When Trust(s) is not enough: An Argument for the Use of Unjust Enrichment for Home-Sharers

Simone Wong*

Feminist Legal Studies 7 (1) pp 47 – 62 1999

Not Published Version

Abstract: *n/a*

Keywords: *n/a*

INTRODUCTION

Since the decision by the House of Lords in *Lloyds Bank* v. *Rosset* [1991][1], there has been a plethora of literature pointing out the limitations of the common intention approach in resolving family property disputes.[2] This is arguably a result of an extremely narrow reading by the judiciary of *Rosset*. Criticisms of the *Rosset* test are primarily levelled at the need for establishing a common intention to share the property, whether express or implied, and where an express intention is absent, the courts have mainly focused on direct financial contributions as being sufficient conduct for an inference of intention to be drawn. In doing so, it has been argued that the *Rosset* test is gender biased in that the principles are formulated and interpreted by the courts in a manner which tends to mask the effects of the sexual division of labour in relationships and, consequently, to discriminate against female claimants.[3]

Given the way in which the common intention approach tends to discriminate against female claimants by ignoring their non-financial contributions, questions have been raised about how rights of family members over the family home may be better dealt with and in a less discriminatory manner. In addition, certain developments have taken place such as the Law Commission's forthcoming consultation paper on the rights of home-sharers which will clearly be significant to these questions and will be explored in more detail below.[4] In an

* Lecturer in Law, Kent Law School, University of Kent. I would like to thank Anne Bottomley for her encouragement and invaluable comments on this paper.

1 [1991] 1 A.C. 107.

2 For example, A Bottomley, "Self and Subjectivities: Languages of Claim in Property Law", *Journal of Law and Society* 20 (1993), 56-70; J Eekelaar, "A Woman's Place – A Conflict between Law and Social Values", *Conv*. (1987), 93-102; M Halliwell, "Equity as Injustice: The Cohabitant's Case", *The Anglo-American Law Review* 20, 550-522; N Glover and P Todd, "The myth of common intention", *Legal Studies* (1996), 325-347; A Lawson, "The things we do for love: detrimental reliance in the family home", *Legal Studies* (1996), 218-231; S Wong, "Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?", *Legal Studies* 18(3) (1998), 369-390.

3 M Neave, "Living Together – Legal Effects of the Sexual Division of Labour in Four Common Law Countries", *Monash University Law Review* 17 (1991), 14-63; L Flynn and A Lawson, "Gender, Sexuality and the Doctrine of Detrimental Reliance", *Feminist Legal Studies* 3 (1995), 105-121; Wong, *supra* n. 2; Halliwell, *supra* n. 2.

4 The present review into the property rights of home-sharers was commenced by the Law Commission in 1995 and the consultation paper is expected to be published some time later in 1999.

influential article, Simon Gardner has raised the possibility of adopting an unjust enrichment approach to the resolution of family property disputes.[5] More recently, John Dewar has argued that the law relating to the family home would achieve greater clarity if we moved away from ownership as the starting point of the analysis and focused instead on identifying what rights family members need in relation to the family home.[6]

These observations raise several questions which this article seeks to address. Firstly, in the light of Dewar's arguments, I wish to consider what approach might best enable the English courts to break away from ownership as the analytical starting point, to allow sufficient flexibility for the consideration of the various rights that family members, especially female members, may need in or over the family home at the end of the relationship. Closely related is Gardner's observation of the possibility of an unjust enrichment approach which suggests the possibility of a more remedial approach in these cases, where the courts' response is not premised on the protection of pre-existing proprietary interests but on determining appropriate remedies in the circumstances of the case. Hence, the analysis shifts from the protection of pre-existing rights to a focus on other issues such as the policy objectives in recognising and conferring certain rights on family members in or over the family home at the end of a relationship. This will involve an examination of the facts of each case to determine whether there are grounds for the courts' intervention as well as an examination of the response of the courts in terms of granting remedies. The shift in analysis away from ownership is particularly significant for female claimants as it provides greater potential for the consideration of other types of contributions besides financial ones in determining the rights that they may need in or over the family home. The paper will therefore consider whether a remedial approach would be a more pragmatic way of dealing with family property disputes and if so, what lessons we can draw from Commonwealth approaches in terms of choosing an appropriate basis for such an approach.

WHY A REMEDIAL APPROACH?

