Morality, Amorality and Equity

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Should equity seek to enforce its moral perceptions? Or is an amoral framework of equitable rules preferable? These questions are presented by the widespread adoption of extra-marital cohabitation. Answers will be sought by reviewing the constructive trust jurisdiction.

Sexual propriety and clean hands

It is obvious from its name that equity is closely related to the moral law.[1] Equitable remedies are distinguished from those of the common law by their underlying ethical quality.[2] The question to be considered is whether equitable supervision should extend in cohabitation cases to a consideration of the moral fabric of the relationship which gives rise to the application for equitable relief. For immediate purposes, it will be assumed that cohabitation outside marriage would be viewed by equity as immoral.[3]

Though rooted in principles of conscience, equity is far from being simply a system of fairness. The moral code adopted is rigid and uneven. In certain areas, the morality of the Chancellor was higher than the morality of ordinary traders. Dicey cites the examples of trusts and agent's duties to his principal,[4] and he might have added the proscription of usury. Equally the ideas entertained in Chancery were often far below the highest standards of enlightened public opinion.

Professor Wasserstrom[5] distinguished morality and sexual morality, and this distinction does appear particularly apposite in this connection. He cited homosexuality as, at the time he was writing in 1971, the paradigm of behaviour that was sexually immoral, but not really contrary to general standards of morality. He argued that equity is not concerned with immorality in the second sense.

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1. A. L. Goodhart, *English Law and the Moral Law* (1953), p.124.
2. Spry, *Equitable Remedies* 3rd ed., p.1.
3. Despite the *dictum* to the contrary in *Stephens* v. *Avery* [1988] Ch. 449, 453G.
4. Dicey, *Law and Public Opinion in Britain* 2nd ed. (1914), p.368.
5. *Morality and the Law* (1971), p.6. On the relationship of law and morality more generally, see Lord Hailsham, "The Law, Politics and Morality", [1988] *Denning LJ* 59.

Equity has not often been called upon to rule upon sexual morality as such. The Tudor Court of Star Chamber[6] enforced general morality in the so-called "criminal equity" but, with the abolition of that court and the disrepute attaching to its jurisdiction, equity was prevented from acquiring a generic jurisdiction in morality itself. Day-to-day matters of morality were dealt with by the ecclesiastical courts[7] rather than by Chancery. After the abolition of the Star Chamber, the Court of King's Bench asserted a right of custodianship of the public morals.[8] Chancery certainly refused to uphold trusts for immoral purposes,[9] but in so doing it merely reiterated the lead of the common law in contractual matters. "The rule invalidating illegal trusts is, at bottom not peculiar to equity."[10] There were, however, some exceptional cases in which equity gave relief against an illegal contract when the common law hesitated. *Goff & Jones* cite as examples marriage brokage contracts and agreements between spouses for future separation.[11] Lord Eldon indicated that the clean hands doctrine is not a bar to such relief.[12] In other areas, in which rules of morality might have been laid down, equity was content to adopt a neutral stance.

Equity, of course, requires its litigants to approach with clean hands.[13] But this maxim must be applied with caution, for in many areas its application is narrow and technical. Equity drew back from equating unclean hands and immorality. Its jurisdiction founded on moral principle is limited to the application of abstract principles of justice to cases within its specific jurisdictions.

So the application of the unclean hands maxim today is decidedly restrictive. "By 'improper' is meant legal, and not merely moral, impropriety."[14] Not any conduct which could be stigmatised as wrong leads to the denial of equitable relief. Though the wrongdoing that can be called in aid of the maxim has been described as "depravity",[15] which might well comprehend almost any extra-marital sexual connection, it is in fact only depravity in a limited sense that suffices. As Eyre CB explained:

"If this can be founded on any principle, it must be, that a man must come

6. *Shaw* v. *D.P.P.* [1962] A.C. 220, 272-3 (Lord Reid); *Knuller* v. *D.P.P.* [1973] A.C. 435, 471 (Lord Diplock); Holdsworth, *History of English Law* vol. V, p.213.
7. *Before the Bawdy Court* ed. Paul Hain (1972), especially the historical introduction.
8. *Shaw* v. *D.P.P.* [1962] A.C. 220, 231 (Ashworth J. for the Court of Criminal Appeal), 268 (Viscount Simonds).
9. *Re Pinion* [1965] Ch. 85, 105F, *per* Harman LJ (school for prostitutes); *Thrupp* v. *Collett* (1858) 26 Beav. 125 (trust for purchasing discharge of poachers).
10. Z. Chafee, (1949) 47 *Mich. Law Rev.* 877, 885; see *Sykes* v. *Beadon* (1879) 11 Ch. D. 170, 196.
11. *The Law of Restitution* 3rd ed. (1986), p.419; *St. John* v. *St. John* (1803-5) 11 Ves. 526, especially at pp.535-6.
12. *The Vauxhall Bridge Co.* v. *The Earl of Spencer* (1821) Jac. 64, 67.
13. Hence the possibility that conduct within the relationship may be relevant to claims based in trust law; conduct is generally irrelevant in the modern family jurisdiction.
14. Meagher Gummow & Lehane, *Equity - Doctrines and Remedies* 2nd ed., p.76 citing *Dering* v. *Earl of Winchelsea* (1787) 1 Cox Eq. Cas. 318.
15. Snell, *Principles of Equity* 25th ed. by P. V. Baker & P St. J. Langan, p.33.

