LEGAL CONSEQUENCES OF THE COMMON LAW MARRIAGE MYTH

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Introduction

The existence of the common law marriage myth – a mistaken belief that unmarried couples living together have the same rights as married couples – has been well established.[1] What has not been considered, however, is the possibility that a mistaken belief in the common law marriage myth might, when combined with detriment suffered or benefits rendered, provide a cause of action against an ex-partner. In other words, the question is whether belief in the myth might be actionable in law, as opposed to merely an important factor in shaping policy. The myth has thus far been considered an important background issue – one which has consequences for the parties' experiences on relationship breakdown, and which might impact decisions made during the relationship.[2] The context to this is, of course, the lack of any statutory rights for an unmarried cohabiting party at the end of a relationship to make a financial claim against their ex-partner. This article seeks to question whether a mistaken belief in the common law marriage myth could ground a claim in private law against the defendant, and therefore operate as a powerful aid for the mistaken party either when seeking to negotiate during mediation or when seeking to claim a financial remedy in court.

The common law marriage myth is, at heart, a mistake of law. It is a mistake of law which may have changed the way that the parties view their relationship in terms of closeness or

[1] See for example A Barlow, C Burgoyne, E Clery and J Smithson, 'Cohabitation and the Law: Myths, Money and the Media' in A Park, J Curtice and K Thompson (eds), *British Social Attitudes: The 24th Report* (National Centre for Social Research, 2008); M Albakri and others, 'Relationships and Gender Identity' in J Curtice and others, *British Social Attitudes 36* (National Centre for Social Research, 2019); R Probert, 'Why Couples Still Believe in Common-Law Marriage' [2007] 37 Fam Law 403; R Probert, 'Common-Law Marriage: Myths and Misunderstandings' [2008] 20 CFLQ 1.

[2] Women and Equalities Committee, 'The Rights of Cohabiting Partners' (2022) HC 92, paras 16–18; A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart, 2005).

commitment, as those who believe in the myth will consider themselves not merely cohabitants, but spouses. On this basis, it is reasonable to expect that the myth might influence the claimant's actions and decisions within the relationship. For instance, she may in reliance on her belief have given up her job to look after the children.[3] Or she may have not insisted on formal marriage or civil partnership as she believed she would be protected regardless. Further, these acts may well have benefitted the defendant, who may not have had to pay for childcare, or whose assets are protected (unbeknownst to his partner) against a financial claim at the end of the relationship. Indeed, this mistaken belief might have been encouraged by the defendant, either because he is also mistaken or, rather more troublingly, to stop the claimant asking for a more formal relationship (where she would be protected, and his assets would be at risk). The doctrine of proprietary estoppel means that private law is well versed in situations where the defendant has encouraged a mistaken belief which has influenced (detrimentally) the claimant's actions, and unjust enrichment covers situations where the defendant has been enriched at the expense of the claimant due to the latter's mistake. This article asks whether the circumstances and context of the common law marriage myth fits into these private law doctrines.

Three legal areas will be considered. First, the common intention constructive trust, which is the doctrine primarily applied to cohabitants at separation. Belief in their position as common law spouses might in some cases influence intentions regarding the parties' beneficial interests in the family home. Second, it will be examined whether the claimant might be able to receive a remedy using proprietary estoppel, on the basis that she has detrimentally relied on a belief encouraged by the defendant. Proprietary estoppel has occasionally been used to receive a

[3] Gendered language is used throughout this article in recognition of the fact that it is usually women who are disadvantaged by the current state of the law and further that it is usually women who are seeking to establish a beneficial interest in the family home on the breakdown of cohabiting relationships. Further, as research has not specifically looked at same-sex couples' belief in the myth, this article focuses on heterosexual couples.

remedy at the end of a cohabiting relationship, but its success has been varied. Finally, the doctrine of unjust enrichment will be considered. Unjust enrichment has never been used to successfully make a claim in the cohabitation context in England and Wales, though it has been used in a modified form in Canada.[4] Here, the argument would be that the claimant has enriched the defendant on the basis of a mistake of law, and therefore that the enrichment received by the defendant is unjust and must be returned to the claimant. Before these doctrines are considered, however, the nature of the common law marriage myth will be discussed. This will be important detail for the consideration of how the claimant's mistaken beliefs fit into any legal claim made against an ex-partner. It is to this detail that this article now turns.

The Common Law Marriage Myth

The common law marriage myth can be defined as 'a widely held belief that heterosexual couples living together "as man and wife" acquire "marriage-like" rights and responsibilities through "common law marriage", at least after a given period of time'.[5] Though subsequent research has shown the common law marriage myth has been around at least as long as the 1960s,[6] widespread belief in the myth was first empirically established in 2000, when the British Social Attitudes (BSA) survey asked the following question: 'As far as you know, do unmarried couples who live together for some time have a "common law marriage" which gives them the same rights as married couples?' 56 percent of respondents answered that unmarried couples 'definitely' or 'probably' had such rights. This mistaken belief in the law appears to be resistant to change – in 2008 the relevant figure was 51 percent, and in 2019 it was 47 percent. This means that in about 20 years there has been a drop of only 9 percent in those who believe in the myth, despite a high-profile Government-backed campaign to dispel

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[4] *Peter v Beblow* [1993] 1 SCR 980; *Kerr v Baranow* [2011] SCC 10.

[5] Barlow et al, above n 2. There has been no specific research into whether the common law marriage myth is also believed by those in same-sex relationships.

[6] Probert, 'Common-Law Marriage: Myths and Misunderstandings', above n 1.

the myth,[7] and a large number of media stories about the Law Commission's recommendations for reform of the law dealing with the breakdown of cohabitation relationships.[8] This suggests that the myth is unlikely to go away, at least in the short-term. In addition, there is little prospect of statutory reform. Despite repeated calls for Parliamentary intervention, particularly by the Law Commission[9] and, more recently, the Women and Equalities Committee,[10] the Government has rejected legislating in the area.[11] The Government argued that any review of the rights of cohabiting partners would have to wait until after the Law Commission's review of financial provisions on divorce, and regardless thought that the presence of civil partnerships for opposite-sex couples would provide for cohabitants who do not want to get married.