In the context of family property particularly the family home, Dewar suggests that the questions to be asked should focus on what rights family members need in or over the family home.[7] In seeking answers to these questions, Dewar observes that the legal rules are formulated and applied in a manner which treats ownership of the family home as the sole means for securing these rights.[8] However, using ownership as the starting point is, he argues, both intricate and problematic,[9] and the conferment of rights over the family home need not be limited to ownership. Dewar advocates instead that the law should "think functionally" about the rights which family members need in relation to the family home and once such rights are identified, we can then go about conferring such

5 S Gardner, "Rethinking Family Property", *Law Quarterly Review* 109 (1993), 263-300.
6 J Dewar, "Land, Law, and the Family Home" in *Land Law: Themes and Perspectives*, eds., S Bright and J Dewar (Oxford: Oxford University Press, 1998), 327-355.
7 Dewar, *supra*. n. 6.
8 Dewar argues (at 353) that ownership has been used as the starting point, for example, in the earlier attempts of the Law Commission to introduce legal reform where the focus is on co-ownership of the family home, as well as in other academic work for theorising the doctrinal basis for dealing with family property disputes.
9 This is in part reflected by the narrowness of the courts' interpretation of the conditions necessary for granting a proprietary remedy to a claimant by way of a common intention constructive trust and the importance given to direct financial contributions in justifying the imposition of such a trust.

rights without having to resort to ownership.[10] Thus Dewar's conclusion is that ownership is neither sufficient[11] nor necessary for the conferment of rights over the family home.[12]

In the light of the Law Commission's forthcoming consultation paper on the property rights of "home-sharers", Dewar's observations are of great significance. At present, there is no clear idea what proposals the Law Commission are likely to make in relation to this matter. However, reference to "home-sharers" instead of "cohabitants" is significant in that the Law Commission is clearly looking to a broader class of relationships and is not limiting itself to those involving a sexual-domestic nature. Further, reference to the rights of home-sharers may be an indication that the Law Commission is also moving away from ownership as the starting point to considering rights that family members may need in relation to the family home other than ownership. Hence, the focus may be shifting to a broader view of family property, a common pool of assets, rather than merely ownership of a specific asset, namely the family home. In moving away from ownership as the sole means of securing such rights, the question of what alternative approaches may be deployed by the English courts, offering the necessary flexibility to consider a wider range of remedies, remains an open one.

In his article, Gardner reviews both the English approach and the approaches taken in other Commonwealth jurisdictions such as Australia, New Zealand and Canada.[13] One key significance of Gardner's article is his attempt to assimilate into English law a form of modified unjust enrichment, based on trust and collaboration, for dealing with family property disputes. He is, however, critical of adopting the Commonwealth approaches on the basis that reference to the parties' reasonable expectations continues to focus the analysis on the parties' thinking which is unrealistic and problematic. Gardner argues that, in reality, parties to a relationship deal with each other on the basis of "trust and collaboration rather than by organised thinking".[14] Hence, in retaining the focus on the parties' thinking in one form or another, the different approaches taken by these Commonwealth jurisdictions are plagued with the same problems as the common intention constructive trust approach.[15]

It is however submitted that Gardner's reference to concepts such as "trust and collaboration" may be equally problematic as they may be just as vacuous as "the parties' thinking" and "common intention". In addition, he appears to take a narrower view than that proposed by Dewar in that the starting point of his modified unjust enrichment analysis remains that of ownership.[16] This does not, however, detract from the overall possibility of a remedial approach in this area of the law, and one that refrains from using ownership as the starting point of the analysis.

---

10 Dewar points to four basic rights which family members normally seek in relation to the family home: the right of control over dealings; the right of occupation or enjoyment; the right of capital entitlement on sale; and the right on the termination of the relationship to have basic needs met out of the family resources represented by the family home. He further observes (at 354) that, under the present legal rules, these rights may be secured regardless of ownership and hence ownership is not an absolute pre-requisite to the conferment of any of these rights on family members.

11 It is insufficient because of the pre-eminence given to financial contributions which generally tends to discriminate against female claimants.

12 *Supra* n. 10.

13 Gardner, *supra*. n. 5.

14 *Supra* n. 5, at 263.

15 For a discussion on Gardner's article, see A Bottomley, "Women and Trust(s): Portraying the Family in the Gallery of Law" in *Land Law: Themes and Perspectives*, eds., S Bright and J Dewar (Oxford: Oxford University Press, 1998), 206-228.

