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PROBLEMS IN FAMILY PROPERTY

SIMON GARDNER*

ABSTRACT. *This article addresses and challenges recent comments to the effect that the common law rules about unmarried couples' property rights are uncertain, and (or but) that these rules yield an unfair result in a common scenario. It goes on to consider the Law Commission's proposed scheme aimed at reform of this area, raising the concern that this would violate Article 1 of the First Protocol to the European Convention on Human Rights.*

KEYWORDS: *constructive trusts, unmarried couples, family property, Law Commission, right to protection of property, European Convention on Human Rights (First Protocol, Article 1)*

Recently in this Journal,[1] Jo Miles noted the Scots appeal to the Supreme Court in *Gow v Grant*.[2] In doing so, she reviewed the present law of England and Wales regarding unmarried couples' property rights; and compared it, unfavourably, with the statutory scheme proposed for England and Wales by the Law Commission in 2007,[3] but never implemented (and also with that actually prevailing in Scotland). Both aspects of her discussion repay further examination.

I. THE PRESENT LAW

The present law is largely the territory of the common intention constructive trust. The principal sources are the decisions of the House of Lords in *Stack v Dowden*[4] and, especially, the Supreme Court in *Jones v Kernott*.[5] By these, briefly, where a family member is dissatisfied with the beneficial interest, if any, that he has by virtue of the paper title to his home, he may claim more by pointing to a common intention to this effect between himself and the (other) proprietor(s). For example,

* Lincoln College and Faculty of Law, University of Oxford. I am indebted to Emily MacKenzie. Address for correspondence: Professor Simon Gardner, Lincoln College, Turl Street, Oxford OX1 3DR. Email: simon.gardner@law.ox.ac.uk

[1] "Cohabitation: Lessons for the South from North of the Border?" [2012] C.L.J. 492.
[2] [2012] UKSC 29; 2012 S.L.T. 829; [2012] 3 F.C.R. 73.
[3] *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com. 307 (2007).
[4] [2007] UKHL 17; [2007] 2 A.C. 432.
[5] [2011] UKSC 53; [2012] 1 A.C. 776.

if you are the sole registered proprietor of our family home, and in terms of the title I have no interest in it at all, I can nonetheless claim an interest if you and I commonly intended that I should have one, of a size determined by that common intention.[6] A common intention as to the first matter – that the claimant should have an augmented share at all – must be genuine,[7] but may be either express or tacit ("implied"), and if tacit, is proved by reference to the parties' "whole course of conduct in relation to [the property]".[8] Given this, a common intention regarding the second matter – the precise size of the claimant's augmented share – may be genuine, express or tacit and proved in the same way, but otherwise is invented ("imputed") by the court, so as to achieve "fairness".[9]

Ms Miles criticises this set of rules for "uncertainty". All law is uncertain to some extent, so the complaint must be of an unacceptable level of uncertainty. And the identification of the latter is a question of degree, judged with an eye on *inter alia* the context. A greater degree of uncertainty may be tolerable in some contexts than in others, because of such variables as the extent to which persons operating in the context in question may guide their behaviour by reference to the rules. There is perhaps less need for lapidary rules in the present context than in for example the law of charterparties, given the unlikelihood that family members who leave their property shares informal will nonetheless shape their relationships and dealings in conscious interaction with the law governing their case. Moreover, if lapidary rules would, by boxing the law in, hinder it from doing effective justice (one thinks of securing the best interests of children, or sentencing offenders), the same reflection suggests that such rules should be positively eschewed. At the same time, even in contexts such as this, other considerations nonetheless argue against a neglect of certainty: including the desirability of being able to predict litigation outcomes, and of guarding against the intrusion of judicial idiosyncrasy. So all in all, there are limits to the degree of uncertainty to be tolerated even in this area of the law, and such significant uncertainty as is present should be accepted only if helpful as promoting some countervailing good.