> into a Court of Equity with clean hands, but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense."[16]

The adoption of the clean hands maxim in all its width leads to manifest injustice, as is shown by the experience in America in which the English wisdom was, at least in the past, lost. It is particularly unfortunate that American courts have applied the maxim in divorce suits, where it is inappropriate.[17] Thus the maxim has been applied to a state trooper's pre-marital fornication so as to debar him from a decree of nullity.[18]

That the English courts have adopted a narrower line can be illustrated by reference to *Argyll* v. *Argyll*.[19] The Duke of Argyll was about to publish details of his relationship with his third wife, defending his breach of confidence by arguing that the former Duchess did not have clean hands by reason of her adultery. Ungoed-Thomas J refused to apply the unclean hands principle.[20] The wife's adultery undermined the confidential relationship for the future, but not so as to betray the confidences of the past.

Argyll demonstrates that sexual immorality will not automatically debar the plaintiff the right to its relief. Only immorality that is directly related to the equitable cause of action has to be weighed in the balance.

Trusts of quasi-matrimonial homes

Pettitt v. *Pettitt*[21] and *Gissing* v. *Gissing*[22] established that a claim to an interest in a matrimonial or quasi-matrimonial home should be a claim to a beneficial interest under a trust.[23] Allowing an action in contract would have removed the unfortunate proprietary effect against third parties. However, this expansion was barred by the doctrine derived from *Balfour* v. *Balfour*,[24] which implied that a cohabitation agreement was unenforceable because the parties were presumed not

16. *Dering* v. *Earl of Winchelsea* (1787) 1 Cox Eq. Cas. 318, 319–20.
17. Z. Chafee, *supra* n. 10, 877, 1065 at pp.1083–90.
18. *Donovan* v. *Donovan* 263 N.Y.S. 336 (1933).
19. [1967] Ch. 302.
20. At pp.332A–337B.
21. [1970] A.C. 777.
22. [1971] A.C. 886.
23. *Gissing* v. *Gissing* [1971] A.C. 886, 896E (Lord Reid), 900B (Viscount Dilhorne) and 904H (Lord Diplock). In *Pettitt* v. *Pettitt* [1970] A.C. 777, 795G Lord Reid rejected the possibility of a claim in unjust enrichment because that would give only a money claim.
24. [1919] 2 K.B. 571. Support for the application for this principle can be found in the speeches of Lords Morris of Borth-y-Gest and Hodson in *Pettitt* v. *Pettitt* [1970] A.C. 777, at pp.804, 806. See also *Cowcher* v. *Cowcher* [1972] 1 W.L.R. 425, 436D and *Burns* v. *Burns* [1984] Ch. 317, 335D *per* May LJ.

to have intended to create legally binding relations.[25]

The insistence on trust law analysis means that the courts have not considered the application to cohabitation agreements of the principle prohibiting the enforcement of a contract founded upon an immoral consideration.[26] An application for equitable relief arising from an immoral relationship might equally be tainted with illegality. In order to assess the importance of the possible immorality argument it is proposed to examine the basis of the jurisdiction on which equity determines the beneficial interests in a quasi-matrimonial home.

It makes little difference whether the legal title is vested in one name or in joint names.[27] A conveyance to joint names raises a presumption that both parties are to enjoy a beneficial entitlement.[28] Whether or not the legal title to the home is vested in both partners, there are essentially three cases which call for discussion. These claims, to be examined in turn, are claims founded upon an express written declaration of trust, upon a financial contribution giving rise to a resulting trust or upon an implied agreement leading to the imposition of a constructive trust.[29]

1. Expressly declared trust

A claim for equitable relief arising under an expressly declared trust is not based upon the nature of the relationship between the legal owner and the beneficiary, but upon a clear fact that operates on the abstract calculus of equity to create rights in the property.[30] That fact is a signed declaration of trust complying with section 53 of the Law of Property Act 1925. The written document stands by itself to establish an equitable interest in the property. The reasons for the execution of the document do not affect its validity.