It is worth considering why such a mistaken belief in the law is so widespread. There are a number of different theories and little concrete evidence, but it appears the media plays a large role, with Rebecca Probert saying that 'after wading through the hundreds of media references to common-law wives […], the belief in common-law marriage seems not merely understandable, but inevitable'.[12] False information passing between friends and family may be partially to blame, with Graham Fraser suggesting the myth has 'gone viral'.[13] Unlike marriage, there is no 'event' which may allow cohabitants to stop and consider their financial and legal position, meaning that the organic process of living together prevents opportunities to correct mistaken understandings of the law.[14] As Anne Barlow argues, although the common

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[7] 'Living Together' (*Advicenow*, 2015) <https://www.advicenow.org.uk/living-together> accessed 8 June 2022, on which see A Barlow, C Burgoyne and J Smithson, 'The Living Together Campaign - An Investigation of Its Impact on Legally Aware Cohabitants' (Ministry of Justice 2007).
[8] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (2008).
[9] Ibid; Law Commission, *Getting Married: A Consultation Paper on Weddings Law,* Consultation Paper 247 (2020); Law Commission, 'Oral Evidence: The Rights of Cohabiting Couples' (Women and Equalities Committee 2022).
[10] Women and Equalities Committee, above n 2.
[11] Women and Equalities Committee, 'The Rights of Cohabiting Partners: Government Response to the Committee's Second Report' (2022).
[12] R Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP, 2012) 215.
[13] G Fraser, 'Cohabitation Reform: What Recent Statistics Mean for the Cause' [2019] Fam Law 717.
[14] Ibid.

law marriage myth is incorrect as a statement of legal truth, it may be far less mistaken in terms of couples' everyday experience,[15] where as a matter of 'lived law' friends and family are likely to treat cohabiting couples as if they were married. Finally, common law marriage did exist in other jurisdictions, including the US.[16] The true cause of the myth is likely to be a mix of the above reasons. The myth pervades all social and age groups, all regions, across class and sex, though is more likely to occur in (and, ironically, detrimentally affect) cohabiting parents.[17]

The nature of the myth enhances this complexity. Although the BSA survey suggests that nearly half of the British public believes in the generalised concept of common law marriage, it is not entirely clear what this means in terms of the public's *specific* beliefs about a cohabitant's legal rights. Beneath the general picture explained here lies a spectrum of misunderstanding. One of the issues with the wording of the BSA survey's question is that it assumes knowledge of rights one would acquire if married. Rosemary Auchmuty has noted that there are a number of myths about marriage itself, including most commonly that married couples share property 50/50.[18] For instance, Mary Hibbs et al found that, in a small-scale study, 74 percent of respondents said they would have a claim immediately on marriage to their partner's property.[19] On the other hand, Pascoe Pleasence and Nigel J Balmer have found in their own empirical research that 25 percent of people did not believe that a spouse would have a good claim for financial support against their partner after ten years of marriage.[20] This suggests ongoing misunderstandings of the legal rights of spouses. The BSA survey shows the

[15] A Barlow, 'Modern Marriage Myths: The Dichotomy Between Expectations of Legal Rationality and Lived Law' in RC Akhtar, P Nash, and R Probert (eds), *Cohabitation and Religious Marriage: Status, Similarities and Solutions* (Bristol University Press, 2020); Barlow et al, above n 4.
[16] Probert, 'Common-Law Marriage: Myths and Misunderstandings', above n 1.
[17] Barlow et al, above n 4; Fraser, above n 13.
[18] R Auchmuty, 'The Limits of Marriage Protection in Property Allocation When a Relationship Ends' [2016] CFLQ 303.
[19] M Hibbs, C Barton and J Beswick, 'Why Marry? Perceptions of the Affianced' [2001] Fam Law 199.
[20] P Pleasence and N J Balmer, 'Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation' (2012) 46 *Law and Society Review* 197.

existence of a common law marriage myth but does not in and of itself evidence mistaken belief in legal protections for cohabitants.

Investigations after the BSA survey have therefore informed understanding of the myth. Pleasence and Balmer's research confirmed 'substantial and ongoing public misunderstanding of cohabitation law' and showed that 52 percent of people thought that financial support would be available from a partner on separation after a 10-year cohabiting relationship.[21] This suggests widespread belief in legal protection for cohabitants. There is some evidence that the belief often shows itself in the form of proprietary entitlement. Hibbs et al's research shows 74 percent of affianced people believed they would have a valid claim on their partner's property, and 69 percent thought living together had legal consequences.[22]

Case law provides further evidence for mistaken belief in proprietary entitlement. In *Churchill v Roach*,[23] the male defendant had told the female claimant that she could not live with him on a permanent basis, as she would then become a common law wife and have an interest in the home after six months. As will be explored below, this formed the basis for the claimant's proprietary estoppel claim. In *Risch v McFee*,[24] 'the defendant said that he would see that [the claimant's] name was on the paper about the ownership of the house after [she] gave him the money. He said to [her] "a common law wife is just as good as a proper wife"'.[25] Similarly, in *Windeler v Whitehall*, Miss Windeler argued, as part of her claim for a beneficial interest in the family home, that she had detrimentally relied on her mistaken belief that she was a common law wife. Belief in the myth also appears to be present in *Clibbery v Allen*, where Ms Clibbery spoke to the Daily Mail after her case 'to alert members of the general public to the lack of a concept of "common law marriage" and that women should be aware of how little rights they