[6] The two dominant authorities themselves concern the "joint names scenario", i.e. that where you and I are joint registered proprietors, and so have prima facie 50:50 beneficial shares in the house – the common intention in this case allowing me to claim a greater share. Their applicability also to the "single name scenario", i.e. that sketched in the text, was indicated by *Jones v Kernott* (note 5 above) at [52], and has been accepted in the subsequent decisions *Crown Prosecution Service v Piper* [2011] EWHC 3570 (Admin) at [7], *Geary v Rankine* [2012] EWCA Civ 555; [2012] 2 F.L.R. 1409 at [19], and *Thompson v Hurst* [2012] EWCA Civ 1752 at [22] and [27], and also *sub silentio* in *Gallarotti v Sebastianelli* [2012] EWCA Civ 865; [2012] 2 F.L.R. 1231 and *Aspden v Elvy* [2012] EWHC 1387 (Ch); [2012] 2 F.L.R. 807.

[7] *Jones v Kernott* (note 5 above) at [51]–[52], [64], [66].

[8] *Stack v Dowden* (note 4 above) at [60]; *Jones v Kernott* (note 5 above) at [13], [51]–[52], [60].

[9] *Jones v Kernott* (note 5 above) at [47], [51]–[52], [64], [72], [84], [89].

Against this background, what should we make of the rules under discussion? They feature two main areas of uncertainty.[10] One consists in the difficulty of predicting when a genuine but tacit common intention will be found, when this is to be done by reference to the parties' "whole course of conduct in relation to [the property]". Lady Hale has explicated this expression,[11] but, to remain faithful to its headline rubric, her explication had to embrace all manner of potentially relevant material, and even then to remain non-exhaustive, and so could not and does not ultimately give much help at all. So the discovery of such intentions is indeed at large. But what else would it be? For sure, the law could require specific forms of evidence, themselves possessing a bright line and highly visible quality, and so introduce more certainty. But the effect of doing so would be to sacrifice claimants who could indeed show genuine common intentions, on a balance of probabilities, on the basis of looser material … and so prioritise certainty over veracity: not an attractive choice.

The other main uncertainty in the current rules is as to the import of "fairness". Remember, fairness is the yardstick by which a judge is to invent a common intention as to the size of a successful claimant's interest, if no genuine common intention can be found on the point. Lady Hale has said that fairness is to be assessed by reference to the same material as will count as evidence of a tacit genuine common intention,[12] but this tells us nothing, as omitting to indicate the normative lens through which such material is to be viewed. (For example, exactly what does it mean in terms of fairness that the parties had children, and brought them up in such-and-such a way?) And there is no other worked-out judicial treatment of the matter. In particular, when the minority judges in *Jones v Kernott*[13] reached an outcome in the name of fairness, they offered no justification for it. (It was the outcome fixed by the trial judge, but his thinking is lost to us.) It may however be possible to analyse the various decisions in terms of their individual facts and outcomes, see a pattern, and thence distil a recipe for fairness. As is well known, I myself am attracted by an account whereby for parties in "materially communal" relationships, fairness

[10] Possibly Ms Miles may contemplate a third, in the shape of difficulty in confidently stating the rules at all. This would be unjustified, however. Certainly, the law as it emerged from *Stack v Dowden* (note 4 above) was hard to describe. Hence the Law Commission's perception of problematic uncertainty in this area, formed at this time (*op. cit.* note 3 above, paras. 2.4–2.11, A.30–A.41). But the rules have since been progressively clarified by the decision of the Privy Council in *Abbott v Abbott* [2007] UKPC 53; [2008] 1 F.L.R. 1451, and especially by *Jones v Kernott* (note 5 above) and subsequent authorities (including those listed in note 6 above), to the point where it really is reasonably straightforward to state them, on the lines in the text above.

[11] *Stack v Dowden* (note 4 above) at [69]–[70].

[12] *Stack v Dowden* (note 4 above) at [69]–[70]; *Jones v Kernott* (note 5 above) at [51].

[13] Note 5 above.

means either[14] 50:50 shares or else[15] what it does under the Matrimonial Causes Act 1973 ss. 24 and 25;[16] while for parties in "non-materially communal" relationships, it means an outcome reflecting the parties' respective financial contributions,[17] maybe in restitution of the claimant's net unjust enrichment of the defendant.[18] Nonetheless, the lack of an authoritative 360° exegesis remains a cause for concern and complaint, for in its absence a judge could not unreasonably strike out in a number of different directions.

Besides – or I suppose it should be despite – her concern about its uncertainty, Ms Miles believes that the current law is dysfunctional for another reason: it can yield unjust results. In particular, she says, facts such as those in *Burns v Burns*[19] would elicit the same unsatisfactory outcome – no relief for the claimant – under today's law as they did in that decision itself, 30 years ago.