16 Dewar, *supra*. n. 6, at 353.

Certain developments may arguably pave the way for the acceptance of a remedial approach in dealing with family property disputes. These include the Law Commission's forthcoming consultation paper on the rights of home-sharers, the emergence of a separate doctrine of unjust enrichment since *Lipkin Gorman* v. *Karpnale* [1991][17], as well as Lord Browne-Wilkinson's observations in *Westdeutsche Landesbank Girozentrale* v. *Islington BC* [1996] [18] that the remedial constructive trust would be the way forward for providing proprietary restitutionary remedies. Thus, the approaches taken by other Commonwealth jurisdictions such as Australia, New Zealand and Canada may offer some helpful insight into possible alternatives.

Unconscionability

The Australian courts have developed alongside the common intention approach the alternative doctrine of unconscionability where the focus is on preventing the legal owner from unconscionably asserting his full legal ownership of the property and refusing to recognise the interests of the claimant where he or she has made contributions towards the relationship which has subsequently failed.[19] In *Muchlinski* v. *Dodds* [1985][20], the act of each party making contributions for the purposes of the parties' joint relationship was viewed by the court as making that relationship analogous to a joint endeavour by the parties. It is arguable that the presence of a commercial aspect in the parties' relationship may have facilitated the court's finding in *Muchlinski* of a joint endeavour. Doubts about the possibility of a purely domestic relationship being viewed in similar terms were however dispelled in the subsequent case of *Baumgartner* v. *Baumgartner* [1987]. [21] In *Baumgartner*, the court emphasised that, notwithstanding the domestic nature of the parties' relationship, the relationship could equally be viewed as a joint endeavour where the claimant has made contributions towards that joint relationship. Hence the court would be willing to intervene to prevent the other party from unconscionably retaining the benefit of the contributions made by the first party.

Although *Baumgartner* clarified the matter of whether a purely domestic relationship may be viewed as a joint endeavour for the purposes of the operation of the unconscionability doctrine, the case did not specifically address the issue of whether non-financial contributions *per se* would justify equity's intervention on the grounds of unconscionability. This point was obscured by the fact that, in that case, the claimant had made both financial and non-financial contributions towards the parties' relationship. Subsequent cases have, however, pointed to a much narrower application of the unconscionability doctrine.[22] The main criterion for the applicability of the doctrine is in finding that the parties' relationship is analogous to a joint endeavour. In order for such finding to be made, decisions post-*Baumgartner* clearly

17 [1991] 2 A.C. 548.
18 [1996] A.C. 669.
19 Certain states in Australia have introduced legislation to provide for property adjustment at the end of a *de facto* relationship, e.g. the De Facto Relationships Act 1984 in New South Wales. Notwithstanding this, the introduction of legislation does not abrogate the applicability of equitable principles in dealing with family property disputes. Equitable principles such as unconscionability remain useful in providing proprietary remedies in situations that are not covered by the legislation, e.g. the *de facto* relationship does not fall within the scope of the legislation, homosexual relationships, those between siblings and other family members.
20 (1985) 160 C.L.R. 583.
21 (1987) 164 C.L.R. 137.
22 See *Hibberson* v. *George* (1989) 12 Fam. L. R. 725; *Tory* v. *Jones* (1990) D.F.C. #95-095; *Public Trustee* v. *Kukula* (1990) 14 Fam. L.R. 97.

indicate that there are two crucial pre-requisites. Firstly, there must be evidence of actual pooling of resources.[23] Secondly, the resources must at the very least be of a financial type.[24] Hence a claimant who has only provided non-financial contributions in the form of domestic services will be equally unlikely to succeed on the grounds of unconscionability.[25] Subsequent cases like *Arthur* v. *Public Trustee* [1988][26] and *Bryson* v. *Bryant* [1992][27] illustrate that domestic contributions will not *per se* be sufficient for the imposition of a constructive trust under the unconscionability doctrine unless supported by some evidence of the pooling of financial resources.

The "Reasonable Expectations" Approach

The approach the New Zealand courts have adopted focuses on what the reasonable expectations of the parties to the relationship are in relation to the sharing of the property. In *Gillies* v. *Keogh* [1989][28], the court stated that, in formulating the parties' reasonable expectations, there are three key factors that have be taken into account. These are: the "degree of sacrifice made by the claimant", including "opportunities foregone", which serves to determine the unjust enrichment of the defendant; "the value of broadly measurable contributions of the claimant by comparison with the broadly measurable value of the benefits received"[29]; and whether the parties have "opted out" of the reasonable expectations approach.[30] In addition to the reasonable expectation of a share, the subsequent case of *Lankow* v. *Rose* [1995][31] listed four essential elements that have to be established in order to justify the imposition of a constructive trust, namely: that contributions, whether direct or indirect, have been made towards the acquisition, preservation or enhancement of the defendant's assets or property; that the claimant expected an interest in the property; that the expectation was reasonable in the circumstances; and the defendant should reasonably be expected to give the claimant an interest.

