Flynn v Reid

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	14 May 2012
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[2012] JRC 100

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats Clapham **and** Le Breton.

Between
Rosemary Flynn
Plaintiff
and
George Reid
Defendant

Advocate C. Hall **for the Plaintiff**.

Advocate J. N. Heywood **for the Defendant**.

Authorities

Matrimonial Causes (Jersey) Law 1949.

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Selby -v- Romeril [1996] JLR 210.

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Thorner -v- Major [2009] UKHL 18.

Gillett -v- Holt [2001] Ch. 210.

Jones -v- Jones [1977] 1 WLR 438.

Pascoe -v- Turner [1979] 1 WLR 431.

Felard Investments Limited -v- Church of Our Lady, Queen of the Universe (Trustees) (1978) JJ 1.

Nicolle -v- Starck.

Traité du droit coutumier de l'ile de Jersey, C.S.Le Gros.

Pirouet -v- Pirouet [1985–86] JLR 151.

Dillwyn -v- Lleqellyn [1862] 4 De G.F. & J 517. See *Pirouet -v- Pirouet* [1985–86] JLR 151.

Ramsden -v- Dyson [1866] L.R. 1HL 129.

Plimmer -v- Mayor or Wellington [1884] 9 App. Cas 699.

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Taylor Fashions -v- Liverpool Victoria Trees Co. Limited [1981] 1 AER 897.

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Property — claim for breach of contract, proprietary estoppel, constructive trust and unjust enrichment.

The Deputy Bailiff

1 The plaintiff and the defendant formed a relationship in 1995 and commenced living together shortly thereafter, the plaintiff moving into the defendant's flat. The first child of the union between them was born in February 1997. It is agreed that about two years later the defendant sold his flat and the couple moved into rented accommodation until March 2001 when the defendant purchased the property 6, Le Petit Pres, Rue des Pres (“the property”) for a consideration of £199,000. The parties regarded the property as being their home. It

was bought in the sole name of the defendant because he was residentially qualified and the plaintiff did not have housing qualifications. The purchase was funded by a deposit of £54,000 which was provided by the defendant, the balance being borrowed from the Royal Bank of Scotland International by way of a loan taken out jointly by the plaintiff and the defendant. That loan was secured against the property by way of hypothec. In 2003 the parties had a second child. In July 2005 the plaintiff and the defendant separated and the plaintiff moved out of the property with the children. The defendant remained there until the property was sold for a consideration of £420,000 on 27 th April, 2011. The defendant had carried out a loft extension which was completed at about the time the plaintiff left the property and was financed entirely by him, either with his own funds or by his repayment of a joint equity release loan in the sum of £15,000 which the parties took out. In addition, the defendant made all the loan repayments after the plaintiff left.

2 By an Order of Justice issued on 6 th August, 2010, the plaintiff sought orders that the defendant sell the property and pay general damages to her for breach of contract and/or 50% of the total equity in the property or such other sum as the Court deemed just. The plaintiff also claimed special damages to compensate her for an alleged loss of her share of the contents of the house which were said to be jointly owned. In his amended answer, the defendant denied the claim, and asked that it be dismissed.

3 The facts set out above are not in dispute. There was some dispute between the parties over the financial arrangements between them. We will deal with that question below when we consider the contractual claim. There was also some dispute between the parties as to how the separation came about. We will deal with that below when considering the claims under the heading of Unjust Enrichment. It is in our view relevant to emphasise the nature of the relationship between these two parties. In her witness statement which stood as her evidence in chief, the plaintiff said this:-

> *"I was not one of these women who needed to be married and although friends were always asking us, we never really discussed marriage very often.* I think this was because Mr Reid had been married before meeting me and had gone through a bitter divorce. I understood that because he had been married before he didn't want to have to go through the whole marriage ceremony etc again but as far as I am concerned that was the only reason. It was not because he didn't love me or didn't intend to stay with me. He treated me as if I was his wife and I treated him as my husband. I knew we were as good as married and we shared everything."

4 As far as the defendant was concerned, more than once he indicated in his evidence that the two parties lived together as a couple, and when asked why he did not take particular actions in relation to some of the financial matters which are considered below, his response was that he did nothing – what else could he do, as they were a couple?

5 The Matrimonial Causes (Jersey) Law 1949 enables the Court to make a wide variety of

orders on separation or divorce. The jurisdiction to do so arises from the statute. The legislature recognised a problem arising from the fact that marriage between two people creates legal obligations as well as emotional and/or moral obligations and a break up of the marriage required a legal solution to the breaking up of the legal obligations. The difficulty with which the Court is having to grapple in this case is one which has exercised the courts of the United Kingdom increasingly over the last 20 years – how to reach a fair result in circumstances where a couple choose to live their lives together outside the institution of marriage, which the law recognises, and nonetheless seek the resolution of the law in relation to their financial matters when they have separated. In her closing submissions, Advocate Hall invited us to make new law. It seems to us that we are entitled to look at all the existing grounds in law upon which a claim by one person against another might be founded, and possibly to extend those grounds if it seems to be appropriate to do so, but we certainly do not feel able to introduce a wholesale new quasi matrimonial causes regime to treat a couple, who remain unmarried, as though they were married and distribute assets amongst them on their separation simply because they considered themselves to be like a married couple. That would be for the legislature, which could give proper and full consideration to the boundaries of the potential for such claims.

6 In the event, Advocate Hall framed the plaintiff's claim on one or more of the following grounds in law:-

(i) Breach of contract;

(ii) Proprietary estoppel;

(iii) Constructive trust;

(iv) Unjust enrichment.

7 In relation to some of these claims, she also raised the issue of waiver, which we will tackle in relation to the different claims. We would like to pay tribute to the helpful submissions that both counsel have made in this case, which raises some difficult issues of law and judgment.

The Claim in Contract

8 The property was purchased on 23 rd March, 2001, in circumstances which we described in paragraph 1 above. There was consensus between the parties that the purchase was registered in the sole name of the defendant only because the plaintiff did not have housing qualifications. The borrowing to complete the purchase was taken from the bank in joint names, and for these purposes the bank required information as to the income of both plaintiff and defendant. There is at least an implication that the Bank required, whether for financial reasons or otherwise, that the loan be a joint loan. At all events, the plaintiff told us in evidence that she agreed to join into the loan because she knew that this was their family home. The lawyers who acted in the conveyance were clearly uncomfortable that the

plaintiff's position was not protected. According to the defendant, it was the lawyers who prepared the agreement which we describe shortly. The agreement was drafted without express instructions and signed without significant discussion. After all, they considered themselves a couple. This was their family home.

9 The agreement describes in its recitals the acquisition of the property and how it was funded. It indicates that the plaintiff would live at the property as the guest of the defendant, and in consideration for that, she had agreed to contribute towards some of the expenses incurred by him with regard to the property. The recitals indicate an agreement to contribute equally towards the payment of legal fees and disbursements incurred by the defendant in connection with the purchase of the property, the bank loan and the agreement itself. The final recital is in these terms:-

> *"Mr Reid and Miss Flynn wish to evidence in writing the terms and conditions upon which Mr Reid shall occupy the Property from the contract date pending either a transfer of the Property into the joint names of Mr Reid and Miss Flynn or the sale of the Property by Mr Reid to a third party or the purchase by Mr Reid of the interest of Miss Flynn in the Property."*

10 The substance of the agreement then contains provisions which may be summarised in this way:-

(i) The parties would discharge in equal shares all outgoings whatsoever in respect of the property;

(ii) The parties would pay to the bank on demand in equal shares all sums due in respect of the bank loan as and when they fell due;

(iii) The bank loan would be used solely for payment of the purchase consideration and the monies due under an ancillary building contract;

(iv) The defendant would keep the property in a good state of repair, decoration and condition, wind and watertight and structurally sound; and would also maintain appropriate insurance; and the plaintiff would reimburse him with one half of all those costs on demand.

(v) The defendant would not permit any further loans to be secured against the property.

(vi) Provision was made for the transfer of the property into joint names if the Housing Committee gave consent to an application to that effect, although no provision was made requiring a housing application to be submitted.

(vii) Provision was made in paragraph 11 of the agreement for the plaintiff to receive 50% of the equity in the property after repayment of the bank loan and the defendant's deposit (with interest on that deposit) in the event that she was asked to leave the property or she decided to live somewhere else; or if the defendant wished to sell the

property.

(viii) Provision was made for the defendant to execute a will devising the property to the plaintiff.

11 Accordingly, the plaintiff claims that the trigger events in paragraph 11 of the agreement have now taken place, and that the defendant should pay her 50% of the value of the property less the bank loan and the defendant's deposit plus interest. There is a problem in relation to the provisions set out in paragraph 11 of the agreement in as much as the obligation set out there, if the defendant were to keep the property on the plaintiff either being asked to live elsewhere or electing to live elsewhere, was that he paid the plaintiff her share within 30 days of her vacating the property, with a further provision that if the parties could not agree on the fair market value at the termination date then that value would be determined by an estate agent agreed on by the parties or nominated by the President of the Jersey Law Society. The plaintiff in fact left the property in July 2005. No formal claim appears to have been made until the issue of the Order of Justice in August 2010. During the interval, the defendant continued to pay all outgoings in relation to the property including the sums due under the bank loan, and indeed paid for improvements to the property. Even if the contractual claim is to be enforced, there is an issue therefore as to the date on which the property is to be valued, and the outgoings which fall to be deducted from that valuation.

12 The evidence before us as to what actually happened after the parties moved into the property shows that the contract or agreement to which we have referred was completely disregarded by both of them. That is unsurprising. Neither party considered, for example, the plaintiff to be the defendant's “guest” in the property. The defendant never submitted to the plaintiff an account for monies which he had spent in respect of insurance or repairs, requiring her to pay up her half share. Although the outgoings in respect of the bank loan were required to be paid in equal shares by the parties, that did not last for long. Originally the plaintiff paid £700 a month into the defendant's account to pay her share of the bank loan, but she says this was changed shortly after they moved in, by agreement, to £500 a month, at the suggestion of the defendant because she was paying nursery fees for their son. Indeed because she was also looking after their son, she reduced her hours of work and thus her income, and the defendant agreed that he knew that this was so. In 2003, the plaintiff became pregnant again and their daughter was born in October of that year. At some point, either then or earlier, the plaintiff stopped making payments towards the bank loan, she claims on the basis that the defendant agreed that as she was paying nursery expenses and making a contribution to other household expenses, he would pay the bank. There seems little doubt that the parties were both working hard. The daughter went to nursery at the age of four months. The plaintiff was caring for the children and looking after the home and also was working, albeit reduced hours from 5pm to 9pm. The defendant too worked long hours. The children would sit with the plaintiff's sister until their father returned in the evening on a regular basis.