In *Ayerst* v. *Jenkins*[31] it was held that Chancery would not set aside a bond

25. Though this was not seen as a problem in *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346; in *Horrocks* v. *Forray* [1976] 1 W.L.R. 230, Scarman LJ (at pp.239F–240A) distinguished cases in which the relationship had ended (where the parties were at arm's length) and those in which it continued. A.A.S. Zuckerman argues for much reduced role in "Formality and the Family – Reform and Status Quo", (1980) 96 *L.Q.R.* 248; see also S. Hedley, (1985) 5 *Oxford Jo.L.S.* 391. Intention to contract is not viewed as a problem in America: *Marvin* v. *Marvin* (1976) 134 Cal. Reptr 815, *per* Tobriner J (on appeal 122 Cal. App. 3rd 871). The question of the validity of a cohabitation contract was left open in the most recent English decision: *Layton* v. *Martin* [1986] 2 F.L.R. 227.

26. *Upfill* v. *Wright* [1911] 1 K.B. 506. Traces of this attitude can be found as late as 1959 in *Diwell* v. *Farnes* [1959] 2 All E.R. 379; S. Parker, *Cohabitees* 2nd ed., pp.124–5 says that it can be assumed that these *dicta* have been overtaken by events.

27. For examples of joint-names cases, see *Bernard* v. *Josephs* [1982] Ch. 391 and *Walker* v. *Hall* (1984) 14 Fam. Law 21.

28. The presumption is rebuttable as in *Grant* v. *Edwards* [1986] Ch. 638 (brother enjoyed no beneficial interest); contrast *Maharaj* v. *Chand* [1986] A.C. 898 (conveyance to one alone).

29. *Per* Fox LJ in *Burns* v. *Burns* [1984] Ch. 317, 326F.

30. A written declaration is conclusive in the absence of fraud or mistake: *Leake* v. *Bruzzi* [1974] 1 W.L.R. 1528; *Goodman* v. *Gallant* [1986] Fam. 106.

31. (1873) L.R. 16 Eq. 275. See also *Howell* v. *Price* (1855) 25 L.T. O.S. 194 (annuity prevailed over immoral consideration not appearing on the face of the deed); *Re Wootton* (1904) 21 T.L.R. 89 (deed founded on past cohabitation not void even though it contemplated future cohabitation); *Robinson* v. *Gee* (1749) 1 Ves. Sen 251 (Lord Hardwick LC was rightly scandalised by a purported assignment of a wife, one Mrs Hanks, which was held to be void).

founded upon an immoral consideration which did not appear on the face of the bond. An apparently innocuous bond was enforceable even though it was in fact to provide for the grantor's deceased wife's sister, with whom he was cohabiting "under the colour of a fictitious marriage". The same principle should apply to a modern declaration of trust. The simple fact that a trust is declared by reason of a relationship that could be branded as immoral is no cause for disputing the validity of the trust.[32]

2. Resulting trust from contribution

The second case to take is the resulting trust. An implied trust may be resulting or constructive. A leading equity text says that "some of the recent cases treat the two kinds of trust as almost synonymous."[33] In many cases, it has only been important to establish that rights arise under a trust that does not require writing. For our purposes it is important to distinguish these two forms of trust. A resulting trust[34] is taken to arise where the beneficial interest is created through a direct[35] financial contribution. There is therefore little scope for a moral examination of the underlying relationship by the court of equity.[36] The main need to examine the surrounding circumstances will be to see whether a contribution or a loan is intended.[37] Further, the nature of the relationship may be relevant on conventional theory to determine whether the presumption of advancement applies.[38]

The bare fact which then founds the equitable jurisdiction is a financial contribution to the purchase. The nature of the relationship which caused the contribution to be made is not pertinent to the ascertainment of the consequences of the contribution. Thus a case such as *Williams & Glyn's Bank Ltd.* v. *Boland*[39] is not a husband and wife case as such, but a case between a legal estate owner and a

32. *Cf.* the analogy of trusts for illegitimate children: P.H. Pettit, *Equity and the Law of Trusts* 6th ed., pp.179–81. At one time a gift by deed for future illegitimate children was void: *Occleston* v. *Fullalove* (1874) L.R. 9 Ch. App. 147. Recent decisions are less strict: *Re Hyde* [1932] 1 Ch. 95. These cases are now reversed by statute: Family Law Reform Act 1987, s.19 replacing s.15(7) Family Law Reform Act 1969.

33. Hanbury & Maudsley, *Modern Equity* 13th ed. (J.E. Martin), p.69; see also p.281. For criticism of the analytical laxity implied, see Frank Bates, (1976) 92 *L.Q.R.* 489. The distinction is fully discussed by M.J. Dixon, "Co-Ownership Trusts in the United Kingdom - The Denning Legacy" [1988] *Denning LJ* 27.