To explain: Mr and Mrs Burns were an unmarried couple, whose home was in Mr Burns's sole name. After 18 years together, they split up, and Mrs Burns claimed a beneficial interest. Her claim failed, on the ground that it was impossible to find the necessary common intention between the parties that she should have such an interest. There was no express common intention. Her hope was that a tacit one would be found on the strength of her contributions within the relationship. The Court of Appeal decided otherwise, holding that such a finding was possible only where a claimant has made a financial contribution to the acquisition of the property concerned (including, to repaying the mortgage used to acquire it).[20] Her contributions had not been of that kind. She had given the family some financial support, but this was supererogatory to Mr Burns's ability to pay for the house. Other than that, her input to the family economy (as opposed to activities on her own behalf) was by way of home-making and child-raising, which the court regarded as not representing even an indirect financial contribution to the house's acquisition.

Ms Miles offers no argument for her view that it was unjust that Mrs Burns should thus have no relief, but I shall not contest it. The

[14] *Abbott v Abbott* (note 10 above); also *Jones v Kernott* (note 5 above) at [19]–[22], pointing to material communality as a reason for the presumption of 50:50 shares in a joint names case and why this presumption is hard to displace. In this vein, see too *Fowler v Barron* [2008] EWCA Civ 377; [2008] 2 F.L.R. 831.

[15] *Jones v Kernott* (note 5 above).

[16] The word is not used in the legislation, but the gist of the latter was authoritatively described in these terms in *White v White* [2001] 1 A.C. 596 at 599–600.

[17] *Stack v Dowden* (note 4 above); *Gallarotti v Sebastianelli* (note 6 above); *Thompson v Hurst* (ibid.); *Aspden v Elvy* (ibid.).

[18] See generally S. Gardner and K. Davidson, "The Supreme Court on Family Homes" (2012) 128 Law Quarterly Review 178; S. Gardner with E. MacKenzie, *An Introduction to Land Law*, 3rd ed. (Oxford 2012), 166–73.

[19] [1984] Ch. 317.

[20] Ibid. at 328–9, 331, 345.

question on which I shall concentrate is whether this would be the outcome under today's law. It seems to me likely that it would not; that Mrs Burns would have relief, probably in the shape of an interest of 50% or so.

The place to start is with the holding in *Burns v Burns*[21] that a tacit common intention could not be found in the absence of a financial contribution by Mrs Burns to the acquisition of the property. The judges there may have seen this as a rule, prohibiting the discovery of a tacit common intention from other material. Certainly, such a rule was enunciated a few years later, by the House of Lords in *Lloyds Bank plc v Rosset*,[22] requiring indeed that the financial contribution be "direct", where the court in *Burns v Burns* had accepted "indirect".[23] But in turn, this was aspersed in at least some measure by the House of Lords in *Stack v Dowden*,[24] and appears to have disappeared from the current law, in favour of (as explained earlier) discovery from the parties' whole course of conduct in relation to the property, this being a reference to all manner of material.

One might, then, conclude that under the current law, Mrs Burns could point to her home-making and child-raising to establish a tacit common intention between her and Mr Burns that she should have a share in the house after all. Upon which, that share would almost certainly be quantified by reference to fairness.

A number of decisions seem to treat fairness as a function of a claimant's monetary contributions.[25] If this approach were followed, it would not be good news for Mrs Burns, as her monetary contributions were insignificant. Likewise, then, for all those similarly circumstanced, the issue to which Ms Miles seeks to draw attention.

The modern rules would operate dreadfully cynically if they meant, in this way, that while (departing from the restrictive older rules) a common intention can be established at the first stage by reference to all manner of material, the resultant interest will be quantified at zero unless the claimant has contributed monetarily (much as under the older rules). Ms Miles's case-note is valuable for having drawn attention to this possible horror. However, as explained earlier, it is possible to treat the decisions fixing quantum by reference to monetary contributions as relating only to the case of a non-materially communal relationship. The type of relationship with which we are concerned is materially communal. This is clearest in the paradigm scenario of

[21] Note 19 above.
[22] [1991] 1 A.C. 107 at 133.
[23] Note 19 above at 329, 330, 331.
[24] Note 4 above at [5]–[6], [19].
[25] Notably *Stack v Dowden* (note 4 above); *Gallarotti v Sebastianelli* (note 6 above); *Thompson v Hurst* (ibid.); *Aspden v Elvy* (ibid.).