The courts have recognised that, as in marriage, a long-standing *de facto* relationship and the conduct of the parties are equally capable of giving rise to reasonable expectations of property sharing.[32] In order to justify the imposition of a constructive trust, there must, however, be a causal link between the claimant's contributions and the acquisition, preservation or improvement of the property. Although the contributions need not be financial, they must fall within one of two categories. The contribution must either of itself assist the defendant in the

23 *Hibberson* v. *George*.
24 *Tory* v. *Jones*; *Public Trustee* v. *Kukula*.
25 For criticisms on the unconscionability approach, see M Bryan, "Constructive trusts and unconscionability in Australia: on the endless road to unattainable perfection", *Trusts Law International* 8(3) (1994), 74- 79 ; D Otto, "A Barren Future? Equity's Conscience and Women's Inequality", *Melbourne University Law Review* 18 (1992), 808-827; M Neave, "The New Unconscionability Principle – Property Disputes between De Facto Partners", *Australian Journal of Family Law* 5 (1991), 185-205.
26 (1988) 90 F.L.R. 203.
27 (1992) 29 N.S.W.L.R. 188.
28 [1989] 2 N.Z.L.R. 327.
29 Here, the courts recognise that indirect contributions, whether financial or not, such as payment of the household expenses and food, and the provision of domestic services may have little significance and may at times be treated as being equivalent to a fair exchange for free board and lodging.
30 As in *Gillies* v. *Keogh* where the defendant had made her non-sharing intent clear to the plaintiff. Hence the plaintiff could not have held any reasonable expectation of a share in the defendant's property.
31 [1995] 1 N.Z.L.R. 277.
32 *Phillips* v. *Phillips* [1993] 3 N.Z.L.R. 159.

acquisition, preservation or enhancement of the property or its value, or by its provision assist the defendant in acquiring, improving or maintaining the property or its value. As such, domestic services may qualify under the second category as contributions towards acquisition of the home. To qualify, the contributions must, however, manifestly exceed the benefits received. In other words, the claimant must show some detriment or that her contributions have resulted in the enrichment of the defendant which is unjust. Further, the appropriate share to be awarded will be dependent on the balancing of contributions made and benefits received.

Notwithstanding the overall willingness of the courts to accept indirect contributions, the cases reveal two major limitations in the reasonable expectations approach. Firstly, the weighing up of contributions made against benefits received may prove problematic at a practical level. The difficulty lies in determining the point at which the contributions actually outweigh the benefits received so as to qualify, especially in cases of purely domestic contributions. A conservative valuation of these contributions will result in the court either drawing the conclusion that the claimant has suffered no detriment or reducing the share to be awarded to her. The balancing act is not necessarily made easier in the case of financial contributions. Given that women are generally in a weaker economic position, their contributions are constrained by their own economic resources. Thus, a consequence of balancing contributions against benefits may equally discriminate against women as in the common intention approach.

A greater difficulty lies in the ability of the parties to contract out of the reasonable expectations approach. The expressed intentions of the parties remain paramount[33] and, where the defendant has made his non-sharing intent clear to the claimant, the claimant can no longer be said to hold a reasonable expectation of a share. Although the courts require the non-sharing intention to be expressed unequivocally, the expression of such intent by the defendant will effectively override the claimant's reasonable expectation and allow the defendant to avoid the imposition of a constructive trust. The effects of "opting out" are felt most in cases of domestic contributions. It may be difficult for women to withdraw their domestic contributions. Yet, such contributions may be devalued when balancing contributions against benefits received and/or discounted where the defendant has unequivocally opted out of sharing. Thus, these two limitations will pose an effective bar to a claim for a share in the property.