[21] Ibid.
[22] Hibbs et al, above n 19.
[23] *Churchill v Roach* [2002] EWHC 3230 (Ch), [2004] 2 FLR 989.
[24] *Risch v McFee* [1991] 1 FLR 105.
[25] Ibid, 108.

have on the breakdown of such a relationship'.[26] Anne Bottomley has suggested that Miss Oxley from *Oxley v Hiscock*[27] might have believed in the common law marriage myth which manifested as an assumption of property sharing.[28] Bottomley argues that Miss Oxley certainly thought of the property as jointly owned.[29] After the case, Miss Oxley was reported as saying:

> 'People have a misapprehension that after a number of months or a number of years you are a common-law wife. It doesn't exist. The law doesn't recognise that. But as much as a married person, you are putting in a huge investment for the future and it can be wiped out. People cohabiting should have something in writing.'[30]

Miss Oxley's point about the need for a written agreement is pertinent as very often there is no clear agreement between the parties at all, let alone anything in writing. For these couples, a doctrinal remedy which does not rely on formalities or express agreement is vital. If Miss Oxley did believe in the common law marriage myth, it indicates the risks involved in the myth – in this case Mr Hiscock had kept quiet about his own understanding of the couple's separate interests, which inevitably would have led to a stronger position on the breakdown of the relationship. These types of disputes, where the more economically powerful partner also has stronger legal knowledge than the less economically powerful partner presents an increased risk of economic harm at the end of the relationship for the latter partner as it is likely she will not have taken steps to protect herself.[31]

Of course, this problem is only exacerbated because couples do not, generally, consider what might happen if they break up. In *Goodman v Gallant* it was said that if the conveyance contains an express declaration of trust 'there is no room for the application of resulting, implied or

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[26] *Allan v Clibbery* [2002] EWCA Civ 45, [2002] Fam 261 [5].
[27] *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211.
[28] A Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-Habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181.
[29] Ibid, 197.
[30] Ibid, 198.
[31] Barlow and others (n 4).

constructive trusts unless and until the conveyance is set aside or rectified'.[32] For those who simply move into their partner's home, it is very unlikely that the parties will have made a written declaration of their respective shares. Couples are unlikely to consider strict legal entitlement and will usually prioritise their relationship instead.[33] Individuals may feel uncomfortable protecting their own financial contributions by making a declaration of trust, even when they have contributed most of the purchase price or are placing the property into joint names. Development of the law, therefore, will need to continue to permit informal ways of obtaining a remedy at the end of the relationship.

The question is whether the claimant's belief in the common law marriage myth itself can form the basis of any private law claim against the defendant at the end of a cohabiting relationship. The presence of the claimant's mistake might provide a cause of action – either on the basis of unconscionability from resiling from a belief the claimant had detrimentally relied on (for proprietary estoppel and the common intention constructive trust) or on the basis of the defendant's unjust enrichment due to the claimant's belief in the myth. The next section will begin the exploration by focusing on the common intention constructive trust.

The Common Intention Constructive Trust

The primary method for a cohabitant to make a claim against their former partner is by arguing they have gained a beneficial share in the family home held in their partner's sole name.[34] Alternatively, where the parties jointly own the home, the claimant may want to argue that they have a larger share than their partner.[35] This requires showing that a so-called common intention constructive trust has arisen for the benefit of the claimant. This constructive trust requires proof of a common intention between the parties regarding how the property is to be

[32] *Goodman v Gallant* [1986] Fam 106 (CA), 110; see also *Stack v Dowden* [2007] UKHL 16, [2007] 2 AC 432.
[33] Anna Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16 LS 218.
[34] *Lloyds Bank v Rosset* [1991] 1 AC 107.
[35] *Stack v Dowden*, above n 32.

held, combined with detrimental reliance on that common intention by the claimant. If the defendant is the sole legal owner of the home, the claimant will first have to show they have *acquired* an interest in the home before that interest can be *quantified*.[36] If the house is held in the joint names of the parties, then the courts will need to consider whether to sever the joint tenancy and quantify the shares otherwise than 50/50, as equity will follow the law and therefore presume a joint tenancy in equity.[37]

The finding in *Risch v McFee* was that the requisite common intention could be found by the defendant's statement that he would see her name on the paper about the ownership of the house, and that regardless of this she need not worry as she was a common law wife and had just as many rights as a 'proper wife'. This suggests that it is possible for an assurance that the claimant has rights as a common law wife, with the implication that this would entitle the claimant to a proprietary interest in the house, is enough to show a common intention between the parties. This assurance, that the claimant need not worry about legal title because she is a common law wife, has a striking similarity with the line of cases based on spurious excuses. In *Eves v Eves*,[38] for example, the defendant had told the claimant that he could not put the house in her name as she was under 21. The Court of Appeal held that this indicated the defendant had intended her to have a share in the property. Further, in *Grant v Edwards* the defendant told the claimant that if they took the property in their joint names it would prejudice the claimant in her divorce proceedings.[39] Again, the Court of Appeal held there was a common intention that the claimant was to have a proprietary interest, as 'otherwise no excuse for not putting her name on to the title would have been needed'.[40] By indicating to the claimant that she already has a property right in the house, the defendant creates the impression to the

[36] The difference between acquisition and quantification was discussed in *Oxley v Hiscock*, above n 27.
[37] *Stack v Dowden*, above n 32, [58].
[38] *Eves v Eves* [1975] 1 WLR 1338.
[39] *Grant v Edwards* [1986] Ch 638.
[40] Ibid, 647.

claimant of a shared understanding that she should have a beneficial interest in the property. The 'excuse' for not transferring the property into joint legal names becomes evidence of the necessary common intention. This suggests that the claimant's mistaken belief caused by the defendant's excuse can give rise to an acquisition of property interests by way of showing a common intention between the parties.[41] Conversations about common law marriage might therefore in *some* circumstances constitute an express discussion relevant to prove common intention.[42]

The excuse cases have been doubted in *Curran v Collins*,[43] where Lewison LJ noted that:

> 'It cannot be right that the giving of a reason why someone is not on the title deeds inevitably leads to the inference that it must have been agreed that they would have an interest in the property […] the more usual inference would be that they would have understood that they were not to become owners or part owners of the property.'[44]

Further, in *Geary v Rankine* the defendant's excuse not to allow the claimant an interest in the property was that her husband may be able to get it in divorce proceedings. It was held that this was 'a perfectly rational reason' and provided evidence that there was *no* common intention.[45] In *O'Neill v Holland*,[46] however, the property was not put into the joint names of the parties because the defendant had (falsely) told the claimant that she would not get on the mortgage. This excuse was considered relevant in the finding of a common intention for the claimant to

[41] *Lloyds Bank v Rosset*, above n 34, 133.
[42] Ibid, 132.
[43] *Curran v Collins* [2015] EWCA Civ 404, [2016] 1 FLR 505.
[44] Ibid, 22.
[45] *Geary v Rankine* [2012] EWCA Civ 555, [2012] 2 FLR 1409.
[46] *O'Neill v Holland* [2020] EWCA Civ 1583, [2021] 2 FLR 1016.

have a beneficial interest in the property (albeit that there was other evidence showing a previous common intention of property sharing). It was held in the Court of Appeal that there was 'a position of clear detriment incurred by Ms O'Neill in reliance on Mr Holland's misrepresentation that she would be unable to obtain a mortgage'.[47] One could easily envision a case where the defendant assures the claimant that they need not get married as she is protected regardless in terms of property entitlement. Where the defendant has used the common law marriage myth as an excuse to not put the house in joint names, therefore assuring that claimant that she already has an interest in the property, these cases suggest the court *could* recognise that a beneficial interest has arisen for the claimant.

At the acquisition stage, behaviour that may allow an inference of a common intention between the parties is restricted to contributions towards the purchase price or mortgage instalments,[48] but at the quantification stage the courts have arrogated to themselves a much wider discretion based on the 'whole court of dealings' to make such an inference.[49] In *Stack*, Baroness Hale set out a non-exhaustive list of relevant factors which included the parties' individual characteristics and personalities, and the nature of their relationship.[50] The fact that either or both of the parties' believed themselves to be in a common law marriage must, surely, be relevant to the nature of the relationship and therefore to the exercise of inferring (or imputing) intentions by looking at the whole course of dealings. In *Stack*, Baroness Hale said that 'in the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection'.[51] This creates a dichotomy between 'love and affection' on one side and

[47] ibid 64.
[48] *Lloyds Bank v Rosset*, above n 34; See *Stack v Dowden*, above n 32. Although Baroness Hale suggested that Lord Bridge had set the hurdle 'rather too high in certain respects', there are no sole name cases which do not comply with the Rosset restrictions; see Brian Sloan, 'Keeping up with the Jones Case: Establishing Constructive Trusts in "sole Legal Owner" Scenarios' (2015) 35 LS 226.
[49] *Stack v Dowden*, above n 32; *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.
[50] *Stack v Dowden*, above n 32, [69].
[51] Ibid.

‘mercenary considerations’ on the other, with cohabiting couples ordinarily being more likely than their married counterparts to fall on the ‘mercenary’ side. Further, Baroness Hale makes clear that ‘the principles of law are the same, whether or not the couple are married, although the inferences to be drawn from their conduct may be different’.[52] For this Baroness Hale relies on the dicta of Griffiths LJ in *Bernard v Josephs*.[53] Griffiths LJ notes that, as cohabiting couples have not made the decision to get married, individuals may value their independence and may be less committed than married couples. On this basis, he believes it would be inappropriate to draw the same inferences from the behaviour of cohabiting couples as married couples. Griffiths LJ goes on, however, to say:

> ‘There will of course be many cases of couples living together with every intention that the relationship should be permanent and with the same degree of commitment as marriage […] and in such cases it may be legitimate to regard them in the same way as a married couple’.[54]

On this basis, presumably it would be inappropriate to distinguish inferences to be drawn from behaviour between married couples and those who *believe* themselves married. If this is the case, those couples who believe in common law marriage could be treated differently by the courts when considering the whole course of dealings of the parties, on the basis that their relationship operates as more ‘akin to marriage’. This would mean that, according to Baroness Hale’s dichotomy, couples who believe in the common law marriage myth might be more likely

[52] Ibid [40].
[53] *Bernard v Josephs* [1982] Ch 391.
[54] ibid 403.

to fall on the 'love and affection' side of the line (like married couples), rather than the 'mercenary considerations' side (like cohabiting couples).

Finally, the claimant must also show that she had detrimentally relied on the parties' common intention in order to show the requisite unconscionability which underpins the constructive trust. The test for detrimental reliance requires 'conduct on which the [claimant] could not reasonably have been expected to embark unless she was to have an interest in the house'.[55] In *Grant v Edwards*, the claimant was successful in proving detrimental reliance due to the very substantial contributions she had made to the living expenses of the household, which allowed the defendant in turn to pay the mortgage. The issues in showing detrimental reliance for the common intention constructive trust are very similar to those for proprietary estoppel, and so detrimental reliance will be discussed in more detail in the following section.

Although belief in the common law marriage myth is not often mentioned in common intention constructive trust cases, on assumption that it is not directly relevant, this belief could in some cases affect both acquisition and quantification of a beneficial interest. For acquisition, a wilful deception by the defendant inducing the claimant's mistake could allow a beneficial interest by association with the excuse cases, though as noted there have been judicial doubts as to the use of excuses to show a common intention.[56] For quantification, the belief that the couple are in a common law marriage must be relevant to the nature of the parties' relationship and might indirectly affect other behaviour relevant under *Stack*. However, any impact is likely to be small, as it is merely one factor to be considered by the courts, and the courts tend to focus their attention on the financial aspects of the relationship. There are stronger ways to make belief in the common law marriage myth directly relevant to a dispute between cohabiting couples, and we next turn to proprietary estoppel.