which *Burns v Burns*[26] is the rough icon, where the claimant makes no monetary contribution at all: there, the parties necessarily pool their resources. It is less immediately clear, but nonetheless still the case, on the facts of this decision itself. Mrs Burns had some earnings, and they were not pooled with Mr Burns's. But they were small and intermittent, and were spent, at any rate in Mr Burns's eyes, as "pin money"; the household economy ran substantially on the basis that Mr Burns's income covered all the family's needs. The authority tracking financial contributions in non-materially communal relationships is thus distinguishable. In the present context, as explained above, fairness denotes either a 50% share, or the outcome that would be forthcoming under the Matrimonial Causes Act 1973 ss. 24 and 25. So a modern Mrs Burns would have maybe half the equity in the home, very possibly more.

However, the understanding just outlined has in principle to rest on the finding of a genuine common intention that Mrs Burns should have an interest in the house. The abandonment of the old rule, that a tacit common intention could be discovered only from a direct financial contribution, removed a possible blockage to such a finding. But on its own it clearly does not guarantee that finding: the parties might, simply, not have had such an intention, and then, in principle, there would be no claim.

This state of affairs might be regarded as unsatisfactory.[27] If so, it could be corrected via the following reflection: in this area of the law, alleged findings of genuine common intentions come quite cheap. This was true in the days of the direct financial contribution rule, when judges often circumvented that rule by more or less unlikely findings of an express common intention, to which it did not apply.[28] It seems to be true today too. In *Jones v Kernott*[29] itself, the Supreme Court unanimously purported to discern a genuine common intention as to departure from the prima facie position, relying however on a finding by the trial judge, which the Court of Appeal had described as without evidential foundation.[30] The majority in the Supreme Court even went

[26] Note 19 above.

[27] Though equally, it might not. After all, attention to the parties' genuine intentions is demanded by mainstream (libertarian) liberalism; and while attention to the lack thereof is not so straightforward, it could be similarly supported. For reference to libertarian liberalism in this general area, see e.g. *Radmacher v Granatino* [2010] UKSC 42; [2011] 1 A.C. 534, and Law Commission, *op. cit.* note 3 above, Part 5. For challenge to such reference, however, see e.g. *Radmacher v Granatino* at [78], [135]–[137], [187]–[193], highlighting the different message(s) of neo-republican liberalism and communitarianism – these being supportive of the argument as it continues in the text.

[28] See e.g. *Eves v Eves* [1975] 1 W.L.R. 1338; *Grant v Edwards* [1986] Ch. 638; *Hammond v Mitchell* [1991] 1 W.L.R. 1127; *Stokes v Anderson* [1991] 1 F.L.R. 391. Moreover, in *Le Foe v Le Foe* [2001] F.L.R. 970 at 982 and *Oxley v Hiscock* [2005] Fam. 211 at [40], [68] the rule was itself misrepresented to less restrictive effect.

[29] Note 5 above.

[30] [2010] EWCA Civ 578, [2010] 1 W.L.R. 2401 at [81]–[83].

on to discern a genuine common intention as regards the size of the resultant interest when the judge himself had not done so, preferring to impute a common intention on the basis of fairness[31] – the approach also taken by the minority in the Supreme Court.[32] Moreover, it is probably no coincidence that the outcome reached under both routes was the same (a 90:10 split); and we should also notice the view taken in the majority judgments that the inference of a tacit genuine intention, and the imputation of a fair non-genuine one, are practically the same thing.[33] This view was rejected by the minority,[34] for persuasive reasons, but for present purposes it is important as having despite those reasons attracted the majority, further supporting the observation that ostensible findings of genuine common intentions commonly, in truth, represent exercises in imputation.

It is this observation that allows one, returning to the position of Mrs Burns, to doubt that a modern court would deny relief on the ground that, regardless of the removal of the direct financial contribution rule, there was no genuine common intention that she should have an interest. If it be fair that she should have an interest (and this is very much indicated by the proposal, above, that fairness would require any such interest to be of 50% or more), then the material in the previous paragraph suggests that a court would not be slow to make the purportedly required finding of a genuine common intention to that effect. Or, to call a spade a spade, fairness *per se* would yield her such an interest.[35] In short, I suggest, in opposition to the view expressed by Ms Miles, that the prevailing law would be very likely indeed to give a modern Mrs Burns her result.[36]

II. The Law Commission's Scheme

To come finally to the Law Commission's proposals for statutory reform,[37] which Ms Miles commends.