13 It does appear that money was a bone of contention between the parties during their

relationship. The defendant's claim is that the plaintiff was not good at organising her finances and he was regularly having to help her. At one stage in their relationship, he made available to her his bank card so she could draw monies out of his account as they were needed for the purposes of meeting household expenses. Later on he changed his bank account into joint names and his salary continued to be paid into it. Nonetheless, the plaintiff maintained her own account and monies which she earned were paid into that account.

14 There was some cross examination of both parties in relation to the outgoings on the accounts revealed by the bank statements. It is fair to say that neither party could be sure, so long after the event, what particular entries on the bank statements reflected. Even so, the Court has no doubt that there were some occasions when the plaintiff removed monies from the defendant's account by the use of his card and credited her own account in order that she could then be seen to be putting the same money back into the defendant's account as her contribution towards the loan repayments. Although this was not straightforward behaviour on her part, the Court accepts the evidence that she was not a spendthrift and although she may have been unwise in her spending, her earnings were spent on the home, the children and necessary outgoings.

15 In April 2003 when the plaintiff told the defendant she was pregnant, he asked to see her bank statements, he says for the first time, as he was worried about their finances. Amongst her personal papers, he found reference to a loan of £6,000 which she had taken out from the bank, which he had not previously known about. He says that when he asked her about that loan, she told him it was none of his business. His case in part was that she was unable to make her contributions towards the loan monies because she had to find some way of repaying the additional loan which she had not previously told him about.

16 The defendant was asked what he did when he found all this out – why did he not take steps to close the account or to take the plaintiff's card away? In cross examination it was put to him:-

Q – And you did nothing?

A – What could I do?

Indeed, what could he have done? His choices were to say nothing, to sue upon the agreement which would almost certainly have brought the relationship to an end, or to renegotiate it, probably with the same result. It appears he took the first option.

17 Both parties agreed that the question of the contract was simply not raised. They never talked about it again after they signed it. As far as both of them were concerned, they were a couple and although the defendant says he was very uncomfortable with the financial arrangements, he did not see what he could do. This was so, notwithstanding that by mid-2004 he had discovered that the plaintiff was not in fact making any payments into the account towards the loan monies which were due, as the contract purportedly required her

to do.

18 Advocate Hall for the plaintiff asserts that there was a contract and points to the original agreement which was signed by the parties; she asserts that there was a variation of the contract because on the evidence of the plaintiff, which she asks us to accept, the defendant knew that the plaintiff was not making the payments which the contract envisaged, and he acquiesced in that arrangement – indeed as to the first reduction he even suggested it because the plaintiff was paying the nursery fees. If there was not a variation, then in effect there was a waiver of her breaches of contract because he could have raised the contract with her while they were living together and re-negotiated it.

19 It seems to us that the claim under this heading is quite impossible. The contract itself is at the heart of these difficulties. It made provision in relation to the property and outgoings for it, as though these could be placed in a vacuum away from all the other arrangements which the plaintiff and the defendant made with each other, as couples do, for the running of their home and for payment of their other outgoings. The contract was thus silent on who would pay for other expenses such as nursery fees or necessaries such as food or heating. It was silent on who would pay for clothes for their son, and had no provision for what would happen if either plaintiff or defendant were unable to work for a time or if there were further children. In other words, the contract was a wholly artificial arrangement reflecting an intention that the plaintiff would share in the equity of the property but, as a contract setting out their mutual obligations, it was meaningless in the sense that the parties paid no attention to it from the very beginning. They did not ask the lawyer to prepare it, did not give him instructions as to what should go in it, and it did not in fact reflect their daily dealings. We are reminded of the dicta of this Court in *Re Knights (Jersey) Limited* (1950–66) Jersey Judgments 207, where there was an intervention in the désastre of that company. Dismissing the intervention, the Court said this at page 210:-

> ***"Finally the Court wishes to add this, that it will not readily uphold documents which are fiction in the sense that they bear no real relation to the facts of a transaction the terms of which they purport to embody and which refer to non-existent documents or to events which have not happened."***

20 In this case, the contract does not refer to non-existent documents or events which have not happened, but it does bear no real relationship to what was actually to happen. This was because it was drawn up as a commercial transaction whereas in fact the domestic arrangements changed from day to day, as many domestic arrangements do. We do not find it sensible to apply ordinary contractual principles to this document. We think the defendant was being entirely honest when he answered the question, as to why he did nothing, with his own question, what could he do? This was not like a contractual arrangement where he could put the agreement on the table and renegotiate its terms. Nor was it a case where the defendant realistically could sue the plaintiff for her contribution to repayment of the loan, or where the plaintiff could sue the defendant for not redecorating the sitting room. Furthermore, it does not make practical sense to discuss whether or not the

defendant agreed a variation in the terms of the contract. The document was never in their minds. It does not make practical sense to discuss whether the plaintiff was in breach of contract, or whether the breaches of contract were waived. The agreement was the lawyer's solution to the fact that the parties were not married and it is clear that it was a solution which did not reflect the reality of the parties' relationship.

21 In *Selby -v- Romeril* [1996] JLR 210, this Court set down four requirements for the creation of a valid contract in Jersey, namely the consent of the party undertaking an obligation, his legal capacity to enter into the contract, an “objet” or subject matter of the contract and, finally, a legitimate “cause” or reason for the obligation to be performed. We do not in any way dissent from that summary of essential requirements, but we add that in relation to the requirement for consent of the parties undertaking the obligations, there must be shown a true consent, a true desire, or, adopting the French word, “volonté” that the arrangement become legally binding between them. We do not doubt that both the plaintiff and the defendant agreed with what was in the agreement as broadly setting out the position at that time. It reflected the fact that they were indeed a couple and were embarking on a family home together. If, however, the parties had intended its terms to operate in their day to day dealings, they would have set up their arrangements quite differently. Advocate Hall described this as a domestic contract rather than a commercial contract and she relied on the case of *Wade -v- Grimwood* [2004] EWCA Civ 999 for the submission that in such contracts, the formal requirements of a commercial contract between strangers can be disapplied. We are not sure what the results of any such distinction might be. Does it mean then in a domestic contract any of the rules on novation, lésion, dol or erreur should be disapplied? If the court followed this approach, how does anyone then know which legal rules apply and which do not? To adopt the approach we are asked to take would possibly lead to definitional problems as to what was a commercial as opposed to a domestic contract and would certainly introduce a lack of certainty which we think would be undesirable. In our judgment, if this is a contractual claim, we must apply ordinary contractual principles, and it is because the application of those principles makes no sense in the context of the facts of this case that we conclude that the contract did not in fact govern the relationship between the parties, nor was it intended to do so. Accordingly, we reject the plaintiff's claim based on contract. We would have to rewrite the contract to do otherwise.

22 We add this. If contrary to the above we had taken a different view on the claim under the contract, we would have found that the property and deductibles fell to be valued at the date the plaintiff left in July 2005 and her claim would have been computed accordingly. She would also have been entitled to claim interest at the Court rate until payment. We do not accept the plaintiff's submission that for the purposes of the contractual claim the value of the property should be assessed at a later date. In theory, that value could have fluctuated after the plaintiff left, and there is no obvious reason why the contractual claim should be assessed as at the date of sale five years after she left. The contract contains the provision for when the property was to be valued; and if we had applied the contract as a contract, we would have followed that provision.

The Claim in Proprietary Estoppel

23 Regrettably, the approach of the Royal Court to claims which are really based on proprietary estoppel has been inconsistent. Before reviewing those cases however, it is perhaps right to restate the nature of proprietary estoppel under English law because that appears to be the basis of the claim which was put before us. It is also relevant to distinguish proprietary estoppel from promissory or equitable estoppel. The latter rule is set out in Snell's Equity (32nd Edition) in this way at paragraph 12–009:-

> ***"Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."***

24 The doctrine of promissory estoppel is similar to the doctrine of waiver. The traditional view is that it may provide a defence, but it cannot create a cause of action, in the sense that it would permit a party to bring proceedings to sue for a gratuitous promise either by an action for specific performance or damages. It may be that the requirement in English law for consideration for there to be a valid contract may lie at the heart of developing the equitable doctrine. At all events, the shorthand maxim was always that promissory estoppel is "a shield and not a sword". The extent to which this shorthand maxim is accurate remains open for debate, and it is unnecessary in this case to consider it further because the plaintiff's claim here is based on proprietary estoppel which, in England, can found an action. The general consensus, according to Lord Walker in *Thorner -v- Major* [2009] UKHL 18 is:-

> ***"That the doctrine is based on three main elements…*** a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance."

25 The typical basis of a claim in proprietary estoppel is where persons have been induced to invest in or improve property owned by others either as a consequence of their own mistake (acquiesced in by the owner) or by direct encouragement or informal agreement. Unlike in the case of promissory estoppel, proprietary estoppel can be a positive source of rights – see for example *Thorner -v- Major* [supra].

26 It is an essential component of proprietary estoppel under English law that the party asserting the benefit of that estoppel must have acted in the belief either that he or she already owned or would obtain a sufficient interest in the defendant's property to justify the expenditure that had been incurred. It is also clear that, as far as the requirement is concerned that the plaintiff must have acted to his or her detriment, the question of detriment is "not a narrow or technical concept. The detriment need not consist of the

expenditure of money or other quantifiable financial detriment, so long as it is something substantial."—see *Gillett -v- Holt* [2001] Ch. 210 at 232 D-E.

27 There is a requirement that the detriment must be causally related to the promise or assurance. It is interesting to note that in *Jones -v- Jones* [1977] 1 WLR 438, the detriment consisted of the plaintiff giving up his job and going to live near the defendant in a house owned by the defendant. In *Pascoe -v- Turner* [1979] 1 WLR 431, the detriment lay in the plaintiff acting as partner and carer in a quasi matrimonial relationship. In *Gillett -v- Holt* (supra) the detriment lay in the plaintiff and his wife devoting the best years of their lives to working for Mr Holt and his company, showing loyalty and devotion to his business interests, his social life and his personal wishes, on the strength of clear and repeated assurances of testamentary benefits.

28 What is clear is that in England and Wales the doctrine of proprietary estoppel is a vibrant doctrine capable of being applied across a wide variety of factual circumstances.

29 The first occasion on which application of this doctrine was urged upon the Royal Court was as far as we can tell in *Felard Investments Limited -v- Church of Our Lady, Queen of the Universe (Trustees)* [(1978) JJ 1. In that case, the Royal Court was faced with a claim that the defendants were estopped in perpetuity from enforcing a building restriction over the land of the plaintiff created in a contract of sale in May 1934, as a result of which the plaintiff's land was the servient tenement. The plaintiff had built on its own land, but the building was in part on land which was subject to the restrictive covenant, and it sought an order which restrained the trustees from enforcing the restriction on condition of payment of such amount of compensation as might be appropriate.