Unjust Enrichment

The Canadian courts have similarly moved away from the common intention approach and adopted unjust enrichment as the underlying basis for granting equitable relief. Cases like *Pettkus* v. *Becker* [1980][34] and *Sorochan* v. *Sorochan* [1986][35] list the constituent elements of an unjust enrichment as being: an enrichment to the defendant; a corresponding deprivation to the plaintiff; and an absence of juristic reason for the enrichment. On establishing these elements, a constructive trust may be imposed provided that there is a causal connection between the unjust enrichment and the property under dispute. The receipt of a benefit is not in itself sufficient to justify the court's intervention. There must also be

33 *Cossey* v. *Bach* [1992] 3 N.Z.L.R. 612.
34 (1980) 117 D.L.R. (3d) 257.
35 (1986) 29 D.L.R. (4th) 1.

evidence pointing to the retention of that benefit being tantamount to an enrichment that is "unjust".[36]

In most of the cases, the claimants had made a combination of financial and non-financial contributions to the parties' relationship.[37] In *Sorochan*, the court had however made no distinction between the claimant's domestic contributions and her farm labour and held that domestic services could equally enrich the owner of the property. Thus, the defendant had benefited from both types of services provided by the claimant without remuneration. In *Peter* v. *Beblow* [1993][38], the court reaffirmed that the provision of domestic services without adequate compensation may be treated as an incontrovertible benefit and is capable of raising the presumption of an unjust enrichment.

The court's reasoning is premised on the fact that cohabitants are not under any common law, equitable or statutory requirement to provide such services. Hence, this raises the presumption that the services are not being given gratuitously and that there is an absence of juristic reason for the enrichment and a corresponding deprivation.[39] To a certain extent, finding the requisite absence of juristic reason so as to label the enrichment as unjust involves some circularity in reasoning. In order for there to be an unjust enrichment, there has be an absence of juristic reason. The absence of juristic reason is, in turn, closely linked to the parties' reasonable expectations in that there is an absence of juristic reason because the claimant, in making the contributions, had done so with a reasonable expectation of a share rather than gratuitously. However, this reasonable expectation is raised presumptively through the combination of two factors, namely that the relationship is one tantamount to spousal and that the claimant has made contributions, whether direct or indirect.

The reasonable expectations requirement acts in a purely evidentiary way. It facilitates raising the following presumptions: that the defendant must know, or ought to have known, that the contributions were not being provided gratuitously by the claimant but with the reasonable expectation of a share in the property; and the services are being provided by one party to the relationship for the benefit of the family or the business of the other party with an expectation of some form of economic compensation.[40] Consequently, the burden of proof shifts to the defendant to show the absence of knowledge of the claimant's expectation. Arguably, the reasonable expectations requirement is very different from the common intention requirement.[41] The latter appears to require some form of meeting of minds by the parties, whereas the former does not and may be formed

36 Dickson J. explains, at 274, that the "absence of juristic reason" condition is satisfied "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in the property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation it would be unjust to allow the recipient of the benefit to retain it".

37 In *Pettkus* v. *Becker* (*supra* n. 34), the claimant had made financial contributions towards the parties' living expenses and provided unpaid labour in the man's bee-keeping business. The claimant in *Sorochan* (*supra* n. 35) had provided both domestic services as well as unpaid farm work.

38 [1993] 101 D.L.R. (4th) 621.

39 K Farquhar, "Unjust Enrichment, Special Relationship, Domestic Services, Remedial Constructive Trusts: *Peter* v. *Beblow*", *Canadian Bar Review* 72 (1993), 538-552.

40 R Scane, "Relationships 'Tantamount to Spousal', Unjust Enrichment and Constructive Trusts", *Canadian Bar Review* 70 (1990), 260-306. Cf. Gardner, *supra*. n. 5, who criticises the reasonable expectations requirement on the grounds that the requirement is equally susceptible to manipulation of facts by the courts so as to find the relevant expectation and an absence of juristic reason for the enrichment.

41 Scane, *supra*. n. 40.

in a purely unilateral manner.[42] Hence, the causal test in family property cases appears to be a more general one and may be established through the presumptive role of the parties' reasonable expectations in a relationship tantamount to spousal. The cases further indicate that causal connection need not be in the form of the claimant's direct financial contributions towards the acquisition of the property. The approach does not place any greater significance on financial contributions over domestic contributions in terms of establishing an unjust enrichment.

WHICH REMEDIAL APPROACH?

A comparison of English and Commonwealth approaches indicates a clear divergence not only at a doctrinal level but also at a policy level. Arguably, one principal source of difference lies in the judicial perception of the type of trust we are dealing with in each case. Traditionally, English jurisprudence has always taken the position that, when dealing with an infringement of a proprietary right, the court has the discretion to award either a personal or a proprietary remedy. In the case of an infringement of a purely personal right, the only remedy available is one which is personal and the courts do not generally have the discretion to award a proprietary remedy in such cases. In principle, the English courts remain staunch to the constructive trust being institutional in nature. In doing so, at a policy level, the English view is that the courts are merely vindicating the pre-existing proprietary interest of the claimant through the imposition of a constructive trust.