[31] Note 5 above at [48]–[49], commenting that the trial judge "could and should" have made such a finding on the basis of the parties' behaviour.
[32] Ibid. at [76]–[77].
[33] Ibid. at [34]–[36], [65]–[66]; following N. Piška, "Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*" (2008) 71 M.L.R. 120, 127–8.
[34] Ibid. at [67], [70]–[76], [89].
[35] Explicit adoption of this position was actually raised as a possibility in *Jones v Kernott* (note 5 above) at [84].
[36] By way of caution, however, note *Geary v Rankine* (note 6 above) at [21]–[24], where the requirement of a genuine common intention is taken literally and seriously. But perhaps that was because, to the extent of the particular relevant facts, the parties' relationship was of a materially non-communal, even semi-commercial, character: the arguments for the approach proposed in the text are strongest in a materially communal context. *Burns v Burns* (note 19 above), the decision under discussion, exhibits (as explained earlier) the latter.
[37] Op. cit. note 3 above.

In brief, the proposed scheme would apply in a context roughly describable as the breakdown of a quasi-matrimonial relationship,[38] and would operate to recompense the claimant where, as a result of his or her contributions within the relationship, either the claimant now suffers a material disadvantage, or the defendant enjoys a material benefit. For example, where a woman relinquished employment to bring up the children she had with her partner, and as a result of this her earning capacity is now reduced, and/or her partner's is now increased, as compared with how each would have stood if she had continued in employment.

In its own sphere, the scheme would override the otherwise prevailing law, notably the trust rules discussed hitherto in this article.[39] And herein lies the problem. The effect would be to remove entitlements acquired by parties under those rules.

Consider an example. Say a man and a woman are partners, living in a house registered in the man's sole name, and having a materially communal relationship. Say further that there are no arguable complications, and that the woman thus has a 50% beneficial interest in the house. And say too that her contributions in the relationship have caused her relatively little enduring loss, and her partner relatively little enduring gain (for instance, that they have had little impact on their respective career prospects); so that removing the imbalance between the parties on this account would require the woman to receive the equivalent of only a 5% capital interest.

Now consider how the proposed scheme would deal with these circumstances. So long as the parties' relationship remains on foot, the woman would continue to have her 50% interest.[40] But in the event of breakdown, she would lose this interest and instead receive relief in correction of the identified imbalance: as specified, the equivalent of a 5% interest.

It seems to me that this cancellation of her 50% interest would interfere with the woman's right to her possessions, engaging Article 1 of the First Protocol to the European Convention on Human Rights (Protection of Property), and so requiring justification as a proportionate ("necessary") means of achieving a legitimate public interest goal. Such a goal might well be present, in the shape of the correction of the scheme's selected kind of imbalance, just described, after relationship breakdown. But the cancellation of the woman's trust

[38] More precisely, a relationship between persons who are not married or civil partners, but before the breakdown had lived together as a couple in a joint household either for a certain qualifying period, or as the parents of children.

[39] Op. cit. note 3 above, paras. 4.41, 4.132–4.146.

[40] So, for example, if the man mortgages the house without the woman's consent, her interest is likely to bind the mortgagee, as in *Williams & Glyn's Bank Ltd. v Boland* [1981] A.C. 487.

interest is not a proportionate means of achieving this, because it does not conduce to, promote, this goal at all.

I must begin in developing this argument by noticing that some apparent interferences with possessions do not normally engage Article 1 at all. According to *Bramelid and Malström v Sweden*,[41] excepted from the Article's scope are rules that address "private-law relations between individuals", and "determine, so far as property is concerned, the effects of those legal relations and, in certain cases, oblige one person to surrender to another property of which the former has hitherto been the owner."[42] This exception may well be seen to cover what happens on divorce under the Matrimonial Causes Act 1973 s. 24, where the parties' prior rights are reallocated so as to deliver future fairness for the family members. And likewise what would happen under the proposed scheme for non-marital relationships, to the extent that this would reallocate the parties' prior rights so as to correct the kind of extant material imbalance at which it is directed. However, the exception seems to me not, or not always, to encompass the aspect of the scheme on which I am focusing: the suppression, or cancellation, or removal[43] of any rights enjoyed by a party under the constructive trust rules.