30 The Royal Court noted that it was dealing with a *servitude réelle*. It noted further that the law of Jersey applies the well known Norman maxim " ***nul servitude sans titre"***.There was reference to the well established rule that ***"promesse à héritage ne vaut"*** when considering the case of *Nicolle -v- Starck* in May 1959. The full Act of the Court is set out at pages 17 and 18 of the Traité du droit coutumier de l'ile de Jersey by C S Le Gros.

31 At page 9 of the Court's judgment, Ereaut, Bailiff said this:-

> ***"As regards to the extinction of a servitude, Le Gros states, at page 21, that this may be achieved by agreement, by "confusion" by "renonciation", by expropriation, and by non user for forty years, to which we may add by destruction.*** We have no hesitation in saying that to achieve the cancellation of a servitude by agreement it is necessary, as in the case of the creation of a servitude, to pass a deed before the Royal Court .
>
> ***Counsel for the company was unable to cite to us any local authority for the proposition that a servitude may be created or extinguished in Jersey by the application of the doctrine of proprietary estoppel.*** Nevertheless he

reminded us that Royal Court is a Court of equity, and he asked us to find that a servitude may be created or extinguished in Jersey by the application of equitable principles, as it can be in England. The Court is indeed a court of equity, but our consideration of the ancient authorities, such as Poingdestre, Basnage, Pothier and Bérault, and of the modern cases, leaves us in no doubt that an interest in land, which of course includes a servitude, can be acquired only by title or in certain cases by prescription or "destination" .

We have already shown that in Jersey an agreement to create (or extinguish) an interest in land is not enough; it must be implemented by a deed passed before the Royal Court. The English doctrine of proprietary estoppel does not require an agreement; as we mention later, conduct on the part of the person asserting his legal right which falls short of an agreement can be sufficient to establish the equity. But it must follow that if an agreement does not in Jersey law create an interest in land unless a deed is passed, that must be even more the case where the conduct relied upon falls short of an agreement .

Counsel for the company argued that he was not asking us to find that the servitude in this case had been extinguished, but only that the trustees, by their conduct, should be held to be estopped permanently from enforcing the breach by the company of the building restriction. That seems to us to be a distinction without a difference. For both parties the effect of such an estoppel would be precisely the same as if the servitude were to be extinguished. As we see it, the application of the doctrine either has the effect of creating (or extinguishing) an interest in land, or it has no effect at all. In England the former is the case; in Jersey, it does not have that effect and therefore it has no effect at all."

32 The Court in *Felard Investments*, having found that proprietary estoppel was not part of the law of Jersey, then went on to consider whether, if the doctrine of proprietary estoppel had been so found, it would have applied it on the facts of that case.

33 The next local case is that of *Pirouet -v- Pirouet* [1985–86] JLR 151. In that case, the plaintiff sought to have set aside the will of his late father by which the deceased left the property "Hambury" to his other sons notwithstanding that during a 30 year period the plaintiff had occupied Hambury at a rent and made significant and costly improvements and alterations to the property. On each occasion he did so, on seeking his father's consent, he was told that the property was to be his and that he could therefore do as he wished with it. The father's position changed when the plaintiff and his family became Jehovah witnesses.

34 The plaintiff's claim was based on an asserted contractual obligation of the deceased father, which was said to be binding on his estate and on the doctrine of equitable estoppel. There was no mention of the English doctrine of proprietary estoppel. In its judgment the Royal Court referred to *Dillwyn -v- Lleqellyn* [1862] 4 De G.F. & J 517; *Ramsden -v- Dyson* [1866] L.R. 1HL 129; *Plimmer -v- Mayor or Wellington* [1884] 9 App. Cas 699; *Jones -v-*

Jones [1977] 1 WLR 438; *Taylor Fashions -v- Liverpool Victoria Trees Co. Limited* [1981] 1 AER 897; all of which were not cases on the doctrine of promissory estoppel at all, but cases based on the principles of proprietary estoppel.

35 Dorey, Commissioner, then referred to a number of cases involving promissory estoppel, and his reasoning, found at page 159 was as follows:-

> ***"In*** [*Taylor Fashions -v- Liverpool Victoria Trees Co. Limited*] ***and also in the almost contemporaneous*** *Amalgamated Inv.* & Ppty. Co. Limited -v- Texas Comm. Intl. Bank Limited ***emphasis was placed on the flexibility of equitable estoppel.*** Although the distinction between proprietary estoppel or estoppel by acquiescence and promissory estoppel or estoppel by representation was noticed, it was accepted that they were facets of the same principle. The necessity of satisfying all the probanda of Fry, J., in *Wilmott -v- Barber* ***was questioned and the view was approved that the real test was whether it would be unconscionable in any particular case for a person to enforce his legal right***.
>
> *In Taylor Fashions -v- Liverpool Victoria Trees Co. Limited, Oliver, J, in commenting on Shaw -v- Applegate said:-*
>
> ***"So here, once again, is the Court of Appeal asserting the broad test of whether in the circumstances the conduct complained of is unconscionable without the necessity of forcing those encumbrances into a Procrustean bed constructed from some unalterable criteria", and quotes with approval the words of Lord Denning*** , *M R in Morgate Mercantile Credit Co. Limited -v- Pitchings* ***who is cited as saying*** [1975] 3 All ER at 323:-
>
> ***"Estoppel is not a rule of evidence.*** It is not a cause of action. It is a principle of justice and equity. It comes to this. When a man by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so" .
>
> *In Amalgamated Inv.* & Ppty Co. Limited -v- Texas Comm. Intl. Bank Limited Goff, J. says ([1981] 1 All ER at 935):-
>
> ***"Of all doctrines, equitable estoppel is surely one of the most flexible… it is no doubt helpful to establish, in broad terms, the criteria which, in certain situations, must be fulfilled before an equitable estoppel can be established; but it cannot be right to restrict equitable estoppel to certain defined categories."***
>
> ***He goes on to approve Oliver, J's rejection of rigid categorisation and his conclusion that recent authorities supported a much wider jurisdiction to interfere in cases where the assertion of strict legal rights is found to be unconscionable.*** Later Goff, J said (ibid at 936:-
>
> ***"[I]t is in my judgment not of itself a bar to an estoppel but its effect may be***

> ***to enable a party to enforce a cause of action which, without the estoppel, would not exist.*** It is sometimes said that an estoppel cannot create a cause of action….In a sense this is true, in the sense that estoppel is not, as a contract is, a source of legal obligation. But…an estoppel may have the effect that a party can enforce a cause of action which without the estoppel, he would not be able to do."
>
> ***We must now consider the effect of these developments on the principle of equitable estoppel on the present case.*** The two recent Jersey cases, York Street *Pharmacy -v- Rault* and *Symes -v- Couch* ***make it clear that the Royal Court will apply equitable principles and award equitable remedies in appropriate cases.*** Although in Felard *Invs.* -v- Trustees ***of Church of Our Lady the Royal Court, in dealing with the extinction of a servitude, declared that the doctrine of proprietary estoppel was not part of the law of Jersey, we cannot avoid coming to the conclusion that the doctrine of equitable estoppel and in particular that facet of it known as promissory estoppel or estoppel by representation, is part of the law of Jersey and can be applied in appropriate cases.*** We consider this an appropriate case. There was a promise. There was a part performance."

36 There appears to us to have been an eliding of a number of different principles and, as described in a later case, some infelicitous language. Estoppel by representation is as we understand it a doctrine which existed at common law and not in equity, whereby a party was prevented from denying the truth of a statement of fact if he or she has induced another party to rely on it to their detriment. It seems that estoppel by representation of fact at common law was treated as a rule of evidence and not as a cause of action – see *National Westminster Bank Plc -v- Somer (UK) Limited* [2001] EWCA Civ 970. It appears therefore to be a misunderstanding to say that estoppel by representation was a facet of the doctrine of equitable estoppel or promissory estoppel.

37 Nonetheless, the Court determined that it would follow the equitable principles which had been set out and would not allow the expectation of the plaintiff to be defeated as it would be inequitable to do so. We gratefully acknowledge the insistence in *Pirouet* that justice had to be done, even if we think the Court may have taken a wrong turn in expounding the law in the way it did.

38 The *Amalgamated Investment & Property Co. Limited* case (supra), is also of interest for the review by Robert Goff J of a number of cases where the courts took the approach that there was a wider jurisdiction to interfere on the basis that the assertion of strict legal rights was found to be unconscionable. Indeed, at one time, it seemed that the prospect of a unified doctrine of estoppel which brought together the common law and equitable approaches such that the court had only to consider whether conduct was unconscionable in order to interfere, was coming closer. However, in the courts of England and Wales at any event, that idea has been firmly put to bed in *Yeoman's Rowe Management Limited -v- Cobbe* [2008] UKHL 55, where the House of Lords confirmed that in order to give rise to an

estoppel, the claim must be capable of being analysed in the traditional manner. It is of interest that that case also reaffirmed that the doctrine of estoppel was independent of the doctrine of constructive trusts.

39 Before leaving *Pirouet -v- Pirouet*, it is also to be noted that there was a recognition of the decision of the court in *Felard Investments Limited*, but no analysis of the rationale which was there set out by Ereaut, Bailiff.

40 The next case in Jersey where the question of proprietary estoppel came up for consideration in the Royal Court was *Maçon and Maçon -v- Quérée* [2001] JLR 80. In this case, the plaintiffs claimed damages for breach of contract or alternatively, in equity, on the basis of an estoppel. They had made an agreement with the defendant whereby she would leave the property to the plaintiffs in her will on condition that they looked after her in her old age. She duly changed her will and as a result the plaintiffs increased the amount they did for the defendant and their activities in the garden and in improvements around the house. Subsequently the parties fell out and the defendant informed the plaintiffs that she was changing her will. The Royal Court dismissed the claim in contract but awarded damages on the basis of an estoppel, finding that the doctrine of proprietary estoppel was applicable in Jersey, and was not irreconcilable with Jersey land law but a flexible doctrine under which the Court could often, as in that case, tailor the relief given so as to avoid any direct conflict with other legal principles. Page, Commissioner, added at paragraph 29:-

> ***"Apart from some infelicity of expression on the part of the court in Pirouet in its reference to the different categories of estoppel (Pirouet is a case that would ordinarily be referred to as "proprietary" estoppel in English law; though it is dangerous to attach too much importance to these various labels)*** , ***it seems to this court that the reasoning in that case is sound and to be preferred to that in Felard, at least in a case such as the present.*** As others have emphasised, and Robert Walker L J reiterated in *Gillett -v- Holt* [2000] 2 All ER at 306, ***the doctrine of estoppel is a very flexible one.*** It is likely, therefore, that more often than not, a court giving effect to it will be able to tailor the relief given to as to avoid any direct conflict with matters of the kind that concerned the court in Felard. It would be a poor and much attenuated form of equity that was unable, as a matter of principle, to meet the needs of justice because of such considerations. This is not to say that there may not be situations of a kind very different from the circumstances of the present case, where the tension between the demands of equity on the one hand and deeply entrenched principles of Jersey land law on the other will pose difficulties for a court of a more intractable kind than anything that arises in the present case; but that will be for others to explore on another occasion. We turn now to the application of the principles of estoppel to the present case."