The imposition of a constructive trust in these cases does not flow from the exercise of discretion on the part of the judiciary but in response to the pre-existing rights of the claimant over the disputed property that arise from the moment she has acted to her detriment in reliance on the parties' common intention. Given the strong nexus between the institutional constructive trust and the recognition of pre-existing property rights, this has arguably led to the English courts taking a narrow interpretation of the requisite conditions justifying the imposition of a constructive trust in such cases.[43] Thus, the English approach requires a clear causal connection between the contributions made (which need to be direct and financial) and the acquisition of the disputed property so as to confer proprietary rights to the claimant.

On the other hand, the approach taken by the Commonwealth jurisdictions, particularly Canada, clearly deviates from this proprietary line of analysis. Although each of the jurisdictions examined has adopted a different approach, there is a common thread in all three jurisdictions. This common thread reflects an approach that is remedial in nature. It is remedial in that, unlike the common intention constructive trust which applies retrospectively in recognition of the claimant's pre-existing proprietary rights, the constructive trust in these cases does not apply retrospectively in recognition of any such pre-existing proprietary right but is purely a discretionary response by the courts to the circumstances of the case. This common thread should not, however, obscure the fact that there remain conceptual differences in the approaches taken by the Commonwealth countries

42 It is further arguable that the presumptive role of the reasonable expectations requirement is not substantially different from Gardner's concepts of trust and collaboration in domestic relationships which, likewise, raise the presumption of shared benefit.
43 Halliwell, *supra*. n. 2; J Warburton, "Trusts, Common Intention, Detrimental Reliance and Proprietary Estoppel", *Trust Law International* 5 (1991), 9-12.

as between themselves. Hence, any move towards treating these various approaches as being synonymous or interchangeable will clearly lead to confusion and uncertainty.[44]

In the context of family property disputes, a review of the Commonwealth approaches indicates that the approach taken by the Canadian courts probably offers the greatest potential in terms of a remedial approach. Both the Australian and New Zealand approaches reveal certain limitations to their flexibility which may render them equally restrictive as the common intention constructive trust. To some extent, the unconscionability approach, in requiring the pooling of financial resources, retains much of the direct financial nexus of the common intention constructive trust approach. Although New Zealand's reasonable expectations approach evinces greater willingness to take into account a broader range of contributions as qualifying contributions, the defendant's ability to opt out will pose an effective bar to the claimant securing any rights in or over the family home.

The unjust enrichment approach taken by the Canadian courts does evince certain advantages when dealing with family property disputes. Firstly, the approach clearly indicates no distinction is made between financial and non-financial contributions for the purposes of being treated as incontrovertible benefits capable of establishing an unjust enrichment. By taking into account domestic contributions, it has been suggested that the unjust enrichment approach is a more realistic acknowledgement of familial relationships as a common enterprise.[45] Each member contributes to the relationship according to his or her abilities and the needs of the other members of the household. If the relationship subsequently breaks down, the property ought to be distributed according to these contributions, whether direct or indirect, financial or non-financial.[46] This approach further avoids the constraints of the need for financial contributions in both the common intention constructive trust and unconscionability approaches. This pragmatic approach to dealing with family property disputes is further illustrated in the recent case of *Suffern* v. *Bystrowski* [1998][47] where the Canadian courts extended the unjust enrichment analysis to include debts which exist at the end of the relationship.

In *Suffern*, three properties had been acquired in the names of both parties during their three-year *de facto* relationship. Among these was a trailer purchased with the help of a $45,000 loan, for which the plaintiff had signed a promissory note. The parties had intended to repay the debt from the sale proceeds of another property. The issue that arose was whether the defendant would be unjustly enriched if, after the division of the sale proceeds of their properties, the defendant was excused from responsibility for the repayment of the loan. The court stated that there would equally be an unjust enrichment where, at the end of the relationship, one party becomes wholly responsible for the repayment of the outstanding debts.

---

44 See, for example, G Jones, "The Law of Restitution: The Past and the Future" in *The Law of Restitution*, ed., A Burrows (London: Butterworths, 1993) where Jones expresses concerns about following the unconscionability approach taken by the Australian courts. His main concern is the conceptual confusion that the Australian courts have caused by treating unconscionability and unjust enrichment as being interchangeable. For Jones, unconscionability with its links to notions such as inequality of bargaining power lacks conceptual clarity. He describes both unconscionability and inequality of bargaining power as "elusive and mercurial concepts". Hence the courts' intervention in restitutionary claims should be clearly premised on unjust enrichment and not unconscionability.