34. It is possible that there may be an underlying intention to create a constructive trust, as in *Re Densham* [1975] 1 W.L.R. 1519 and *Passee* v. *Passee* [1988] 1 F.L.R. 263.

35. For a case in which indirect contributions gave rise to a resulting trust, see *Howard* v. *James* (1989) 19 *Fam. Law* 231.

36. Though a fraudulent intention would bar equitable relief: *Sekhon* v. *Alissa* [1989] 2 F.L.R. 94, 98A–C.

37. Good examples are *Sekhon* v. *Alissa* [1989] 2 F.L.R. 94 and *Spence* v. *Brown* (1988) 18 *Fam. Law* 291.

38. Megarry J in *Crane* v. *Davis* Times Law Rep. 13 May, 1971 decided that the presumption did not apply between a man and his "mistress"; the point was left open in *Cantor* v. *Fox* (1975) 239 E.G. 121: see J.G. Miller, *Family Property & Financial Provision* 2nd ed., pp.26–27.

39. [1981] A.C. 487.

contributor, so that the same principles would apply if the roles were reversed, or if the parties were unmarried, or if there were some other connection between them;[40] mother and son,[41] aunt and niece,[42] yuppies sharing, or sleeping together, or homosexuals. Whatever the relationship should make no odds; it is the pull of money that counts.

3. Constructive trusts

Pure resulting trusts, as defined above, are uncommon. Much more common are constructive trusts arising between the parties to an extra-marital relationship.[43] Many cases involve variations after the initial purchase, which must presumably operate by way of constructive trust.[44] The ultimate object of enquiry is the relevance of moral conduct in the exercise of this equitable jurisdiction. It is first necessary to consider the circumstances in which the jurisdiction can be exercised.

The modern tendency is to discount the very wide jurisdiction proposed at times by Lord Denning MR[45] which amounted to an assertion that a constructive trust could be used as a redistributive remedy. The argument for that wide jurisdiction, derived from the speech of Lord Diplock in the House of Lords in *Gissing* v. *Gissing*,[46] was in truth inconsistent with the actual decision in that case. A cohabitee does not acquire an interest in his or her partner's house simply because they live together for a long period of time, or because the claimant looks after the children of the relationship, or contributes to the general living expenses of the household.[47] No constructive trust is to be implied simply because a woman goes to live in a man's house, for claiming a share of the property is not the only reason for cohabitation.

The essential unifying concept of the modern jurisdiction, identified by Browne-Wilkinson V-C in *Grant* v. *Edwards*,[48] is that when a property is purchased there is a common intention that both partners to the relationship should be entitled to a defined beneficial interest. A constructive trust arises when the claimant has acted to his or her detriment in reliance upon that common

40. At p.502F, *per* Lord Wilberforce.
41. *Bull* v. *Bull* [1955] 1 Q.B. 234; *Sekhon* v. *Alissa* [1989] 2 F.L.R. 94 (mother and daughter).
42. *Re Sharpe* [1980] 1 W.L.R. 219 (a loan case).
43. The jurisdiction was said to be founded upon commonsense by Lord Upjohn in *Pettitt* v. *Pettitt* [1970] A.C. 777, 816G.
44. See *Hussey* v. *Palmer* [1972] 1 W.L.R. 744 (paying for extension same as paying part of price); *Bernards* v. *Josephs* [1982] Ch. 391, 404E Griffiths LJ; Fox LJ in *Burns* v. *Burns* [1984] Ch. 317, 327D.
45. *E.g.*, in *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286, 1290A; *Eves* v. *Eves* [1975] 1 W.L.R. 1338.
46. [1971] A.C. 886.
47. *Burns* v. *Burns* [1984] Ch. 317. A claim to a constructive trust must allege a contribution to the purchase of a specific asset: *Layton* v. *Martin* [1986] 2 F.L.R. 227.
48. [1986] Ch. 638, 654F–H.

intention.[49] Usually detriment is proved, or at least evidenced, by a financial contribution. Cases where no financial contribution are made, but where nevertheless sufficient detriment is shown, are rarer.[50] Financial contribution is an objective fact, in which moral judgment has no part to play.[51]

The essential element for our purposes, in which moral judgment might be relevant, is the proof of the common intention, which founds the basis for the implication of a trust. It is now possible to abstract a number of related situations in which an event occurs on acquisition of the property which is inherently capable, if supported by appropriate later conduct, to found a claim for the imposition of a constructive trust. They are conveniently summarised by Mustill LJ in *Grant* v. *Edwards*:

> "For present purposes, the event happening on acquisition may take one of the following shapes. (a) An express bargain whereby the proprietor promises the claimant an interest in the property, in return for an explicit undertaking by the claimant to act in a certain way. (b) An express but incomplete bargain whereby the proprietor promises the claimant an interest in the property, on the basis that the claimant will do something in return. The parties do not themselves make explicit what the claimant is to do. The court therefore has to complete the bargain for them by means of implication, when it comes to decide whether the proprietor's promise has been matched by conduct falling within whatever undertaking the claimant must be taken to have given *sub silentio*. (c) An explicit promise by the proprietor that the claimant will have an interest in the property, unaccompanied by any express or tacit agreement as to a *quid pro quo*. (d) A common intention, not made explicit, to the effect that the claimant will have an interest in the property, if she subsequently acts in a particular way."[52]

It may become apparent to the court of equity asked to enforce the contractual arrangement that an irregular relationship is implied. A moral examination of the basis of the relationship is much more likely in cases falling within heads (b) and (d) of Mustill LJ's analysis than heads (a) and (c). Mustill LJ postulates that the

49. Detriment is necessary to establish a resulting, constructive or implied trust; otherwise an informal declaration is void under s.53(1)(b), Law of Property Act 1925: *Midland Bank P.L.C.* v. *Dobson* [1986] 1 F.L.R. 171. An authority for imposing a constructive trust without detriment is Lord Denning MR's judgment in *Eves* v. *Eves* [1975] 1 W.L.R. 1338; the case is better supported on the grounds adopted by Browne LJ and Brightman J.

50. Examples are *Grant* v. *Edwards* [1986] Ch. 638 and *Eves* v. *Eves* [1975] 1 W.L.R. 1338.

51. Financial contributions are also relevant as evidence of the parties intentions if wholly inferred, as corroboration of a direct intention, and in quantifying the beneficial interest: *per* Browne-Wilkinson V-C in *Grant* v. *Edwards* [1986] Ch. 638, 654B-C.

52. [1986] Ch. 638, 652A-C (dealing with a case in which the claimant is female). For discussion see A.J. Oakley, *Constructive Trusts* 2nd ed., pp.41-3 and P.H. Pettit, *Equity and the Law of Trusts* 6th ed., chs. 8 and 10.

parties have not made explicit the precise terms of their arrangement, so that the common intention has to be implied by equity completing the presumed bargain between the parties. Effectively the courts are ascertaining the arrangement that might be anticipated to be reached by a couple in the position of the parties to the action. Proof of the relationship is an essential part of the proof of the claim to a beneficial interest.

The common feature of all Mustill LJ's heads of constructive trust[53] is that they are founded upon an agreement, whether express or implied, that a share is to be created. If equity could form a moral judgment as to a contract, it could also adopt a moral judgment in applying the constructive trust jurisdiction. Therefore, constructive trusts arising from house purchases do give scope for moral examination of the background to the relationship. The extent to which the courts have adopted a moral tone must now be considered.

The stereotype of marriage

The constructive trust jurisdiction originated with claims under the Married Women's Property Act 1882, and has been gradually extended to cases involving unmarried couples. This history explains the tendency, noted by Freeman,[54] to append legal consequences only to relationships that conform to the stereotype of a conventional marriage. Freeman was discussing the unrivalled influence of Lord Denning in this area of the new equity. The former Master of the Rolls would probably have regarded the intervention of equity as acceptable only where the relationship conformed, except in formality, to marriage.[55] Looser forms of association outside marriage or sexual variants of it would not have attracted his intervention. The moral structure of a relationship may be relevant in the eyes of equity.

Consideration must start with *Ulrich* v. *Ulrich*.[56] An engaged couple had bought a house, both contributing, though the conveyance was taken into the man's name alone. After the marriage had occurred, the Court of Appeal were called to adjudicate upon the ownership of the matrimonial home. It was held that the wife was entitled to an equal interest on the facts of the case. Lord Denning MR said that the effect of contributions before a marriage was the same as after a marriage, provided that the marriage took place.[57] He asserted that the position would have

53. [1986] Ch. 638, 652A-C.
54. In Jowell & McAuslan (eds.), *Lord Denning - The Law and the Judge*, p.152.
55. In *Hohol* v. *Hohol* [1981] V.R. 221 there is some evidence that strict principles of property law are not applicable between cohabitees; see Robert L. Stenger, (1989) 27 *J. Fam Law* 373 for a comparative survey.
56. [1968] 1 W.L.R. 180 (C.A.), subsequently disapproved.
57. At p.185G-H.