41 Interestingly, the Court concluded on the facts that the defendant's decision to remove the plaintiffs from her will was wholly understandable and could not be described as unconscionable. Nonetheless, given the substantial capital improvements to her property at

the expense of the plaintiffs, equity and justice required that some account need to be taken of that expenditure such that equity could be satisfied. In all the circumstances the court then made an award of damages in a fixed amount subject to various conditions which are not relevant for present purposes. It would have been unconscionable if the plaintiffs had received nothing back for their investment in terms of capital improvements at the defendant's property, and the Court would thus provide a remedy, in the form of an award of damages, to recognise that. So there we have a further decision of the court on the matter of proprietary estoppel, choosing to follow flexible principles of equity on the basis that it was dangerous to attach too much importance to the various labels. The case was of course decided prior to the decision of the House of Lords in *Yeoman's Rowe Management Limited -v- Cobb* (supra). Although this decision of the Royal Court was delivered under a label of proprietary estoppel, it may well be that the same result could have been reached on the application of the principles of unjust enrichment, to which we turn later in this judgment.

42 The only other occasion on which the doctrine of proprietary estoppel has to our knowledge been considered by the Royal Court is in *Cannon -v- Nicol* [2006] JLR 299. At page 340 at paragraphs 115 – 118, Birt, Deputy Bailiff, considered that it was established in *Maçon -v- Quérée* that the doctrine of proprietary estoppel forms part of the law of Jersey although the matter does not seem to have been argued. At paragraph 116, he added:-

> ***"Neither counsel sought to argue otherwise and in our judgment Maçon was correctly decided."***

43 The principles of proprietary estoppel were then summarised at paragraph 117:-

> (i) Although it is convenient to marshal the circumstances of any particular case under the classic headings of assurance, reliance and detriment, the doctrine cannot be treated as being sub-divided into three or four watertight compartments;
>
> (ii) The fundamental principle is that equity prevents unconscionable conduct, and this permeates all the elements of the doctrine. The court must look at the matter in the round;
>
> (iii) An equivocal representation can give rise to a proprietary estoppel;
>
> (iv) Detriment is not a narrow concept and does not need to consist of the expenditure of money as long as it is a substantial detriment;
>
> (v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. Whether the detriment was sufficiently substantial could be tested by whether it would be inequitable to allow the assurance to be disregarded – the essential test of unconscionability.

44 Interestingly, the fundamental principle referred to above as the basis for the application of the doctrine of proprietary estoppel, namely some unconscionable conduct on the part of

the defendant, does not seem to have been established on the facts in *Maçon -v- Querée* where the Court expressly did not find the defendant guilty of such conduct. It is also appropriate to add that English law seems to have added some nuances to the principle that as long as a person acted unconscionably, the courts in equity could step in.

45 It is reassuring to know that this jurisdiction is not the only one to struggle with the question of unconscionability. While the Royal Court in *Cannonplaced* reliance on a general principle that was designed to frustrate unconscionable behaviour, the High Court in Australia has suggested that such an approach leaves one in a state of uncertainty because of the abstract nature of a claim of unconscionable conduct – see *Tanwar Enterprises Pty Ltd -v- Cauchi* (2003) 217 CLR 315 at p.324.

46 Indeed in *Royal Brunei Airlines Sdn.* Bhd. v. Tan [1995] 2 A.C. 378, albeit in a different context, Lord Nicholls of Birkenhead said at 392:-

> ***"[If] unconscionable means no more than dishonesty, then dishonesty is the preferable label.*** If unconscionable means something different, it must be said that it is not clear what that something different is."

47 In the same case Lord Walker considered that unconscionability would only be examined once the recognised requirements for proprietary estoppel had been established and perhaps only to confirm those other elements. On either part of that test, unconscionable conduct would not be a component part of the doctrine, yet that seems to be at the heart of the summary of principle by the Royal Court in the earlier case of *Cannon*.

48 The central difficulty with applying the English doctrine of proprietary estoppel – assuming one can adequately define it – in Jersey is that it requires us to accept the principle that there is a theoretical division between the legal ownership of immovable estate in Jersey and its beneficial ownership. This is dealt with in more detail below under the heading of constructive trust and is no doubt what Page, Commissioner, had in mind when he referred to possible situations where the tensions between the demands of equity and the deeply entrenched principles of Jersey land law might pose difficulties for the court which were intractable.

49 It might be argued that these principles of land law are not set aside but instead the court is merely providing a remedy for someone who has suffered unconscionable conduct at the hands of another. Leaving aside the abstract nature of the premise, it appears to us that the difficulty with this argument is that in order to provide the remedy, principles of law would in fact have to be overridden in the case in question. Now there is no doubt that in cases of equitable estoppel, the remedy is provided because the law forbids the party from exercising his legal rights by resiling from a representation he has made to the defendant on which the defendant relied to his detriment. Equity in the classical sense there mitigates the rigours of the law; but although the boundaries are not always as clear as one might wish, it is possible to say the law has not been changed. The legal rights remain the same,

but in equity they cannot be enforced. By contrast, changing the legal rights so as to found an action seems to us to have been the problem which this Court faced in *Felard Investments* (supra); to hold that the doctrine of proprietary estoppel existed in Jersey law was a step too far for that court because the remedy provided would in fact have put at naught the principle of Jersey law embodied in the maxim *nul servitude sans titre*. Once that principle was put aside, there would be uncertainty in the law of Jersey real property because a check of the Public Registry would not indicate what servitudes burdened or benefitted a property; neither would it be possible to ascertain this from any other registry nor from an examination of the abstract of title. This would be a great prejudice for potential purchasers and creditors and thus for landowners generally.

50 For these reasons, we do not think that the doctrine of proprietary estoppel forms part of Jersey law if its effect is to create an equitable interest in land that exists in parallel with the legal interest which, as we understood it, was the bedrock of the plaintiff's claim. Accordingly, we reject the plaintiff's claim under this heading. However we do not have to reach our conclusion on that basis alone because, even assuming the doctrine did exist and formed part of the law of Jersey, we think that applying the precision of that doctrine to the facts, the plaintiff faced insuperable difficulties with this part of her claim.

51 We must try to identify:-

(i) What was the clear and unequivocal promise or assurance;

(ii) Whether it was acted upon by the plaintiff;

(iii) Whether there was detriment to the plaintiff as a consequence of such reasonable reliance.

52 We recognise the principle that assurance, reliance and detriment cannot be treated as subdivided in three distinct compartments because the issues are frequently so intertwined, but the court has to start somewhere and cannot determine what would be a fair result in a vacuum, devoid of component parts. Accordingly, we do think it is right to look at each component part in the formulation of Lord Walker cited above.

53 Taking the first limb, we think there was a clear understanding between the parties that the plaintiff would have an equity in the property the amount of which would be calculated by allowing the defendant repayment of his deposit and splitting equally between the parties the resulting equity after repayment of secured charges. However, we are also satisfied that at least at the time the property was acquired, the defendant's understanding was based on the premise that the plaintiff would pay half of the loan monies due to the Royal Bank of Scotland.

54 This clear understanding is evidenced by the terms of the written agreement. The question is whether the defendant ever gave any clear and unequivocal promise or assurance that

despite the failure of the plaintiff to pay half the loan monies due, she would nonetheless have half of the equity in the property.

55 We accept on the evidence that the plaintiff agreed with the defendant that her financial contributions would be reduced. To the extent this conflicts with the evidence of the defendant, we prefer the evidence of the plaintiff, who said this was agreed. Even the defendant accepted that he knew her hours of work would be reduced and her income would drop. He agreed in cross examination that he knew in 2001 that she would not be returning to work until their son went to school, and even then she would be picking him up from school. He agreed she would stay at home to look after their baby daughter in 2004, and that he must have known she was not earning a lot of money.

56 We also accept that the plaintiff assumed she would continue to have a half share in the equity of the property. However we are not able to identify any unambiguous promise or assurance from the defendant that the plaintiff's assumption was agreed.

57 Identification of the promise or assurance is important for the purposes of considering the extent to which the plaintiff acted upon it to her detriment.

58 The promise or assurance on which the plaintiff might rely for these purposes cannot be the promise contained in paragraph 11 of the agreement. It was not as a result of that promise that she moved in to the property with the defendant – they had previously lived together in both his own property and a rented property. Nor was it in reliance on that promise that she structured her affairs so as to pay half the loan monies to the Royal Bank of Scotland, or became pregnant, or worked in the evenings or bought items for the home or paid nursery fees.

59 It seems to us that although not articulated quite in this way, the case for the plaintiff must be based on the proposition that the terms of paragraph 11 represented the context against which the agreement that the plaintiff could reduce her financial contribution needs to be measured; and that by failing to inform the plaintiff that such a reduction would affect her share in the equity, the defendant impliedly gave an unambiguous promise that it would not do so. Her reliance on that to her detriment would have to amount to her lack of opportunity to raise with the defendant the supposed changes in the financial agreement on the equity of the property, or to work longer hours to preserve her equity share, or to move out and make her claims at that stage.

60 It may be that there are some factual circumstances where the doctrine of proprietary estoppel, even if it were part of the law of Jersey, could permit a claim to be made where the claim is based upon an implied promise. Those factual circumstances would have to be such that there could be no doubt about the lack of ambiguity as to the nature of the promise and as to the propriety of drawing the implication of the existence of the promise. But here it is clear the parties simply did not address their minds to the equity shares in the

property. The change in financial arrangements was made in the course of their every day dealings as a couple. We cannot imply here any such promise, because we cannot be sure it is one which the defendant can be taken to have given.

61 Furthermore, the very different outcomes to any detriment one might identify, as in paragraph 58 above, for the plaintiff show that the plaintiff's detriment – recognising that the question of detriment is not a narrow or technical concept – is not causally related to even the implied assurance that, on this hypothesis, the defendant gave. In essence, we do not think the plaintiff relied upon the defendant's assurances, whatever they were, for her actions, and it would be artificial to hold otherwise.

62 Conscious of the problems around its abstract nature, we now also look at whether there has been unconscionable conduct by the defendant, considering the matter in the round. Has the plaintiff been duped or misled? Has the defendant acted in such a way that the Court must say to him that he loses some or all of his share of the property?