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[55] *Grant v Edwards*, above n 39, 648.
[56] See text to fn 53 and following.

Proprietary Estoppel

Imagine that the defendant has encouraged the claimant to believe in the common law marriage myth, and therefore that she has rights akin to a wife. The claimant then acts to her detriment in reliance on this belief. Might there be a claim for proprietary estoppel? Further, what if the defendant has made no *positive* encouragement of the claimant, but has instead merely stood by and not corrected her in full knowledge she was mistaken as to her legal rights? This latter situation might be where the defendant has intentionally kept his cards close to his chest, further strengthening his legal position relative to that of the claimant (unbeknownst to her).

Proprietary estoppel is comprised of three ingredients – a representation by the defendant that the claimant has or will have a proprietary interest; the claimant relying on that representation; and the claimant suffering detriment as a consequence of this reliance. The principle of unconscionability permeates these ingredients.[57] Claimants have frequently attempted to use proprietary estoppel in the cohabitation context.[58] However, there has been no successful proprietary estoppel case where the claimant has argued that the relevant representation is that the claimant is protected as a common law wife. The furthest the case law goes is *Churchill v Roach*,[59] in which the defendant had said that the claimant could not live with him as, after six months, she would become a common law wife and have an interest in the house. After a few years the couple did end up living together permanently, and the claimant took this therefore as meaning she would have an interest in the property. The judge did not doubt that this could be a relevant representation for proprietary estoppel, but the claimant failed as there was no evidence the defendant made the representation concerning the specific property they ended up

[57] *Gillett v Holt* [2001] Ch 210.
[58] See for example *Layton v Martin* [1986] 2 FLR 227; *Pascoe v Turner* [1979] 1 WLR 431; *Wayling v Jones* [1995] 2 FLR 1029; *Southwell v Blackburn* [2014] EWCA Civ 1347, [2015] 2 FLR 1240.
[59] *Churchill v Roach*, above n 23.

living together in, and regardless the defendant knew nothing of the claimant's detrimental reliance.

A proprietary estoppel claim requires a mistaken belief in *property* rights, not merely generalised rights to financial security. This can be seen in the difference between *Pascoe v Turner*[60] and *Coombes v Smith*.[61] In the former the defendant told the claimant 'this house is yours and everything in it'. This is clearly referring to specific property, and the claimant was successful. In *Coombes*, the defendant told the plaintiff that he will always look after her and that she will always have a roof over her head. The plaintiff failed in a claim for proprietary estoppel as no specific asset was identified for the claimant to have an interest in.

It is therefore important to know what the common law marriage myth means for each believer. As has been explored, many couples believe that being in a common law marriage entitles them to an interest in specific property – as a reminder, Hibbs et al[62] found that many couples do not have strong knowledge of the rights of married couples. Therefore, belief in the common law marriage myth might often involve belief in some form of property sharing, or otherwise belief in the common law spouse gaining an interest over her partner's property after a certain period of time (much like the belief of the parties in *Churchill v Roach*). For these couples, it is suggested there is no reason why a proprietary estoppel claim should not be possible, assuming they fulfil each of the requirements. This is because, unlike cases such as *Layton v Martin*, *Coombes v Smith* and *Lissimore v Downing*,[63] the assurance will involve specific property, for instance 'you already have an interest in the house as my common law wife'.

The proprietary estoppel analysis should be separated into instances of representation and acquiescence. Where the defendant has positively encouraged the claimant to believe that she

[60] *Pascoe v Turner*, above n 58.
[61] *Coombes v Smith* (1986) 1 WLR 808.
[62] Hibbs, Barton and Beswick, above n 19.
[63] *Layton v Martin*, above n 58; *Coombes v Smith* above n 61; *Lissimore v Downing* [2003] 3 FLR 308.

is a common law wife and therefore entitled to a proprietary interest (either after a certain period of time or on separation), and the claimant can show detrimental reliance on this belief, a proprietary estoppel claim can be sustained. The representation is one which relates to specific property. This is the *Churchill v Roach* style case. Where there is positive encouragement, the defendant does not need to be aware of the true position,[64] so a claimant could succeed here where the defendant is sharing in the mistake. This means that proprietary estoppel by representation might be useful whether the defendant has intentionally or unintentionally led the claimant to a mistaken belief (though clearly there must still be encouragement).

However, an express representation might not always be present – often the claimant may have been encouraged in their mistaken belief in common law marriage by the acquiescence of the defendant. Here, the defendant, despite knowing the truth, has not corrected the claimant and has rather allowed her to continue to act in reliance on her mistaken belief. In other words, instead of the defendant assuring the claimant she is a common law wife so will have an interest in the family home, in this situation the claimant has herself begun to believe in the common law marriage myth and the defendant, aware of his partner's mistake, has chosen not to intervene and allowed her to continue in her false belief. This may even be strategic, where the defendant does not want the claimant to push for greater legal rights (such as marriage) and so is happy to allow her to believe she already has them. The defendant is holding his cards close to his chest. Could the claimant mount a successful proprietary estoppel claim in this situation?