45 M Welstead, "Domestic Contributions and Constructive Trusts: The Canadian Perspective", *Denning Law Journal* (1987), 151-161.

46 To some extent, this is no different from Dewar's arguments that the law relating to the family home should shift its focus to what rights family members need in or over the family home and to determine the conferment of such rights without having to resort to ownership as the starting point.

47 (1998) A.C.W.S.J. 97.

Hence, the issue of unjust enrichment and the distribution of property at the end of the relationship should take into account outstanding debts and the parties' respective obligations for repaying such debts.

A further advantage that the unjust enrichment approach has is that, being remedial in approach, the establishment of an unjust enrichment does not make a proprietary remedy inevitable but offers the courts greater flexibility to decide on the most appropriate remedy to be awarded to the claimant for reversing the unjust enrichment. The availability of defences is also an added attraction of the unjust enrichment approach. As was clearly recognised by the court in *Lipkin Gorman*, the defence of change of position will be available to the defendant in a restitutionary claim. Hence, taking into account any available defences that the defendant may have, the courts have the discretion to consider and choose from a wider range of remedies to effect restitution, which may or may not include a proprietary remedy through the imposition of a remedial constructive trust.

In addition, the approach avoids the difficulties of "opting out" in the New Zealand approach. The unjust enrichment analysis appears to be premised on two elements: the claimant's mistaken belief that, in making contributions such as the provision of domestic services, she will acquire a share in the family home; and the defendant's acquiescence in "freely accepting" the contributions made by the claimant.[48] This appears to suggest that, like the New Zealand cases, the unjust enrichment analysis would be excluded in situations where the defendant has made his non-sharing intention clear to the claimant and that, notwithstanding the continued provision of the claimant's contributions, the claimant cannot be said to hold any reasonable expectation of an interest in the family home. Although the reasonable expectations of the parties is essential to the finding of an absence of juristic reason for the contributions made and hence the unjust enrichment of the defendant, the Canadian courts have indicated that expressing a non-sharing intent may not be sufficient to nullify the claimant's reasonable expectation of a share.[49] Thus, the continued provision of the services by the claimant may not necessarily be treated as being "voluntary" and should not exclude a restitutionary remedy. [50]

Given the flexibility of the courts to choose from a wider range of remedies, this raises the question of when the courts should award a proprietary restitutionary remedy to the claimant. In other words, what is the necessary "proprietary link" between the unjust enrichment and the property to justify a proprietary remedy? In *LAC Minerals Ltd* v. *International Corona Resources Ltd* [1989][51], the court recognised the significance of a proprietary remedy when monetary compensation is inadequate. The imposition of a constructive trust will however depend on whether

48 P Birks, *Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985, repr. 1993), 265. Birks defines free acceptance as one "where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept". He argues that free acceptance establishes not only the enrichment but also the unjust factor. Cf. A Burrows, "Free Acceptance and the Law of Restitution", *Law Quarterly Review* 104 (1988), 576-599 and G Mead, "Free Acceptance: Some Further Considerations" *Law Quarterly Review* 105 (1989), 460-467. Both Burrows and Mead argue that a party who offers his unrequested services is assuming the role of risk-taker in expecting payment from the recipient and that the law of restitution should not be used or expected to protect against such risks.

49 Scane, *supra* n. 40 (at 295) argues that, notwithstanding communication of the defendant's non-sharing intent, the very nature of domestic relationships is such that the claimant will probably continue to provide the services when faced with the risk of losing more from the deterioration of the relationship than what may be gained from withdrawing the services.

50 This proposition appears to be supported by *Sorochan* where a constructive trust was imposed, despite the defendant having communicated his non-sharing intent to the plaintiff.

51 (1989) 61 D.L.R. (4th) 14.

the claimant should be given additional rights over the property which necessarily flows from awarding a proprietary remedy. In addition, there must be a "proprietary link" between the unjust enrichment and the property. Here again, the unjust enrichment analysis appears to offer more flexibility.