63 It seems to us that it would be very undesirable to reach the point that whilst on divorce the general conduct of the parties was rarely taken into account, the position was quite different when an unmarried cohabiting couple split up. To engage in an analysis of fault for the breakdown of a relationship which the law does not recognise seems to us to be a curious approach and we decline to adopt it. The unconscionable conduct must therefore be related not to the breakdown of the relationship but to the breaking of promises or assurances directly related to the property which is asserted to be the subject of the claim in proprietary estoppel. This takes us back to the three non-watertight compartments of assurance, reliance and detriment.

64 It appears to us to be clear that the plaintiff and the defendant moved into the property because they considered themselves a couple, not because the defendant made any promises to her about her ultimate interest in it. The doctrine of proprietary estoppel does not naturally fit the facts which exist here and which are not at all uncommon; and it is no surprise to see that the English courts appear to have adopted the principles of constructive trust rather than estoppel when dealing with this kind of claim.

65 Accordingly, even if the doctrine of proprietary estoppel forms part of the law of Jersey, the plaintiff's claim fails because the facts we have found do not fit the essential requirements for a successful claim under this head.

Constructive Trust

66 The next legal ground which Advocate Hall put forward for claiming a proportion of the sale proceeds of the property was under the heading of a Constructive Trust. She referred first of all to the Trusts (Jersey) Law 1984 (“the Trust Law”). Article 1 of the Trust Law defines property in this way:-

""Property" means property of any description wherever situated, and in relation to rights and interests includes those rights and interests whether vested, contingent, defeasible or future."

67 The obvious difficulty with the argument on the basis of a constructive trust arises from Article 11(2)(a) of the Trust Law which is in these terms:-

"(2) Subject to Article 12, a trust shall be invalid –

(a) To the extent that –

…

(iii) it purports to apply directly to immovable property situated in Jersey, or

…"

68 The only other provision in relation to constructive trusts in the Trust Law is at Article 33 the material part of which is in these terms:-

"(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain or advantage .

(2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust .

(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it .

(4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee."

69 There is no binding decision of the Royal Court as to whether or not there can be a constructive trust in relation to Jersey real estate. The matter was touched upon in the matter of the *Esteem Settlement* [2002] JLR 53 where at paragraph 92, Birt, DB said this:-

"We appreciate that the recognition of constructive trusts in such circumstances may raise questions concerning Art. 10(2)(a)(iii) of the 1984 Law, which provides that a trust shall be invalid to the extent that "it purports to apply directly to immovable property situated in Jersey". That would be for a decision on another occasion but, as at present advised, we think it is strongly arguable that that provision does not apply to constructive trusts.

> Articles 29 and 50 refer to “property” which is defined by Art. 1(1) to mean “property of any description wherever situated”. It is hard to envisage that Jersey law would accept that, if a trustee, in breach of trust, uses trust monies to purchase immovable property for his own benefit, he should be permitted to hold that immovable property free from any trust for the beneficiaries. In any event, any concerns about Jersey immovable property are not sufficient in our judgment, to negate the general principle which we have described.”

70 The article references to the Trust Law in *Re Esteem* have changed as a result of the issue of the revised edition, but correspond with those which are set out earlier in this judgment.

71 The analysis of the Royal Court in the extract cited above comes in that part of the judgment which considers whether the victim of fraud has an equitable proprietary interest in the proceeds of the fraud. At paragraph 88 of the Court's judgment, Birt, DB held that a beneficiary under a constructive trust does have an equitable proprietary interest in the assets which are the subject of that trust and then applied himself to the question as to whether Jersey law should hold that a constructive trust existed in circumstances such as those in that case. The Court concluded that when property is obtained by fraud, equity did impose a constructive trust on the fraudulent recipient so that the victim had a proprietary interest in that property. That is the background to paragraph 92 where the Court expressed a provisional view that what is now Article 11(2)(a)(iii) of the Trust Law did not apply in the case of constructive trusts, where the proceeds of fraud had been invested by the trustee in Jersey real estate for his own benefit.

72 This is not a case of trustee fraud, and therefore we do not have to decide whether there is some special category of constructive trust which could apply to Jersey real estate in the context of trustee fraud and the issue is left over should such a case ever arise. Nonetheless we do comment that the issue is not necessarily straightforward. Of course at one end of that spectrum, one could be faced with a trustee who has fraudulently deprived the beneficiaries of the trust estate, and purchased with the proceeds some real property in Jersey. There, equity may indeed demand that the beneficiaries should have recompense. More difficult is where there are competing equities, even in such circumstances. The fraudulent trustee may have other creditors and where there has been an insufficiency of assets, it would then be an issue as to whether, in effect, the beneficiaries who have been fraudulently deprived of the trust estate should be preferred to other creditors, who might also be the victims of fraud, albeit not as beneficiaries.

73 Like Birt, DB in *Re Esteem*, we do not have to decide this issue today because the factual circumstances are quite different. We are considering today only whether a constructive trust in relation to Jersey real estate can arise in the circumstances of this case.

74 Advocate Hall submitted that the constructive trust here arose outside the scope of Article 33, as she was bound to do because there is no obvious basis for asserting that the defendant had made a profit gain or advantage from a breach of trust. She submitted that

the constructive trust was an equitable remedy and we should follow the approach which English law adopted to such matters. The trust arose by operation of law, and if that were the case then clearly it could not be illegal under Article 11(2)(a) of the Trust Law. She pointed out that the defendant accepted that the plaintiff had an interest in the property. The only disagreement was as to the extent of that interest.

75 The submissions then turned to an analysis of various English cases starting with the case of *Jones -v- Kermott* [2011] UKSC 53, the judgment being delivered on 9 th November, 2011. The Supreme Court revisited the decision of the House of Lords in *Stack -v- Dowden* [2007] UKHL 17, a case where the parties had lived together for 19 years, and had four children between them although they did not marry. There was substantial disparity between their respective financial contributions to the purchase, and that earlier decision of the House of Lords was directed to the case of a house in joint names of a married or unmarried couple who were both responsible for the mortgage and where there was no express declaration of their beneficial interests. The conclusion was that there was a presumption that the beneficial interests would coincide with the legal estate, and the mere fact that there had been unequal contributions whether to the deposit or to the mortgage payments was insufficient to rebut that presumption. However, if the task was of showing that the parties intended their beneficial interests to be different from legal interests, then it was necessary to ascertain the common intentions of the parties in the light of their whole course of conduct. Of course the common intentions might change producing what Lord Hoffman referred to as “an ambulatory constructive trust”.

76 In the joint judgment of Lord Walker and Lady Hale in *Jones -v- Kermott*, the principle in *Stack -v- Dowden* was put simply in this way:-

> ***“At its simplest the principle in Stack -v- Dowden is that a “common intention” trust, for the cohabitants' home to belong to them jointly in equity as well as on the proprietaryship register, is the default option in joint names cases.*** The trust can be classified as a constructive trust, but it is not at odds with the parties' legal ownership. Beneficial ownership mirrors legal ownership. What it is at odds with is the presumption of a resulting trust.”

77 After a detailed analysis and discussion, Lord Walker and Lady Hale reached their conclusions at paragraph 51 of their judgment, with which Lord Collins and Lord Kerr agreed. The summary was of the principles applicable in a case where the family home is bought in the joint names of the co-habiting couple who are both responsible for any mortgage but without any express declaration of their beneficial interests. Against these facts the approach is as follows:-

> (i) The starting point is that equity follows the law and they are joint tenants both in law and equity.
>
> (ii) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later

formed the common intention that their respective shares would change.

(iii) Their common intention is to be deduced objectively from their conduct.

(iv) In those cases where it is clear that the parties did not intend a joint tenancy at the outset or had changed their original intention, but it is not possible to ascertain what their actual intention was as to the shares in which they would own the property, the Court would declare each party entitled to that share which it considered fair having regard to the whole course of dealing between them in relation to the property.

(v) Each case would turn on its own facts.

78 Where, however, the family home was put into the name of one party only, the starting point was different. The first issue was whether it was intended that the other party have any beneficial interest at all. If it was so intended, the second issue is what that interest was. There would be no presumption of joint beneficial ownership but the common intention would have to be deduced objectively from the conduct of the parties.

79 Advocate Hall contended that the Royal Court should follow this approach. Of course, that would require us to say, as the first bullet point in paragraph 77 above demonstrates, that as a matter of Jersey law, a division of the beneficial and legal interests in Jersey immovable estate is possible. The argument was that the Court could reach this conclusion because there is no law or previous court decision which says otherwise. By contrast, it was submitted by Advocate Heywood that the law of Jersey did not recognise the English distinctions between legal and beneficial interests in land. He relied on the report of the Commissioners appointed to enquire into the civil municipal and ecclesiastical laws of the Island, published in 1861, at page (XII) where the Commissioners summarised the evidence they had then received:-

> ***"We now proceed to describe the several kinds of property in real estate with reference to the degree or quantity of interest*** .
>
> ***There are only two species of freehold estate known to the law of Jersey; an estate in fee simple (à fin d'héritage), and, in some few exceptional cases of privileged lands, an estate tail*** .
>
> ***According to the general law, the law of Jersey makes no division of the freehold.*** Ordinarily, an estate in fee simple is the mode in which real property is held. Most properties are, to a greater or less extent, charged with perpetual encumbrances in the shape of rentes; but the rente owner has no actual estate in the land itself, corresponding with the legal estate of an English mortgagee. He cannot interfere with the position of the owner of the fee, so long as the rente is regularly paid, nor can he ever demand to be paid off. He has merely, in the case of the rente falling into arrear, a right of action, enabling him, by judgment of the Royal Court, in a manner to be hereafter explained, to dispossess the freeholder, and enforce his security. The land in the hands of subsequent owners whether by descent or purchase continues liable to the exercise of this

right."

80 The Commissioners in 1861 were examining a system in relation to freehold land in Jersey which was fraught with difficulty, the detail of which does not need to be examined for the purposes of this judgment. However, albeit perhaps belatedly, the result of the 1861 report in this respect was the adoption of the Loi (1880) sur la Propriété Foncière ("the 1880 Law").

81 The real problem which the 1880 Law addressed was the need to create a different form of hypothec and to tackle the problems under the old law arising out of the potential enforcement of guarantees in a décret, a form of bankruptcy procedure. As a result, the 1880 Law redefined the nature of immovable estate in Jersey, the arrangements for the creation of hypothecs, and for the conduct of a bankruptcy procedure (the dégrèvement) in relation to such estate. Although these changes were introduced, the starting point remained that there was no distinction between legal and beneficial interests in property, as had been the position when the Commissioners reported in 1861. Accordingly, the 1880 Law recognises the hypothec, but it does not recognise the mortgage. No doubt by way of convenience, lenders and borrowers, and indeed courts frequently refer to mortgage payments or a mortgage holder – but in Jersey law, it is not a mortgage which exists. The hypothec is a form of claw over the real estate enabling the creditor to pursue through the bankruptcy procedure security for his debt. It does not however, unlike the mortgage, create any legal or equitable interest in the property itself. The two are fundamentally different.