Acquiescence in a mistaken belief can sustain a proprietary estoppel claim – an early example is *Ramsden v Dyson*, where it was thought '[Equity] considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that I

[64] *Hopgood v Brown* [1955] 1 WLR 213, 223.

would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented'.[65] This suggests that if the defendant remains silent in circumstances where he knows the claimant is detrimentally relying on her belief in the common law marriage myth, the defendant might come under an active duty to dispel the myth. Fry J's judgment in *Willmott v Barber* contains the classic statement of the requirements for proprietary estoppel by acquiescence, which have become known as the five probanda.[66] First, the claimant must have made a mistake as to their legal rights. Second, the claimant must have done some acts on the faith of their mistaken belief. Third, the defendant must know of the existence of his own right which is inconsistent with the right claimed by the claimant. Fourth, the defendant must know of the claimant's mistaken beliefs. Fifth, the defendant must have encouraged the claimant in their expenditure of money or other acts directly or by abstaining from asserting his legal right. Though an old case, Ben McFarlane argues that acquiescence-based claims must continue to fulfil the *Wilmott v Barber* probanda, stating that acquiescence 'is satisfied where B adopts a course of conduct in reliance on a mistaken belief as to B's current rights, and A, knowing of B's action, of B's belief, of the fact that B's belief is mistaken, and of A's own right, fails to take a reasonably available opportunity to assert his or her right against B'.[67]

It is therefore a relevant question how far the five probanda continue to be necessary. Certainly, in the context of the common law marriage myth, these probanda would suggest that the defendant must be aware of the true position and therefore must not also believe in the myth. This is because 'the doctrine of acquiescence is founded upon conduct with a knowledge of your rights'.[68] In *Taylor Fashions*, Oliver J notes that 'so far as acquiescence pure and simple

[65] *Ramsden v Dyson* (1866) LR 1 HL 129, 141.
[66] *Willmott v Barber* (1880) 15 ChD 96.
[67] Ben McFarlane, *The Law of Proprietary Estoppel* (OUP, 2nd ed 2020) 19.
[68] Ibid 105.

is concerned, [the defendant] could not lawfully object to the work and could be under no duty to [the claimant] to communicate that which they did not know themselves'.[69] The consequence of this is that acquiescence-based proprietary estoppel claims would only be possible where the defendant is knowingly misleading the claimant.

The probanda also suggest that the claimant must be making a mistake as to their current rights, rather than rights they may receive in the future. This means that the claimant would only succeed if she can show that her belief in the common law marriage myth translated to a mistaken belief in her current proprietary entitlement, and not merely a belief that she would be entitled to a proprietary interest in the future, particularly on separation of the parties. This could exclude some cohabitants from a successful proprietary estoppel claim and would make proof more difficult. On this point, it is argued that the five probanda are outdated, and that the modern law allows a more liberal approach for acquiescence-based claims.

In *Re Basham*, for example, a case where the claimant understood she would get her father-in-law's property when he died, the court said:

> 'Equitable doctrines cannot be confined within a straitjacket by the labels which have become attached to them. It is clear that the doctrine which bears the label "proprietary estoppel" is not limited to cases like *Willmott v. Barber* where A believes that he already has the interest which he asks the court to confirm, but extends to cases in which A believes that he will obtain an interest in the future.'[70]

[69] *Taylor Fashions Ltd v Liverpool Trustees Co* [1982] QB 133, 151–52.
[70] *Re Basham* [1986] 1 WLR 1498, 1510B.

Re Basham was not an acquiescence case, but this is a statement of principle which rejects categorisation and suggests that modern proprietary estoppel doctrine is flexible. This statement has been relied on in *Wayling v Jones* and *Lissimore v Downing*.[71] Oliver J in *Taylors Fashions v Liverpool Trustees Co* thought that it was 'open to doubt' whether 'the strict *Willmott v. Barber* probanda are applicable as necessary requirements in those cases where all that has happened is that the party alleged to be estopped has stood by without protest while his rights have been infringed'.[72] Further, the court at first instance in *Amalgamated Property Co v Texas Bank* noted that the statement of principle in *Willmott v Barber* was not intended to be exclusive.[73] However, *Amalgamated Property*, like all those others discussed here, was not an acquiescence case and any reference to *Willmott* is therefore obiter. It is difficult to find *authority* that the *Willmott v Barber* probanda should not be strictly applied, and this is perhaps why Ben McFarlane continues to argue that a mistake as to *current* property rights is required:

> 'classic formulations of the acquiescence principle stipulate that B must have acted on the basis of a mistaken belief as to B's *current* rights […] this requirement of the acquiescence principle forms a vital distinction between the acquiescence- and promise-based strands of proprietary estoppel'.[74]

The modern law, however, uses unconscionability as its guide. Oliver J's judgment in *Taylors Fashions* was a landmark in defining modern proprietary estoppel. Oliver J said that he was 'not at all sure that so orderly and tidy a theory is really deducible from the authorities—certainly from the more recent authorities, which seem to me to support a much wider equitable

[71] *Wayling v Jones*, above n 58; *Lissimore v Downing*, above n 63.
[72] *Taylor Fashions Ltd v Liverpool Trustees Co*, above n 69, 147C.
[73] *Amalgamated Property Co v Texas Bank* [1981] 2 WLR 554.
[74] McFarlane, above n 67, 22.

jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable'.[75] Oliver J went on to note that he does not think it 'desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstance' whether the claimant can successfully show unconscionability so as to sustain a proprietary estoppel claim.[76] Further, in *Hoyl Group Ltd v Cromer Town Council* Floyd LJ noted that 'subsequent decisions, including subsequent decisions of the House of Lords, have favoured a more holistic approach to proprietary estoppel, as opposed to the application of rigid rules'.[77] The Privy Council has supported Oliver J's focus on unconscionability, saying in *Blue Haven Enterprises v Tully* that 'Fry J's five probanda remain a highly convenient and authoritative yardstick for identifying the presence, or absence, of unconscionable behaviour on the part of a defendant sufficient to require an equitable remedy, but they are not necessarily determinative'.[78] Finally, in the recent case of *Guest v Guest* the Supreme Court agreed that the aim of the doctrine was to correct unconscionability, with Lord Leggatt (in the minority) noting that the five probanda from *Wilmott v Barber* might apply more widely than a mistaken belief in an existing right, extending to cases where the claimant was encouraged to believe he would be granted an interest in land.[79] *Guest v Guest* itself was not an acquiescence case, and so the basis of unconscionability (the stepping back from a clear promise) is not relevant for our purposes. Finally, in *Lester v Woodgate*[80] the Court of Appeal said a flexible and fact-sensitive approach for estoppel by acquiescence was needed:

[75] *Taylor Fashions Ltd v Liverpool Trustees Co*, above n 69, 147B.
[76] Ibid 148F.
[77] *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782, [2015] HLR 43 [37].
[78] *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 [23].
[79] *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911 [143].
[80] *Lester v Woodgate* [2010] EWCA Civ 199, [2010] 2 P&CR 21.