If the point of suppressing a party's trust right were to reallocate it to the other party in satisfaction of a desert on the latter's part, one might readily discern here another instance of the *Bramelid and Malström* exception. The Law Commission's account[44] is unclear as to the thinking involved, but it certainly contains nothing on these lines, nor is it easy to see how such a vision of the exercise could be suggested. Remember the example raised earlier. Suppressing the woman's 50%

[41] (1983) 5 E.H.R.R. 249 at 256. Examples give are "the division of property upon succession particularly in the case of agricultural property, the winding-up of certain matrimonial settlements and above all seizure and sale of goods in the course of execution proceedings." The subject matter of the case itself forms another example: a rule "which, in certain circumstances, requires minority shareholders to sell their shares [to majority shareholders] at a price to be fixed by arbitration, while recognising their right to have them purchased on the same conditions if they so wish."

[42] It is tempting to see this effect in terms not of the material being excepted from Article 1, as the decision has it, but of its engaging the Article but being obviously justified. (All the more so given the point raised in note 46 below.) But this argument of principle is not pursued here.

[43] The Law Commission does not use any of these words, nor a synonym for them. The relevant passages are in fact rather opaque (op. cit. note 3 above, paras. 4.42, 4.143–4.145), but may envisage less a substantive suppression or cancellation or removal of the claimant's trust rights than some kind of procedural impediment to their enforcement. This, however, would still represent an interference with property; see *Sporrong and Lönnroth v Sweden* (1983) E.H.R.R. 35 at [60], [63] for the concept's width. (It would also engage Article 6 (Right to a Fair Trial).) One could debate whether this interference takes the form of a "deprivation" or a "control" under the Article; *cf. Pye v United Kingdom* (2006) 43 E.H.R.R. 3; (2008) 46 E.H.R.R. 45; see S. Gardner with E. MacKenzie, op. cit. note 18 above, 34–7. However, the importance of this distinction is that reasonable compensation is needed to justify a "deprivation", but not a "control" (*James v United Kingdom* (1986) 8 E.H.R.R. 123 at [54]). For present purposes, this does not signify: either way, the interference under discussion is unjustified (also or otherwise) for the distinct reason given in the text.

[44] *Op. cit.* note 3 above, paras. 4.136–4.146.

beneficial interest means that the man, as legal owner, regains a 100% beneficial entitlement to the house, while having to pay the woman the equivalent of a 5% interest. There is no suggestion that this near-doubling of the man's entitlement should occur because he actually deserves it *per se*.

Rather (though one cannot say for sure, given the lack of clarity), the suppression seems to be a ground-clearing exercise, aimed at facilitating the application of the remainder of the scheme by disallowing the setting up of trust rights as an alternative to it.

In some cases this might make sense. These would be cases where the trust interest and the proposed scheme represent rival ways of responding to the same consideration – i.e. of correcting extant material losses and/or enrichments traceable to the claimant's contributions. Then, a suppression of the trust interest would prevent double recovery,[45] and as such would promote the scheme's overall project, and thus could be seen as another instance of the *Bramelid and Malström* exception.

But the discussion of the trust rules above indicates that, to put it at its lowest, they do not always operate in this way. Consider a case where the rules react, in the way suggested earlier, to the parties' materially communal relationship, i.e. to the fact that they lived together on the basis of sharing rather than keeping separate accounts. Here, the rules are driven by a consideration altogether different from the correction of extant material losses and/or enrichments traceable to the claimant's contributions. So in these cases a double recovery argument could not be made.

Nor does there appear any other basis for seeing a suppression of trust rights generated in this way as within the *Bramelid and Malström* exception.[46] As such, the suppression would involve an interference with the claimant's possessions after all, engaging Article 1, and so requiring justification as proportionate.

Coming then to the question of proportionality, I am sure that the general aim of the proposed scheme – correcting extant material losses

[45] Para. 4.42 of the Law Commission's account (op. cit. note 3 above) seems to suggest that the suppression rule would be aimed at prevention of double recovery: "Procedural and costs rules … must prevent parties who are eligible cohabitants from bringing claims under the [constructive trust doctrine] on the basis of facts which constitute qualifying contributions under the scheme." But paras. 4.136–4.146 are less clear.