82 Article 3 of the 1880 Law makes it plain that only a *bien fonds* is susceptible to being hypothecated. This is defined in Article 1 as ***"un héritage formant un tout distinct et complet …"*** The *bien fonds* is susceptible to being hypothecated separately from other immovable estate of the owner, and is separately submitted to *dégrèvement* independently of any other immovable estate which the bankrupt might own.

83 The hypothec is described by Article 2 as an immovable estate right attached to a *rente* or other claim by virtue of which one or more *biens fonds* can be particularly affected by the *rente* or claim and which confers on the possessor a number of advantages. It is noteworthy that what it does not confer on the possessor is any beneficial interest in the property.

84 It seems to us to be clear that the 1880 Law is drafted on the assumption that there is no distinction between legal and equitable ownership of land in Jersey.

85 Although there have been changes to the 1880 Law since it was adopted by the States, particularly in relation to some of the bankruptcy procedures; although the Law of Désastre has been substantially amended by the passage of legislation; and although there have been other changes in property law by which rights, such as the right to reclaim *propres*, have been abolished, the substance of Jersey property law has remained the same for centuries. The law does not recognise any split or division between legal and beneficial

interests. We do not in Jersey have anything comparable to the extended property legislation in the United Kingdom in 1925, nor is there any possibility of registering equitable interests. The Island has for centuries operated a system under which ownership of real estate can be established by checks made in the Public Registry of this Island, which is not a register of owners but a register of transactions. Thus by identifying transactions which particular persons have made, it becomes possible to identify whether land has been established in their ownership or in the ownership of their predecessors in title for the requisite period that no challenge to that ownership can be sustained. The Public Registry is not laid out to record any equitable interests and to accept that such interests could sit alongside legal interests in land would be to accept that it was no longer possible to identify the ownership interests in land by a check in the Public Registry.

86 We note in passing that the States adopted in 1862 the Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations. This law enabled the creation of certain types of public interest trusts which were able to hold real estate. The existence of the statutory regime, even in a confined area, attests to the absence of any similar provision in the general law.

87 Although not articulated in this way, we think that the judgment of the Court in *Felard Investments Limited -v- Trustees of Our Lady* (supra) that on the application of the principle *nul servitude sans titre*, there could be no proprietary estoppel as a matter of law was also founded on a similar understanding of the law of Jersey immovable property and the way in which the system of land registration works. It was similarly on this understanding that the Court decided in *Re Degrevement of Christopher Bonn* (1971) JJ 1771 that a single debt could not be enforced against jointly owned property, because there was no division in the nature of that ownership whereby one could treat each joint owner as having an equitable interest in one half of the property. It needed the adoption of the Bankruptcy (Désastre) (Jersey) Law 1990 to overcome the perceived and probably actual difficulties which *Re Bonn* illustrated. Although the Court in *Re Esteem* was not required to consider these matters in detail it is necessary to approach these issues in a holistic way. In our judgment, the provisions of Article 11(2)(a)(iii) of the Trust Law are in place because, save perhaps in the proprietary estoppel cases referred to above and in the statutory exceptions, Jersey law has never recognised a division between legal and equitable interests in Jersey immovable estate. To hold that such different interests could arise would be to create an enormous gap in Jersey property law, with all the ensuing uncertainty as to the ownership of land. It would be to ignore the distinctions which for years have existed between those who are *fondée en héritage*, and those who are not. It would be to create uncertainty in bankruptcies and *désastre*. It may indeed be desirable that there should be a distinction between legal and equitable interests in land, and this judgment does not address whether that is so. What we do recognise is that if such a distinction is to be introduced, then it must be by the legislature after appropriate consultation and consideration.

88 Before leaving the issue of a constructive trust, we refer also to two cases from the Bailiwick of Guernsey. The first is the judgment of the Court of Appeal in *Pirito -v- Curth* [2003–4] GLR 218. In that case, the Court was considering an appeal against an order of

the Court of Alderney for licitation of a property jointly owned between the parties and the equal division of the proceeds of sale, in circumstances where the appellant had provided most of the price of the land and the cost of building the house. The Court of Appeal did not disturb the order of the lower Court. Relevant *to* the present case, Southwell JA said at paragraph 35:-

> ***"Mrs Haskins argued that equitable principles of English law form part of the law of Guernsey and must be applied in the same way as in English law.*** For my part, I do not consider that such principles can be imported wholesale into the law of Guernsey real property, which is derived from Norman, not English, origins and which is, in many respects, very different from English law, particularly English statutory law from the major statutory reforms of 1925 onwards."

89 The second is *Bougourd and another -v- Woodhead and another* [2009–2010] GLR 487 where the Royal Court of Guernsey was considering a claim by the wife's parents against her and her husband for a declaration as to their entitlement to live in the wing of a house bought by the defendants with a substantial monetary contribution from the plaintiffs. The claim was brought on the basis of an express trust; by way of alternative also in proprietary estoppel and constructive trust.

90 The Jurats found that there was an express trust – it would appear there is nothing in the Trusts (Guernsey) Law 1989, or in the customary law, equivalent to Article 11(2)(a)(iii) of the Trust Law – and it was therefore unnecessary to consider the issues of proprietary estoppel or constructive trust. The finding would tend to suggest that the Court proceeded on the basis that a division of legal and equitable interests in Guernsey real estate is possible although the judgment reveals no discussion of the point and it may not have therefore been argued. However, the nature of the trust was that it was created in respect of the plaintiffs' contribution of £75,000 towards the purchase price for the purpose of that purchase, such that the plaintiffs would have the right to reside therein as long as they chose. This would appear to be akin to a *droit d'habitation* although both parties disavowed any such assertion, because the right was not set out either in a " *Contrat Juridique"* or a will. The trust does not seem to have conferred any right to share in the proceeds of sale of the property.

91 It is of interest that, albeit obiter, Collas, DB, indicated that having regard to Southwell JA's comments mentioned above, and other circumstances, it would not be appropriate to apply the English law doctrines of constructive trust or proprietary estoppel in that case.

92 For all these reasons, in our judgment, a constructive trust of Jersey immovable estate is not possible in circumstances such as those we have before us today. Accordingly the plaintiff's claim under this head fails.

Unjust Enrichment

93 Although not pleaded in this way, the plaintiff's case in unjust enrichment is really based upon the premise that she and the defendant acted as though they were married and therefore ought to be treated as though they were married and that was the context of both parties' argument before us. The home was bought as a family home. Advocate Hall submitted there was no justification in treating married and unmarried couples differently if they made the same commitment.

94 She went on to submit that in the circumstances of this case, the parties pooled their finances and in effect shared what was coming in. The plaintiff's non financial contribution should be recognised. She and the defendant had two children together. She had primary responsibility for the family home. It was as a result of her contribution that the defendant was able to work additional hours and earn more money. Furthermore, the fact that the loan was a joint loan indicated two things. First of all it indicated an overall intention on the part of the plaintiff and the defendant that the equity in the property be shared. Secondly, it indicated that, on his own, the defendant did not have the income to justify the bank loan which enabled the property to be purchased, and as a result there was an equity in ensuring that the plaintiff had her fair share of the property. Advocate Hall contended that we should look at the plaintiff's claim as one in restitution, an equitable remedy which needed to be widely interpreted. Neither party produced any authority from the Royal Court or Court of Appeal in relation to the doctrine of unjust enrichment in Jersey, but Advocate Hall did rely on the Scottish case of *MacKenzie -v- Nutter* [2007] SLT 17, to which we will turn shortly.

95 The general index in the Jersey law reports lists three cases as decided in Jersey relevant to the law of unjust enrichment. The first of these references is to the quantum *meruit* cases in *quasi* contract. A review of these cases does not show that the court specifically looked at the law of unjust enrichment, and certainly did not seek to define the component parts of such a claim but the quantum *meruit* remedy itself is evidence that unjust enrichment is a principle known to our law. A quantum *meruit* claim requires the services provided to be valued because it would otherwise be unjust that the party receiving them is enriched by not having to pay the value of what they are worth. Apart from decided cases, there is no doubt that quantum *meruit* actions have been treated by practitioners for many years as well founded in theory under Jersey law.

96 The second reference was to the planning case of *Planning and Environment Committee -v- Lesquende* [1998] JLR 396. In this case, the plaintiff had acquired the property for the States of Jersey from the defendant by use of compulsory purchase powers. In accordance with the relevant legislation, the plaintiff had paid out a sum of money under the arbitration award. Subsequently the award was challenged by the defendant, and on that challenge being brought, it was challenged also by the plaintiff, and was quashed by the Royal Court. The plaintiff then commenced proceedings seeking the repayment of monies which it had paid on the basis of an arbitration award which was no longer valid. On a summary judgment application, the Greffier gave judgment in favour of the plaintiff. He noted that in England the law of unjust enrichment was very complicated, and he quoted from Goff & Jones, The Law of Restitution 4th Ed at 39 (1993) in these terms:

> ***"It is not in every case where a defendant has gained a benefit at the plaintiff's expense that restitution will be granted.*** It is only when a court concludes that it would be unjust for him to retain the benefit that he must make restitution to the plaintiff."

97 The Greffier applied that general principle of lack of justice in holding that the defendant should not be permitted to keep the fruits of an arbitration award the basis of which the defendant itself had attacked. Accordingly summary judgment in relation to the capital sum was granted. There does not appear to have been any appeal, and the judgment seems to have been issued purely on the basis of the court's view of what was just.

98 The third case in which unjust enrichment appears to have been considered is that of *Re Esteem Settlement* [2002] JLR 53. In that case, the court was considering the nature of a remedy which might be afforded to a beneficiary as against an innocent recipient who no longer had the property, or its proceeds in his possession. Birt, DB said at paragraphs 156–7:-

> ***"Any principle of restitutionary recovery against a fault free recipient can only be based on the principle of unjust enrichment.*** It follows that the claim can only succeed if the recipient remains unjustly enriched. He must therefore have available to him a change of position defence. The underlying principle must be that in no circumstances should the innocent recipient be left worse off than if he had never received the funds in the first place .
>
> ***This is a complex area.*** We are conscious that many ramifications may flow from a decision to allow such a claim. Accordingly, we deliberately express our decision in terms that are no wider than is strictly necessary for the present case, without wishing to be taken to suggest that a remedy would not also be available in other analogous situations. We hold that, under the law of Jersey, where property in respect of which a person (a beneficiary) has an equitable proprietary interest (because the property has been taken from the beneficiary by a person who is in a fiduciary position towards that beneficiary) is received by an innocent volunteer, the beneficiary has a personal claim in restitution against the recipient even where the recipient has not been guilty of any "fault" in receiving the property. In order words, the state of mind required for a "knowing receipt" claim under English law is not required in Jersey. It is a strict restitutionary liability. However, the claim is based upon unjust enrichment and, accordingly, the beneficiary can only succeed to the extent that the recipient remains unjustly enriched. A defence of change of position is therefore available. We emphasise that the liability is a personal one; the recipient is not a constructive trustee for the beneficiary."