> ‘the courts have held that it is not necessary for all five probanda to be satisfied in every case or (therefore) for the acts of the party seeking to rely on the estoppel to have been motivated by a mistaken belief as to his rights. Those conditions are a useful test of what might amount to unconscionable behaviour in such a case but they are not intended to apply indiscriminately regardless of the particular facts or circumstances in question.’[81]

The touchstone of the modern doctrine of proprietary estoppel, therefore, is unconscionability: ‘the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine’.[82] It is difficult to see how one party holding their legal knowledge about their relationship back from their partner, despite their partner acting to their detriment in reliance on this belief, would not be unconscionable. In particular, it is difficult to see why the defendant knowingly allowing the claimant to continue in her mistaken belief in her legal rights is any less unconscionable than the defendant actively assuring the claimant of her mistaken legal rights. In the latter case, a mistaken belief in a future property right is sufficient.[83] Within intimate relationships, it may be unconscionable to engage in behaviour which may be perfectly legitimate in commercial contexts.[84] There is a degree of trust within relationships which develops an expectation that parties will not withhold information where their partner is acting in a way which is detrimental to themselves. Context

[81] Ibid [33].
[82] *Gillett v Holt*, above n 57, 225.
[83] *Crabb v Arun District Council* [1976] Ch 179.
[84] In *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 Lord Walker notes the differences between the commercial and domestic contexts, and makes clear that though mere hopes or expectations of a proprietary interest may not be sufficient in the commercial context to show proprietary estoppel, the same is not necessarily true in the domestic context (see [65]-[68]). Further, in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [56] Lord Walker notes that the relevant assurance (which could constitute mere silence in an acquiescence case) need only be ‘clear enough’, and that this standard would depend hugely on context.

is everything,[85] and the meaning that one attributes to silence must be dependent on the relationship at hand. Several judges, including Scarman LJ in *Crabb*, and Oliver J in *Taylors Fashions*, have cautioned against putting estoppel into arbitrary categories, instead preferring to highlight the broader unconscionability framing. This means that the idea that acquiescence should have such different rules to positive assurances goes against the spirit of the modern doctrine of proprietary estoppel. Unconscionability underlines the doctrine – this requires a court to be conscious of context. The *Wilmott v Barber* probanda therefore should not operate to prevent an acquiescence-based proprietary estoppel claim even when the expectation is of a future (rather than current) property right.

A final issue with the use of proprietary estoppel to ground a claim based on the common law marriage myth is causation. The claimant must show that detrimental acts done were in reliance on the defendant's assurance. This creates a risk that courts will find that the claimant acted only because of her love and affection for the defendant, and not because of her expectation (encouraged by the defendant) that she was a common law wife. In *Layton v Martin*,[86] for example, the assurance was that the defendant would provide 'what emotional security I can give, plus financial security during my life and financial security after my death'.[87] The judge noted that the claimant had been almost wholly unmercenary in her dealings with the defendant, and this assessment worked against her. He found that the claimant was not influenced by the assurance, and instead she went to live with the defendant on the footing that she would be his wife in all but name. In other words, it was found that the claimant acted as she did because she was his partner and cared for him, not because she relied on his assurance. Similarly, in *Coombes v Smith* the defendant purchased a house and the claimant moved in on the

[85] *Thorner v Major*, above n 84.
[86] *Layton v Martin*, above n 58.
[87] Ibid 230.

expectation that the defendant would follow.[88] He never did. The assurance was that he will always look after the claimant and that she will always have a roof over her head. The defendant then moved in with another woman and stopped paying the mortgage instalments. The claimant argued that she was entitled to remain in the house. The judge found that acts done by the claimant, such as looking after their daughter and renovations to the property, were not in reliance of the assurance, but were instead due to the claimant's status as occupier, mother, and mistress. The judge further did not consider the claimant's failure to find a job as detriment, as she got to stay at home while the defendant paid for her.

If courts approach work done in the home in a way that assumes the claimant's motivation must be her love and affection for the defendant, litigants will struggle to argue proprietary estoppel successfully in the domestic context. There are however a few cases which suggest a more flexible approach. In *Wayling v Jones*,[89] for example, the Court of Appeal said that 'once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendants to establish that he did not rely on the promises'.[90] In other words, there is a presumption of reliance, where so long as there is conduct from which inducement may be inferred, the defendant must show that his assurances were not relied on. Further, it was made clear by the court that the promise relied on does not have to be the *sole* inducement for the detrimental actions taken by the claimant. The Court of Appeal in *Campbell v Griffin* explained that 'it would do no credit to the law if an honest witness who admitted that he had mixed motives were to fail in a claim which might have succeeded if supported by less candid evidence'.[91] In this case a lodger moved in with an elderly couple for a rent. He began caring

[88] *Coombes v Smith*, above n 61.
[89] *Wayling v Jones*, above n 58.
[90] ibid 173.
[91] *Campbell v Griffin* [2001] EWCA Civ 990, (2001) 82 P&CR DG23, [29].

for them and maintaining the house, and in return they had told him that whatever happened, he had a home for life. The Court of Appeal held that, although the context indicated that the lodger did help due to 'common humanity' and his close relationship with the elderly couple, this did not mean that the detriment he suffered was not in reliance on the representations made by the couple. Similarly, in *Pascoe v Turner* the claimant told the defendant that the house and everything in it belonged to her.[92] The defendant renovated, repaired and improved the house. The relationship broke down and the claimant tried to remove the defendant from the house. The defendant was successful in her proprietary estoppel counterclaim and was awarded a transfer of the freehold to her. It was held that the work done was substantial, and the claimant had stood by and watched, encouraged and advised, without saying that she was putting her money and labour into his house. Finally, a flexible approach can also be found in *Southwell*,[93] where the Court of Appeal held it was wrong to attempt to undertake some arithmetic accounting exercise for detrimental reliance. The detriment in this case was the giving up of secure accommodation in which the claimant had invested, and the invested money in a property in which she had no legal title. The approach in these cases is much more relational, as it involves accepting that parties in a relationship are likely to act for a multitude of reasons and singling out any one motivation for a particular act is often futile. There is no reason therefore, in line with the cases above, that a proprietary estoppel claim should not be available when the representation is only one cause of the detrimental acts done by the claimant.