Unlike commercial cases where there is greater emphasis on the causal connection and inadequacy of monetary compensation, the courts' treatment of family cases appears to be more generous. They evince a greater willingness to impose a constructive trust, despite the absence of a clear proprietary link to any particular asset of the defendant. The necessary link may be easily satisfied by the presumptions raised in favour of the claimant through the reasonable expectations requirement. Further, given the courts' view on the defendant's ability to expressly exclude any sharing intent, it may be increasingly difficult for a defendant to resist a proprietary claim.[52] Thus, the courts' willingness to grant a proprietary restitutionary remedy stems from the reasonable expectations of the parties that the contributions are being made towards the joint relationship, to a common pool of family assets rather than any specific property.

Reference by the Canadian courts to "relationships tantamount to spousal" in the unjust enrichment analysis raises two particular problems in that analysis.[53] The first relates to identifying relationships which will qualify. In deciding whether a relationship qualifies, the courts are faced with the factual difficulty of assessing whether a relationship is sufficiently "marriage-like" to fall within the scope of the doctrine. This arguably exposes the unjust enrichment analysis to value judgments on the part of the courts and the tendency will be for the courts to look at long-standing relationships as being more worthy of the courts' protection than relationships of shorter duration.[54]

The second problem is whether the analysis will apply to other types of relationships. Most of the earlier Canadian cases dealt with heterosexual couples who were cohabiting and the question raised was whether the courts would be prepared to extend the unjust enrichment analysis to other relationships, for example, homosexual couples or couples who share a household but do not have a sexual relationship. The unjust enrichment approach has, however, indicated its flexibility to encompass a wider range of relationships including those which are not sexual-domestic. This is illustrated in *Clarkson* v. *McGrossen Estate* [1995][55] where a stepdaughter's claim against her stepfather's estate was successful.

---

52 D Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priority over Creditors", *Canadian Bar Review* 68 (1989), 315-351. Paciocco argues that the court's more generous treatment of domestic cases may be justified on two grounds: the nature of domestic relationships requires the causal connection requirement in domestic cases to be less stringent than in commercial cases; and, unlike commercial cases where there is some level of risk acceptance, the acceptance of risk in domestic relationships is generally absent.

53 Wong, *supra* n. 2;

54 Factors such as the duration of the relationship, the presence or lack of presence of children, the usage of the same family name and having a joint account may influence the courts in deciding whether a particular relationship qualifies. Cases like *Pettkus* (twenty years), *Sorochan* (forty-two years), *Pirie* v. *Leslie* (1988) 29 E.T.R. 246 (Man QB) (nine years) and *Boucher* v. *Koch* (1988) 14 R.F.L. (3d) 443 (Alta CA) (twenty years) illustrate that the length of the relationship may be an influential factor in determining whether equitable relief is to be granted.

55 (1995) 122 D.L.R. (4th) 239.

CONCLUSION

The overall flexibility of the unjust enrichment analysis in terms of its willingness to take into account a wider range of contributions, of relationships and remedies appears to offer a very attractive option to the resolution of family property disputes for home-sharers. The courts are not limited to dealing with these disputes solely from an ownership perspective and the grant of a proprietary remedy through the imposition of the institutional common intention constructive trust. The award of a proprietary restitutionary remedy is clearly through the imposition of a constructive trust which is remedial in nature and, being prospective in nature, the trust will not affect the prior claims of third parties. The grant of a proprietary restitution remedy is not, however, inevitable upon the finding of an unjust enrichment. Given the remedial approach, the courts have the discretion to take into consideration a wider range of remedies. Hence the court may decide that, in the circumstances of the case, an award of monetary compensation out of the sale proceeds of the property may be more appropriate than granting a proprietary remedy.[56]

This approach provides a suitable vehicle for what Dewar refers to as the "give and take" approach in the law relating to the family home whereby the English courts are given greater flexibility in dealing with family property disputes.[57] The "give" aspect of the unjust enrichment analysis will permit the courts to take into account a wider range of contributions, financial and non-financial, for the purposes of establishing an unjust enrichment and, more particularly, to move away beyond financial contributions in determining whether a proprietary remedy should be awarded to the claimant. The "take" aspect will correspondingly permit the courts to take into account third party rights over the property under dispute and the extent to which these third party rights are to be protected when deciding on what rights the claimant needs in respect of the family home and the appropriate restitutionary remedy to be awarded to secure such rights. More importantly, the approach provides a more flexible method for considering the various rights which family members may need in relation to the family home, as well as other family assets, at the breakdown of the relationship and for securing these rights without having to rely on ownership as being the sole means of doing so.

56 For example, in *Clarkson* v. *McGrossen* where the stepdaughter was granted a monetary award from the sale proceeds of the house in lieu of a proprietary remedy.
57 *Supra* n. 6, at 332-334.