[46] Imagine it were argued otherwise; that ground-clearing is warranted even where there is no question of double recovery. It would have to be noted that the doctrine in *Bramelid and Malström v Sweden*, note 41 above, contains a limitation. It does not apply (so there would be an interference, engaging Article 1, after all) where the impugned rule "create[s] an imbalance between them which would result in one person arbitrarily and unjustly being deprived of his goods for the benefit of another": ibid. at 256. It seems to me that such undiscriminating ground-clearing would fall foul of this limitation. Unlike the deprivations involved in *Bramelid and Malström v Sweden* and the examples given there, and in a double recovery case in the area under discussion, it would not simply vindicate or help to vindicate the authentic implications of private law relations with respect to property. With its lack of discrimination, it would on the contrary be arbitrary and unjust.

and/or enrichments traceable to the claimant's contributions – is a legitimate one, or would be, once adopted into the positive law. The question is whether the suppression of the claimant's trust rights would be necessary to it. It seems to me plainly not. Remember the example. Under the scheme, and clearly in furtherance of its aim, the woman in it would receive an award in correction of the extant material losses and/or enrichments traceable to her limited qualifying contributions. But she would simultaneously lose the 50% trust right to which she is entitled for the quite different reason of her materially communal relationship with the man. Given the lack of connection between the two, this loss of her trust right would not even conduce to, let alone be necessary to, the delivery of the scheme's aim. So the interference it represents with her possessions could not be justified so as to satisfy Article 1.

There is, finally, an even more fundamental point to be made, as follows. The trust rules display a commitment to taking material communality, where it exists, seriously: that is, to following the parties' own choice to pool their resources, rather than keep separate accounts. This would continue after the introduction of the proposed scheme, as we would be reminded by the rules' enduring operation in the pre-breakdown context. The law could not properly contradict its own appreciation of such relationships by attending, in the breakdown context, to their parties' individual losses and/or enrichments, as the scheme would entail.

Contrast the position in respect of the Matrimonial Causes Act 1973 s. 24, relating to marriage and civil partnership. On divorce, this operates to deliver fairness, which the courts view in terms of the family members' interests and needs and the achievement of equality between the couple.[47] A marriage or civil partnership is by definition a materially communal relationship; regardless of how the couple may in practice organise their finances, this is part of what their status fundamentally entails, as can indeed be regarded as the foundation of the courts' understanding of fairness. The relevant constructive trust rules will therefore, depending on just how one reads them,[48] deliver either equal shares in the family home, or a replica of the position under the Act. So there is little or no disjuncture of principle between the statutory regime and the constructive trust rules (which are not only of theoretical interest, but continue to apply to every situation except divorce). This position is, of course, as one would wish. The point is that the Law Commission's vision for the quasi-matrimonial context compares disadvantageously with it.

[47] *White v White* [2001] 1 A.C. 596; *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 A.C. 618.
[48] See text at notes 14 and 15 above.

III. Conclusion

Perish the thought that the Law Commission might be neglectful of either theoretical consistency or human rights. Rather, its proposals simply do not take adequate account of the extant law. Even this is understandable, in that they were conceived immediately after *Stack v Dowden*,[49] when the extant law was relatively indistinct; the difficulties largely emerge from subsequent clarifications or indeed adjustments. But we are where we now are, and it is accordingly unsatisfactory to continue urging the proposals.

In so contending, I do of course rely upon my arguments against Ms Miles's positions that the present law is unsatisfactorily uncertain, and (or but) that it would continue to yield the original outcome in *Burns v Burns*.[50] I am reasonably confident regarding the latter, and indeed that the rules are normatively appropriate more generally. I must concede, however, that a judge could wrong-foot me on this tomorrow, by giving the law a trajectory different from that which I claim to discern. Which concession prompts me all the more to further allow that Ms Miles assuredly has a point as regards uncertainty. Even if we should correctly understand the law as outlined in this article, it would indeed be welcome if this were conveyed more transparently by the primary sources, especially as regards "fairness".

Nor is the current law otherwise perfect. It certainly faces one challenge: to be able to deliver relief by way of monetary adjustment rather than beneficial interest, not least so as to address the increasing number of situations where the parties' home is rented rather than owner-occupied. I hope to focus on this issue in a future article.

[49] Note 4 above.
[50] Note 19 above.