'The essential elements of the trust are, first, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually be formed at the time of the transaction and may be inferred as a matter of fact from the words or conduct of the parties. Secondly that the party claiming a beneficial interest must show that he, or she, has acted to his, or her, detriment. Thirdly, that it would be a fraud on the claimant for the other part to assert that the claimant had no beneficial interest in the property.'[142]

O'Bryan J's formulation was criticised by Fullagar J in a decision of the Full Court of Victoria in *Thwaites v Ryan*;[143] but has since been affirmed by the Full Court in the recent case of *Higgins v Wingfield*.[144] This case affirmed the need for detrimental reliance on the expectation of a beneficial interest. In the course of this McGarvie J noted the similarity between this form of the constructive trust and the principles of estoppel, and suggested that they have a similar rationale:[145]

Similarly, the English Court of Appeal in *Grant v Edwards*[146] has said that a constructive trust can arise from the parties' common intention, relied on to the detriment of the claimant. Browne-Wilkinson V-C suggested that in future, useful guidance might be obtained from the principles underlying the law of proprietary estoppel. Although the two doctrines had developed separately they rested on the same foundation and have reached the same conclusions:[147]

Grant v Edwards illustrates why it is in fact better to apply the principles of proprietary estoppel where appropriate without confusing it with the requirements of resulting or constructive trusts, and without necessarily referring to the parties' common intention. The case involved

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140 [1981] VR 221.
141 [1971] AC 886. See especially at 905.
142 [1981] VR 221, 225.
143 [1984] VR 65.
144 [1987] VR 689.
145 Ibid 695-696.
146 [1986] Ch 638.
147 Ibid 656. A similar view has been taken by the Privy Council in *Maharaj v Chand* [1986] AC 898 and *Austin v Keele* (1987) 61 ALJR 605, which cite *Grant v Edwards* with approval.

a West Indian couple who began living together following the birth of their son in 1969. The house was taken in the joint names of the defendant and his brother. The defendant told the plaintiff, his de facto wife, that he couldn't put her name on the title as it would affect her divorce proceedings. In fact, the judge found, he had no intention of putting her name on the title. All the initial purchase moneys were provided by the defendant and the balance was supplied by two mortgages.

The Court of Appeal found that the plaintiff made a material contribution to the family finances, and the house could not have been afforded without her income. The Court gave her a half-share by way of a constructive trust. They found the evidence that she should have a half-share in the fact that the defendant had to make an excuse for not putting the property in joint names.[148] Furthermore, when a fire damaged the house in 1975, the defendant received insurance money. Most of this was used to repair the house but the balance was placed in a bank account held in the joint names of the defendant and the plaintiff.[149]

The case illustrates the difficulties of giving effect to the common intention of the parties. Clearly, the intention was not common at all.[150] Nourse LJ acknowledged that the defendant never intended to put her name on the title.[151] He clearly equated title with having a proprietary interest. Nonetheless, a proprietary estoppel arises with respect to a party's representations, not his or her intentions. It would have been clearer if the law of estoppel had been applied directly.

Further, once a common intention is established, the remedy according to *Gissing v Gissing* and the subsequent cases is to give effect to that common intention. The difficulty with this, as has been said above, is in going beyond their established intention that the property should be shared to quantifying the beneficial interests. The evidence used to justify giving her a half-share was very scant. Browne-Wilkinson V-C drew support from the principles of proprietary estoppel in saying that the remedy is to give effect to the common intention.[152] As has been shown however, it is not a necessary feature of the proprietary estoppel that the courts should give effect to the representation.[153]

Estoppel is clearly an approach which, like the notion of unconscionability, has the potential to take over the field. It could be used in most situations where de facto spouses are in dispute over their property. Nonetheless, there are dangers in such doctrines if applied too

148 Ibid 659 (per Nourse LJ), 655 (per Browne Wilkinson V-C).

149 Ibid 650, 656.

150 It was a common intention within Lord Diplock's definition in *Gissing v Gissing* [1971] AC 886, 906. '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 or conduct.' This however better defines a representation than an intention, since the latter word connotes a subjective element.

151 Ibid 649. Cf *Eves v Eves* [1975] 1 WLR 1338.

152 Ibid 657.

153 See the Privy Council case of *Maharaj v Chand* [1986] AC 898 which cited *Grant v Edwards* with approval. In this case a distinction is drawn between the remedy available where there is proprietary estoppel, and that of the common intention trust as explained by *Grant v Edwards*. Estoppel is seen there as giving rise to more limited remedies.

sweepingly. It is important for the court to identify clearly the respects in which the present position of the parties is unconscionable. If it would be inequitable to deny a plaintiff the court's assistance, what remedy is called for? Estoppel is useful as one of the weapons in the armoury of the court, and much more appropriate than looking for an express trust. It should not, however, take over the field.

8. CONCLUSION

The ambivalence in the High Court's attitude to equitable doctrines displayed between *Calverley v Green* and *Baumgartner* reflects the difficulties which courts have faced throughout the common law world in doing equity between de facto spouses. The temptation is there for the courts to take to themselves a discretion to do whatever they consider to be fair and just. This is the approach of a Lord Denning. Yet part of equity's contribution to the development of law has been to try to give content to words like 'fair' and 'unconscionable', and to define their limits.

To be sure, such definitions have to be continually reviewed in the light of changed circumstances and shifts within society. 'Fairness' can never be a term with a settled meaning. Yet some attempt has to be made to identify, with as much clarity as possible, when equity will intervene. Doctrines which allow courts to paint with a broad brush are useful, but need to be cautiously applied.

Furthermore, as long as the kaleidoscope of equitable doctrines and remedies remains, and as long as de facto spouses and others become involved in informal arrangements affecting property, there will be an inherent difficulty in interpreting the parties' legal relationships on the basis of the (often slender) evidence available. The common thread between *Calverley*, *Muschinski* and *Baumgartner* is that they offer an approach which is more dependent on analysing the financial contributions of the parties than looking in the abstract for evidence of their intentions.

What is needed now is that courts applying equitable principles will be more rigorous than has sometimes been the case in the strength of evidence they allow to prove proprietary claims, and that the High Court should clearly state the scope and limits of the *Muschinski* doctrine and its relation to other doctrines such as the resulting trust and the doctrine of contribution. There is at least the possibility that in jurisdictions which do not accept the philosophical underpinnings of the De Facto Relationships Act 1984 (NSW), equitable principles can reach a great enough degree of certainty to allow parties to bargain in the shadow of the law.