been different if the marriage had never taken place.[58] However, Lord Denning was applying the view that matrimonial property formed a family asset, so that equal ownership could usually be implied. This view was emphatically rejected by the House of Lords in *Pettitt* v. *Pettitt*[59] and in *Gissing* v. *Gissing*.[60] Hence Lord Denning's *dictum* that there is a substantial difference between the position if the parties subsequently married and if they did not has to be treated with great caution.[61] So too must his opinion that a couple who bought a house intending to marry but who subsequently did not do so should be treated much as two strangers.[62]

Ulrich reveals the original opinion of Lord Denning that there was a substantial difference between the affairs of married and unmarried couples. This view was quickly and decisively rejected by the House of Lords. Both of the leading House of Lords decisions, those in *Pettitt* v. *Pettitt*[63] and in *Gissing* v. *Gissing*,[64] involved married couples. In both cases ordinary principles of equity were applied to *married* couples. Viscount Dilhorne in *Gissing* deprecated "the error of supposing that the legal principles applicable to the determination of the interests of spouses are different from those of general application in determining claims by one person to a beneficial interest in property in which the legal estate is vested in another."[65]

The extension of the constructive trust therefore started with licit relationships. In relation to matrimonial homes this jurisdiction was supplemented by the courts' power to redistribute family property according to principles of fairness on divorce.[66] In relation to cohabitation outside marriage the equitable jurisdiction, based upon established property rights, has stood alone and therefore assumed an enhanced significance.[67] A claimant would acquire no particular rights through cohabitation, but equally he or she would not lose any equitable rights which he or she had acquired simply because the couple were cohabiting out of marriage. Such

58. The purchase arrangement could be seen as an ante-nuptial settlement within s.17, Matrimonial Causes Act 1965 (now s.24, Matrimonial Causes Act 1973). The case led to specific statutory provision for the property of engaged couples: Law Reform (Miscellaneous Provisions) Act 1970, s.2; the legislation does not confer a general power to adjust the rights of engaged couples: *Mossop* v. *Mossop* [1988] 2 W.L.R. 1255. Query whether engagement is now a general precursor of marriage.
59. [1970] A.C. 777.
60. [1971] A.C. 886.
61. *Cowcher* v. *Cowcher* [1972] 1 W.L.R. 425,429G (Bagnall J).
62. *I.e.*, that there would probably be a resulting trust for them according to their contributions. In *Diwell* v. *Farnes* [1959] 2 All E.R. 379 the majority of a differently constituted Court of Appeal had held that a man and his "mistress" should be treated as strangers and not as husband and wife. The reason given was the absence of legal liability to a cohabitee. Again the underlying assumption was that matrimonial property formed family assets.
63. [1970] A.C. 777.
64. [1971] A.C. 886.
65. [1971] A.C. 886, 899G. See also Lord Diplock at p.905C, who analysed the case in the neutral language of "trustee" and "*cestui que trust*"; *Burns* v. *Burns* [1984] Ch. 317, 325C (Waller LJ); *Grant* v. *Edwards* [1986] Ch. 638, 651G (Mustill LJ).
66. Matrimonial Causes Act 1973, part II.
67. Where there are children of the relationship, a wide jurisdiction is conferred by s.12, Family Law Reform Act 1987; this provision operates from April 1, 1989: 1989 S.I. No. 382.

a cohabitee "should be treated in exactly the same way as any other tenant in common in relation to the joint property."[68] Apart from cases where specific statutory jurisdictions apply only to married couples, general equitable principles are to be applied.[69]

Logically, as ordinary equitable principles are applied by analogy to marital property disputes, there is no call for restricting the application of those techniques to particular relationships. However, the modern case-law can be seen as an extension from marital disputes to quasi-marital disputes. That extension has been prompted by the tendency to regard marriage as a mere formality,[70] so that those who are effectively married should be treated in the same way as if married.[71] The current state of the authorities reflects the tension between these two fundamentally irreconcilable approaches.

The starting point for exploration post-*Gissing* is *Cooke* v. *Head* in which Lord Denning MR expressed his opinion that the same principles should be applied to "husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too."[72] This theme was taken up in *Bernard* v. *Josephs*[73] where Griffiths LJ accepted that the same principles should operate whether the couple were married or unmarried, but added an important rider. In extra-marital cases the nature of the relationship is a very important factor in determining what inferences should be drawn from the way that the parties have conducted their affairs.[74] Griffiths LJ suggested that the commitment to the relationship is crucial. If a couple act as married, though not bothering to go through the ceremony of marriage, then the courts will treat them as *de facto* married. If however they choose not to marry, to retain independence, then according to Griffiths LJ different conclusions have to be drawn from their conduct. "One cannot make the blithe assumption that all couples living together are no different from a married couple."[75]