99 For the purposes of this case, two principles arise out of that extract. The first is that the doctrine of unjust enrichment is one which the Royal Court is prepared to recognise in principle. The second is that the Royal Court deliberately refrained from setting out the

limits of a claim of unjust enrichment and specifically expressed its decision in terms that were no wider than was strictly necessary for the purposes of that case.

100 It is unsurprising that there are no authorities in Jersey in relation to the law of unjust enrichment in circumstances such as arise in this case. Historically, as a matter of policy and/or morality, the courts would not give effect to a gift either to a concubine or to an illegitimate child, and clearly if an actual gift would be liable to be set aside, there would be no realistic possibility of such a person claiming ownership of property on the grounds of unjust enrichment if the gift were not made. However, the fact that unjust enrichment could not have been contemplated until recently in the type of circumstance facing the court in this case does not mean that the court is unable to declare new limits on a cause of action for unjust enrichment today. Indeed we think that we would be failing the community in Jersey if we did not attempt to do so, recognising that the circumstances which apply here might similarly apply in a good many other cases which might not necessarily be expected to come to court. We can contemplate such cases might include heterosexual and homosexual partnerships in circumstances falling short of those partnerships which the law formally recognises such as marriage or civil partnership; *de facto* business arrangements not formally recorded in a partnership; and platonic co-habitation arrangements which might be made, whether by members of the same gender or not, and whether as a result of family ties or friendship. So the context for the claim in unjust enrichment may change. However, the doctrine of unjust enrichment is a vibrant doctrine. What we need to do is analyse its component parts because there seems no doubt that the principles can be applied across a wider basis than merely a cohabitation case of the kind presently under consideration.

101 Before coming to the rules which we consider to be right, it is appropriate to look at the jurisprudential basis for the claims in unjust enrichment. This court has frequently had regard to the writings of *Pothier*. In his Traité des Obligations, 9th Edition, Tome 1 Chapter 1, having considered various questions arising out of contract, *quasi* contract, *délits* and what is described as *quasi délits*, *Pothier* turns at page 109, paragraph 123 to obligations of law where he says this:-

> ***“123. La loi naturelle est la cause au moins médiate de toutes les oligations: car si les contrats, délits et quasi-délits produisent des obligations, c'est primitivement, parce que la loi naturelle ordonne que chacun tienne ce qu'il a promis, et qu'il répare le tort qu'il a commis par sa faute*** .
>
> ***C'est aussi cette meme loi qui rend obligatorires les faits d'où il résulte quelque obligation, et qui sont, pour cet effet, appelés quais-contrats, comme nous l'avons déjà remarqué*** .
>
> ***Il y a des obligations qui ont pour seule et unique cause immediate la loi.*** Par exemple, ce n'est en vertu d'aucun contrat ni quasi-contrat que les enfants, lors qu'ils en ont le moyen, sont obliges de fournir des aliments à leurs père et mere qui sont dans l'indigence; c'est la loi naturelle seule qui produit en eux

cette obligation .

L'obligation que contracte la femme de restituer la somme qu'elle a empruntée sans l'autorité de son mari, lorsque cette somme a tourney à son profit, n'est point non plus formée par aucun contrat, ni quasi-contrat: car le contrat de prêt qui lui a été fait de cette somme sans l'autorité de son mari, étant nul, ne peut par lui meme produire aucune obligation: Quod nullum est, nullum producit effectum. Son obligation est donc produite par la loi naturelle seule, qui ne permet pas que quelqu'un s'enrichisse aux dépens d'autrui: Neminem æquum est cum alterius damno locupletari; l. 206, ff. de reg. jur .

L'obligation en laquelle est le propriétaire d'une maison de la ville d'Orléans de vendre à son voisin la communauté de son mur qui sépare les deux maisons, lorsque ce voisin veut bâtir contre, est une obligation qui a pour seule et unique cause la loi municipal qui en a une disposition."

102 Having given a number of examples, *Pothier* concludes with the following:-

"On peut rapporter beaucoup d'autres exemples d'obligations qui ont pour seule et unique cause la loi .

Ces obligations produisent une action que l'on appelle condictio ex lege."

103 The context may change, and certainly Pothier' s view of la loi naturelle would not have included a relationship which in those days the law regarded as immoral and not appropriate for protection, but nonetheless these are statements of principle of somewhat general application. Similar reasoning appears in the other writers to whom the Royal Court has frequently had regard – for example in Domat's Traité de Loi at chapter 9, at paragraph iv, *Domat* reflects on rules of equity which take the place of a Law – all men are impressed with the requirement that they should not do wrong to others; that they should render to another that which belongs to him; that they must be sincere in their engagements, faithful in executing their promises and complying with other similar rules of justice and equity.

104 Towards the end of the 19 th century, the French courts came to admit claims by someone who, to his own loss and not on the performance of a contract, had enriched another. In doing so, they gave effect to the maxim of Roman law that *nemo ex alterius detrimento fieri debet locupletari* – no man ought to be made rich out of another's injury. The leading case was *Patureau-Miran c Boudier* a decision of the Cour de Cassation, at req. 15.6. 1892. In that case, a landlord leased agricultural land to a tenant who bought, used but did not pay for, fertiliser from Monsieur Boudier. The tenant failed to perform his obligations and the landlord terminated the lease. The sum due from the tenant for his breaches was admitted at 15,000 francs. As part payment, the landlord took the standing crop, which was estimated by valuers and agreed at a figure which did not include the cost of fertiliser. This cost was thus notionally part of the balance still due from the tenant to Monsieur Boudier. He was insolvent, and the supplier claimed the price from the landlord and won at first instance.

The landlord appealed on a number of grounds including the ground that these suppliers had never been party to any contracts between landlord and tenant. The court held in relation to this third branch of the appeal that:-

> ***"Attendu que, cette action, dérivant du principe d'équité qui defend de s'enrichir au detriment d'autrui, et n'ayant été réglementée par aucun texte de nos lois, son exercice n'est soumis à aucune condition determine; qu'il suffit, pour la render receivable, que le demandeur allègue et offer d'établir l'existence d'un avantage qu'il aurait, par un sacrifice ou un fair personnel, procure à celui contre lequel il agit; que, dès lors, en admettant les défendeurs éventuels à prouver par témoins que les engrais par eux fournis à la date indiquée par le jugement avaient bien été employés sur le domaine du demandeur pour server aux ensemencements don't ce dernier a profité, le jugement attaqué n'a fait des principles de la matière qu'une exacte application."***

105 The relevant principle is that a person who, without any cause, obtains a benefit at the expense of another is bound to restore it. As with the principles underlying the French claim of abus de droit, neither principle is found in the Code Civil or in any other law. The approach is seemingly based upon the natural law and on general principles of équité of the kind described above. That is entirely consistent with the practice of the Royal Court over many years in allowing, as examples of unjust enrichment, claims for money paid by mistake of fact, or claims for damages on a quantum meruit.

106 In *Stack -v- Dowden* (supra) the majority were able to reach their conclusion on the basis of constructive trusts under English law. However it is of interest to note that Lord Hope of Craighead also considered how these solutions which were proposed fitted with the approach which would have been taken had the problem arisen in Scotland. As he said, the social problems under which co-habiting couples lived together in England and Wales are in general no different from those that exist in Scotland, (nor indeed are they in Jersey). Having noted that except in those cases where it can be shown that a title was held in trust although it is *ex facie* absolute, Scots property law does not distinguish between the legal and beneficial interests in heritable property, Lord Hope went on at paragraph 8 as follows:-

> ***"Where the title to a dwelling house is taken in one name only, the presumption is that there is sole ownership in the named proprietor.*** Where it is taken in joint names those named are common owners, and, if the grant does not indicate otherwise, there is a presumption of equality of shares… the rights that are thus divided from the outset between those named in the title in the Land Register are rights of ownership. There are no intervening equitable interests. The presumption that the common owners are entitled to share the value of the property equally is however capable of being displaced by evidence to the contrary. The analysis now moves from the law of property to the law of obligations. This opens the door to evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement

during their relationship…

9. More recently resort has been made to restitutionary remedies . *In Mackenzie -v- Nutter* [2007] SLT (Sh Ct) 17 ***the title was taken in joint names.*** The intention of the co-habiting couple was that they would live together as a couple in the property and that they would both sell their own separate houses and apply the proceeds towards the purchase of their new home. In the event only one party contributed the proceeds of his house towards its purchase and paid the costs associated with maintaining and improving the property. The other party continued to reside in her own house, which, due to her bad faith, she did not sell. She then insisted on a division and sale of the property. Following the state of the title, the expectation was that when the property was sold the proceeds would be paid to the parties equally. But an order was made that the party who had contributed everything towards its purchase and upkeep was to be entitled to recover the other party's share of the proceeds. As Sheriff Principal Lockhart explained in his judgment, this was on the ground that she had been unjustly enriched because the condition on which the enrichment was given, due to her bad faith did not materialise.

10. The law of unjust enrichment has also been invoked where the title was taken in the name of one of the co-habitants only and they subsequently separated. It was held that the other co-habitant was entitled to the return of sums which he contributed to the purchase of the house and its refurbishment while the parties were living there (see *Satchewell -v- Macintosh* [2006] SLT (Sh Ct) 117). ***The problems which these very unusual cases create are for the most part problems of fact.*** The law that is to be applied, now that the former restrictions on the mode of proof have been abolished, is relatively uncomplicated."

107 So there we have a reference from Lord Hope to two Scottish cases where the law of unjust enrichment has been applied. In *Mckenzie -v- Nutter*(supra) Sheriff Principal Lockhart, having summarised the relevant law, described his approach at paragraph 33 as follows:-

"On the basis of the law which I have set out it is clear that the court may allow an equitable remedy in circumstances where one party has been unjustly enriched at the expense of another party. I propose to deal with this matter under four headings:

(a) Has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment?

(b) If so, was that enrichment unjust?

(c) If so, what remedy, in the particular circumstances of this case, is open to the respondent?

(d) Is that remedy equitable?"