68. *Dennis* v. *MacDonald* [1981] 1 W.L.R. 810, 814B *per* Purchas J; for a recent reaffirmation of this principle see, *per* Mustill LJ, *Grant* v. *Edwards* [1986] Ch. 638, 651F.
69. The rules about housekeeping allowances in Married Women's Property Act 1964, s.1 cannot apply between an unmarried couple: Bromley's *Family Law* 7th ed. (P.V. Bromley and N.V. Lowe), p.525. S.37, Matrimonial Proceedings and Property Act 1970 relating to improvements is also not applicable to cohabitees unless engaged, but the position is clouded by the fact that the section is stated to be declaratory of the existing law: J.G. Miller, *Financial Property and Financial Provision* 2nd ed., p.41.
70. See Sir George Baker P (strongly disapproving!) in *Campbell* v. *Campbell* [1976] Fam. 347, 352E.
71. The development of the jurisdiction over extra-marital property is naturally well-travelled territory. Particularly helpful are the discussions by M.D.A. Freeman & C.M. Lyon, *Cohabitation without Marriage* (1983), pp.88–102, S.M. Cretney *Principles of Family Law* 4th ed., pp.660–68, and Robert L. Stenger, "Cohabitants and Constructive Trusts - Comparative Approaches", (1989) 27 *J. Fam. Law* 373.
72. [1972] 1 W.L.R. 518, 520G. Karminski LJ at p.522 is to like effect. On quantification of the interest, Lord Denning also equated a married and an unmarried woman (referred to as "a mistress") at p.521H.
73. [1982] Ch. 391.
74. [1982] Ch. 391, 402E–F; also Kerr LJ at p.408D.
75. At p.403B–C.

The case reflects a most marked and sharp divide in moral perspective. Lord Denning referred to the woman as a mistress and grudgingly extended protection to a woman within an illicit relationship.[76] He said that the courts should extend the principles applied to married couples to "couples living together (as if married)."[77] It is by no means clear that this extends beyond a marriage conforming to a stereotype of marriage. Griffiths LJ's approach enabled couples to be free to cohabit without commitment without attracting the moral stigma of the court.[78] It is submitted that Griffiths LJ's approach reflects better modern society.

The modern understanding is best summarised in this passage from the opinion of Fox LJ in *Gordon* v. *Douce*:

> "The court may in drawing inferences as to the intentions of the parties, be influenced by the relationship. What might be sensible between husband and wife might not be so between two brothers, but in general the principles applicable must be the same whatever the relationship."[79]

In this and other cases in which the issue has arisen for decision the couple were cohabiting as if married. It remains to be seen whether doctrinal orthodoxy will be upheld in less obvious cases. If a couple drift into a relationship, it is unlikely that they will define the basis of their relationship with precision.[80] Often it will be "undetermined and indeterminable".[81] The courts will usually have to construct an implied agreement from evidence as to the course of the relationship. The quality of the relationship is relevant when drawing inferences from conduct. As the nature of the relationship is an inherent part of the proof of the cause of action, there is the future possibility, in a different social climate, that the courts might express a judgment as to the desirability of the form of relationship that exists between the litigants.

76. Observing that the institution of marriage was being eroded: [1982] Ch. 391, 396G. As Jonathan Montgomery noted in "Back to the Future - Quantifying the Cohabitee's Share", (1988) 14 *Fam. Law* 72, 73, Lord Denning's view of justice was predicated on an assumption of women's dependency; *cf.* *Wachtel* v. *Wachtel* [1973] Fam. 72.

77. The difficulty is that many couples are unmarried by choice or through a rejection of the institution of marriage: Brenda M. Hoggett and David S. Pearl, *The Family, Law and Society - Cases and Materials* 2nd ed., p.284. Surely such considerations should make no difference to trust law principles?

78. See also May LJ in *Burns* v. *Burns* [1984] Ch. 317, 333B-C.

79. [1983] 1 W.L.R. 563, 565H-566A. The apparent divergence between married couples and unmarried couples as to the date of assessing the beneficial interest has been removed by the decision in *Turton* v. *Turton* [1988] Ch. 542; Kerr LJ said at p.554F that *Hall* v. *Hall* (1982) 3 F.L.R. 739 (which appeared to justify a divergence) was "pervaded by what is now recognised to be an untenable approach of differentiating between married and unmarried couples otherwise than on the basis of statutory provision."

80. Charles Harpum, *Adjusting Property Rights Between Unmarried Cohabitees*, (1982) 2 *Oxford Jo.L.S.* 277, 277.

81. *Per* Lord Denning MR in *Bernard* v. *Josephs* [1982] Ch. 391, 400B, speaking of whether a couple were "engaged" within the Law Reform (Miscellaneous Provisions) Act 1970, s.2; see now *Mossop* v. *Mossop* [1988] 2 W.L.R. 1255.

This exploration has shown that the courts have come to accept the logic of Lord Diplock's analysis in *Gissing* v. *Gissing*[82] that the constructive trust jurisdiction is to be applied without recourse to moral judgment. This has great significance for variant relationships, for example those between homosexual partners.

Variant relationships

Where the relationship conforms to marriage in all but formality, it is clear that the constructive trust jurisdiction may be invoked. There is scope for a divergence of opinion, and so of result, where the parties have some other relationship. The court has to deduce from the nature of the relationship the appropriate inferences as to the intentions of the parties. Normal expectations as to property ownership have to be deduced within a particular kind of relationship. Subtle variations of circumstances – whether the couple intend in the future to marry when free or they simply begin to live together without a thought to the future – may then lead to variant results.[83] The nature of the relationship is inevitably brought into the forum of public debate.

The tools of legal analysis used to regulate extra-marital cohabitation – implied contracts, constructive trusts and the like – could be used for other variant forms of relationship looser in their commitment or variant in their sexual orientation.[84] They are amoral in character, so that they could be applied to a relationship whether the court approved of or disapproved of or was neutral in relation to it. As Carol Bruch has noted of the American experience:

> "[T]here is little in the legal or economic rationales . . . that restricts their use to the monogamous heterosexual unit. It is true that in the context of homosexual or group living arrangements implied agreements may be somewhat less susceptible of proof, and in many states public policy may remain a defense to enforcement of established agreements. Beyond such qualifications, however, the arguments that follow apply."[85]

Ms Bruch recognises the possibility of immorality arguments being raised. The court might stigmatise other, more *outré*, relationships as immoral and so refuse to sanction the enforcement of property rights arising from it. The current moral dislocation presents the difficulty of making ethical judgments if no moral consensus is to be found in society. It cannot however be assumed that the tolerance implicit in cases such as *Stephens* v. *Avery*[86] will hold good in the future.

82. [1971] A.C. 886, 905D–906B.
83. *E.g.*, whether the couple are divorcing previous spouses as in *Bernard* v. *Josephs* [1982] Ch. 391 or where there are no marriage prospects as in *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346.
84. Ruth L. Deech, (1980) 29 *I.C.L.Q.* 480, 485.
85. (1976) 10 *Fam.L.Q.* 101, 106.
86. [1988] Ch. 449 (lesbianism); contrast *Glyn* v. *Weston Feature Film Co.* [1916] 1 Ch. 261 (adultery).

In these circumstances it does seem quite possible that public policy issues might be pleaded and taken into account by the courts. There is no English authority in which a dispute between homosexuals has had to be adjudicated.[87]

Chancery has available the intellectual apparatus, in the shape of the 'clean hands' doctrine, to withhold its sanction from applicants of whom it does not approve. It might well form a judgment, say, that homosexual unions were contrary to public policy and so that applicants who came to court to allege such a relationship should be denied access to equitable remedies.

It is suggested, however, that equity should not introduce an element of moral guardianship into the constructive trust jurisdiction. The doctrine should be based upon abstract principles of equity,[88] so that an amoral approach to property disputes is adopted. It is possible to apply the terminology of trust – putative trustee and putative *cestui que trust* – impartially. Happily equity is based upon abstract moral perceptions, and not upon merit, and those equitable considerations can be applied impartially to litigants irrespective of their race, their beliefs, or their sexual propensities.

Conclusion

The constructive trust jurisdiction has grown organically from marital to extra-marital relationships. Hence there was a tendency to support only relationships that conformed, except in formality, to the pattern of monogamous marriage. However, the tools of equitable analysis are of themselves amoral in character. The logic of the leading statement in *Gissing* v. *Gissing* was that the equitable jurisdiction should be founded on abstract conceptions of justice, rather than a narrow vision of sexual morality. This logic appears now to be accepted in the Court of Appeal.

However, the courts retain a residual jurisdiction to deny the use of legal sanctions to enforce a trust that is *contra bonos mores*. The Chancery Division has recently refused to rule on matters of sexual morality in an action for breach of confidence.[89] The unhappy possibility remains that, if the moral tide changes, public policy arguments may be available in future cases concerning quasi-matrimonial homes.

87. See a *dictum* by Glass JA in *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685, 689C supporting the application of the same principles to any heterosexual or homosexual relationship.
88. But *cf.* the parallel presumption of advancement: Snell, *Principles of Equity* 28th ed. (1982), p.183 approved by Sir F. Lawton in *Mossop* v. *Mossop* [1988] 2 W.L.R. 1255, 1260H.
89. *Stephens* v. *Avery* [1988] Ch. 449.