108 In our view, this approach to the questions of unjust enrichment is one which is not inconsistent with such slender authority as can be ascertained in Jersey law from the cases, and is consistent with principle. It also provides a modern statement of an approach currently adopted by French courts to questions of *enrichissement sans cause*. The starting point is the legal interest. The Court then looks at whether there has been enrichment which benefits the legal owner or owners or perhaps some of them, at the expense of the claimant in a way that is unjustifiable. We also think that approaching the problem in this way will enable the Court to consider enrichment problems holistically, rather than in separate compartments. We apply these principles to the facts of the instant case.

Decision on Unjust Enrichment

109 The Court has no doubt that the defendant has been enriched at the expense of the plaintiff. In reaching that conclusion, we take the legal interest as a starting point. The defendant has the benefit of the entirety of the proceeds of sale of the property. He has that benefit notwithstanding, in our judgment, that it was the estimated joint earnings of the parties which provided the basis upon which the bank loan was advanced to the defendant for the purchase of the property in the first place, and notwithstanding that some financial contributions have been made by the plaintiff towards the redemption of the bank loan. We were told that the defendant was unable to borrow further monies from the bank in 2005 when the plaintiff left the property in order to buy out any claim which she might have to a proportion of the value of the property. That emphasises the importance of her contribution a few years earlier both in actual monetary terms and in the mere fact of her accepting joint responsibility for the bank loan. In our judgment, the plaintiff is not limited to showing enrichment at her expense by virtue of the financial arrangements. We consider that the provision of domestic services within their relationship in caring for the children of their union and in spending more time running the household can legitimately be viewed as a contribution which the plaintiff made to the defendant's enrichment. She had no general duty to perform those services. As has been said by the Supreme Court of Canada in *Kerr -v- Baranow*; *Vanasse -v- Séguin* [2011] 14 ITELR 171, it follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from any other contributions. They constitute an enrichment because the services are of value to the partner and, if there are children, to the family. We also agree that any other conclusion would devalue the contributions made, mostly by women, to the family economy. On the other side of the coin, the fact that domestic services have been given on an unpaid basis is a commitment, sometimes a full-time commitment, of time and labour without compensation and therefore amounts to a deprivation on the part of the giver. In our judgment, any suggestion that the services are performed out of natural love and affection and therefore cannot form the basis of an unjust enrichment claim would be wrong, and we were pleased to note that Advocate Heywood, on behalf of the defendant, accepted that a non-financial contribution was still a matter which could be taken into account. This, then, is the nature of the enrichment.

110 What was its effect? It was that the defendant was able to work longer hours and make a

greater financial contribution to the family during the time the plaintiff and defendant co-habited; and although the services were no longer performed after the plaintiff left, her underlying commitment in terms of the bank loan even though she paid nothing towards it from the time she left enabled the defendant so to organise his financial affairs that he was able to remain in the property for longer than would otherwise have been the case and therefore gain from the improvement in its market value between 2005 and the date of sale.

If so, was that enrichment unjust?

111 We have no doubt that it was. Our view of the justice of the case takes into account in particular the following factors:-

If so, what remedy, in the particular circumstances of this case is open to the plaintiff?

(i) The parties considered themselves to be a couple, and the contract, even though not enforceable as a contract, clearly shows a common intention on their parts that the value of the property should, after repayment of the bank loan and the deposit provided by the defendant, be shared equally. The intention of the parties may well in most cases not be relevant to the question of whether there has been any enrichment, but it may certainly be relevant to the question as to whether there is any justification for the enrichment. It goes to the justice of it. It is, in some respects, ironic that the contract between the parties in this case is unenforceable as a contract, but nonetheless may be relevant evidence which the court is entitled to take into account in determining the common intentions of the parties. Of course, if the contract itself had been enforceable, it would have been enforced, and it would follow, so it seems to us, that there would be no need, and indeed no room, for a claim in unjust enrichment. If any enrichment had taken place and was justified by the contract which had been made, it could not be said that it was an unjust enrichment, because it flowed from the common intention of the parties and, were there a valid contract, *la Convention fait la loi des parties*.

(ii) The enrichment was also unjust because the plaintiff did in fact make a substantial contribution to the family home which it would be unfair not to recognise. As we have said that contribution is measured both monetarily and in kind.

(iii) On the other hand, we do not wish to suggest in any sense that the defendant himself has not made a contribution which has resulted in the plaintiff being enriched. It would be unjust to pay attention only to the contributions of the plaintiff without giving any emphasis to the contributions of the defendant. This is an important principle to assert but of course it gives rise to very great difficulties in practice. The parties found it difficult enough to identify the reasons for particular payments being made in and out of the bank account, and for the court to create, as it were, a bank account of non-monetary contributions by the plaintiff and the defendant over the years they were together would be an enormous task. Indeed to attempt it would require the Court to receive evidence across a wide spectrum from those who had

seen the relationship at close quarters. We do not think that this would be an appropriate way to proceed in the future, unless there are some unusual circumstances. It is the reason why we are not concerned with the causes of the breakdown in the relationship or with whether the plaintiff left the property in 2005 of her own accord, or was told to go. We therefore take the view that some painting with a broad brush in this area is not only the most practical way to go forward but also, unless there are some unusual circumstances, the fairest way of going forward with the evaluation of where the justice lies in future cases. Nonetheless, it is appropriate to value the plaintiff's contribution over the years to 2005 differently from that made in the years 2005 – 2011 when the defendant made all the financial contributions towards the property but the plaintiff's financial and non financial contributions were limited to the non enforcement of any of her claims during that period against the defendant. This is an example of the defendant's contribution enriching the plaintiff because she stands to gain from his deposit and from his payment of the bank loan during the later years if she shares in the capital appreciation between 2005 and 2011.

112 Prior to the sale of the property in April 2011, the potential remedies for the plaintiff's claim in unjust enrichment could theoretically have been either a claim for a conveyance of the property whether outright to her or into joint names, or for damages. We do not need to decide in this case whether the court would have had the jurisdiction to grant the relief of a mandatory conveyance of property. It may well be that the court would have had such a power, because this would be the granting of a remedy for an injustice which had been established, and the nature of the remedy might depend upon the nature of the injustice – particularly if, for example, there were a number of minor children of the union who regarded the property in question as their home. It may well be that such a case does not fall within the maxim that *promesse à heritage ne vaut*; but as we have said, we do not need to decide that in this case and we leave that point over for adjudication in the future, should the need arise. In this case the remedy is clearly a financial remedy in personam against the defendant and the question which then arises is as to how that is best calculated.

113 The first question is at what point the unjust enrichment arises. It seems to us that it was not an unjust enrichment which arose at the date of purchase of the property in the defendant's sole name. Indeed it is not obvious that there was necessarily established any enrichment at all at that time. The effective dates for calculating the enrichment must either have been the date on which the plaintiff left in 2005, or the date of sale in April 2011 – or there was possibly an enrichment growing from the date of purchase until the date on which the plaintiff left and continuing until the date of sale when the quantum of that enrichment could finally be ascertained.

114 We think the latter is the case. The defendant was enriched, because the value of the property went up and the value of the bank loan was reduced, progressively from the point of purchase to the point of sale. The financial remedy takes into account all the contributions made by both the plaintiff and the defendant over that period. In principle that

means we start with the net value of the property, after repayment of the bank loan and costs, at the date of sale. That is the starting figure which the court has to adjust to reach the appropriate remedy. In our judgment, the adjustment takes account of the defendant's deposit which he paid, with interest thereon and it takes account of the respective contributions of the plaintiff and the defendant while they were co-habiting. We assess those contributions as being equal. We consider that both parties probably made contributions in kind as well as in cash, and that the fair way of looking at it is to treat those as having been made equally. If this had been a mathematic exercise, one could have looked at the contributions in detail; but it is not. On the basis that the defendant would not have been a house owner at all had the loan not been approved, and that he enjoyed the plaintiff's overall contribution in money and money's worth, and had expressed an intention that any gain should be shared equally, we think that a 50/50 split of equity (after repayment of the bank loan deposit and interest), in 2005 would have been the appropriate way of assessing the plaintiff's claim in unjust enrichment at that date.

115 However we are not assessing it at that date but assessing it as at 2011. Since 2005, the defendant has had to make all the payments under the bank loan as previously indicated; but he has also had the benefit of the plaintiff's built up unjust enrichment claim as at 2005. There is no obvious fairness in allowing him to have all the capital gain from that asset of the plaintiff thereby depriving her of such a gain, compensating her only with interest during the intervening period at rates which do not reflect in fact the rate which property values increased.

116 In the circumstances, recognising that there is an element of broad brush painting in the assessment, we think that the remedy for the unjust enrichment is calculated by having regard to the sale proceeds of the property in April 2011, reducing that figure by the amount of the outstanding bank loan at that date, the costs of sale and the defendant's deposit towards the initial purchase price with interest at the rate of 1% over base rate, with the remaining balance then divided as to 40% for the plaintiff and 60% for the defendant.

Is that remedy equitable?

117 We think it is. First of all we think it is necessary that there should be a causal connection between the claim for unjust enrichment and the disputed property. Here the plaintiff has established that link or causal connection – it is there in the evidence of the defendant that the two parties were a couple; in his evidence that the property would have been acquired in joint names but for the plaintiff's absence of housing qualifications at that time; by her joint responsibility for the bank loan; and by the fact that the plaintiff's contributions in cash and kind were in fact linked to the enjoyment of the family home, represented by the property.

118 Secondly, we recognise that it might be argued that the defendant had paid the bank loan between the date the plaintiff left and the date of sale, and that he therefore should have the increased equity in the property between those dates. We have already made the point that the increase in the equity was also in part due to the defendant's continued use of the

plaintiff's notional capital share, contributed in cash and kind. In addition, the remedy is fair, however, because the defendant had free accommodation in the years which followed the plaintiff leaving the property in 2005, but the plaintiff had to make other arrangements for herself. We recognise that the plaintiff could have brought proceedings at an earlier stage, and that this would undoubtedly be a factor which worked against her. Nonetheless, we think that her inability to enjoy whatever notional capital share she might have had flowing from the unjust enrichment claim at that time coupled with the cost of having to find alternative accommodation for herself makes the remedy which we have identified a fair and equitable remedy.

119 The financial information put before us was not entirely easy to track down amongst the voluminous paperwork, but the formula we adopt is as follows:-

Sale price of Property in April 2011 £420,000

Less costs of sale £ X

Less bank loan repayment £ Y

Less deposit paid to the Defendant £54,000

Less interest on defendant's deposit calculated at 1% over the Royal Bank of Scotland International base rate for the period 23 March 2001 – 27 April 2011£ Interest

120 This leaves the net equity of £ E. We divide that figure 40/60 as set out above and on that basis, award the plaintiff the sum of 40% of E. Put mathematically the plaintiff's entitlement (PE) is:-

PE = 40% (£420,000 —£X —£Y —£54,000 —£ Interest)

Before entering any final order we wish to hear from the parties on the actual calculations against the principles disclosed in this judgment.