The above discussion shows that belief in the common law marriage myth might be able to ground a claim for proprietary estoppel. If the defendant has assured the claimant that she is a common law wife (and therefore has encouraged his partner in her belief), then so long as the parties' belief in the myth involved the claimant having a right in specific property (as

[92] *Pascoe v Turner*, above n 58.
[93] *Southwell v Blackburn*, above n 58.

discussed above), this should constitute a representation. Similarly, where the defendant has knowingly remained silent while the claimant has acted to her detriment in the belief that she is a common law wife (and therefore is or will be entitled to an interest in the property), this should constitute acquiescence (though it should be noted that evidencing that the defendant was knowingly keeping silent may often be difficult). If the claimant has then relied to her detriment on her partner's encouragement in this belief, a proprietary estoppel claim should be available. This could aid those individuals who have assumed throughout their relationship that they are entitled to a proprietary interest either when living together or on separation and have therefore not taken steps to protect themselves. This is particularly true in circumstances where the legally knowledgeable partner has kept their cards close to their chest to prevent their mistaken partner demanding protection, and therefore could aid the mistaken partner after separation in negotiations prior to litigation.

I. Unjust Enrichment

The previous section found that a mistaken belief in the common law marriage myth could in some circumstances ground a successful claim for proprietary estoppel. This section will consider whether such a mistaken belief might also allow a claim for unjust enrichment. Mistake is a well-established unjust factor,[94] meaning that if the claimant can show an enrichment of the defendant at their expense alongside this unjust factor of mistake, restitution should be available. As Simon Gardner has noted, cases of cohabitation breakdown 'might well disclose a case of unjust enrichment'.[95] An example can be seen in the Scottish case of *Newton v Newton*.[96] Here, a man bought a house in contemplation of marriage to his partner. His partner took sole legal title. After the relationship broke down, the man failed to show that the house

[94] *Kelly v Solari* (1841) 152 ER 24.
[95] S Gardner, 'Family Property Today' (2008) 124 LQR 422, 437; see also N Piska, 'A Common Intention or a Rare Bird? Proprietary Interests, Personal Claims and Services Rendered by Lovers Post-Acquisition: *James v Thomas*; *Morris v Morris*' [2009] 21 CFLQ 104.
[96] *Newton v Newton* [1925] SC 715.

was held on trust for him, and therefore sought recovery of the money he had spent on improving the house. It was held by the Court of Session that an honest mistaken belief that the house was his property could lead to a claim for recompense. In *Shilliday v Smith*, the Lord President said of *Newton* that 'the critical factor in the pursuer's ground of action was his mistake about the title: he recovered because his wife was benefiting from sums which he would not have spent if he had been aware of the true position'.[97]

Unjust enrichment classically requires four elements. In *Benedetti v Sawiris*, Lord Clarke noted that 'it is now well-established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?'[98] These questions can help to consider whether unjust enrichment can apply in novel situations, such as the cohabitation context. It should be noted to begin with that as unjust enrichment has only rarely been applied in the cohabiting context in England and Wales,[99] there are several questions as to its application. This article focuses only on whether the unjust factor of mistake may be applicable in cases where the claimant has benefitted the defendant due to a mistaken belief that she is a common law wife. If proven, unjust enrichment requires the defendant provide restitution, returning any unjust gain he has received. This will be simple to quantify if the claimant has simply paid money to the defendant (or on, for example, paying off the mortgage) but will be more difficult where the claimant has

[97] *Shilliday v Smith* [1998] SC 725 731.
[98] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [10].
[99] See for example *Walsh v Singh* [2009] EWHC 3219 (Ch); *Cook v Thomas* [2010] EWCA Civ 227. In both cases the analysis of the unjust enrichment claim is remarkably brief and neither case involves a belief in common law marriage.

provided 'services', including child-caring and general homemaking. In this scenario, the defendant must return the ordinary market value of these services.[100]

It is well established that the claimant's mistake might make an enrichment of the defendant unjust,[101] regardless of whether that mistake is a mistake of fact or a mistake of law.[102] Many cohabiting cases will show a clear case of enrichment of the defendant at the expense of the claimant. Clearly payments towards mortgage instalments on a house owned solely by the defendant will enrich the defendant, as he has had his liability partially discharged. Similarly, where the claimant has improved the defendant's property, either by ensuring necessary repairs are completed or by paying for renovations (which may or may not increase the market value of the property), this must be an enrichment as the defendant has not had to pay for the improvements himself. There is, further, no reason why so-called domestic contributions, meaning unpaid work in the home such as homemaking and childcare, could not constitute enrichments of the defendant. If the claimant is looking after the children at home, for example, the defendant is enriched in one of two ways: either he has not had to pay for childcare, in which case he has saved an expense; or he has been able to take on work outside of the home, in which case he will have increased his wealth. The breadwinner will be able to go to work outside the home and earn a salary only because he has delegated the domestic tasks to the homemaker.[103] As Wanda Wiergers notes, 'where domestic labour is provided "for free," the costs of caring will be borne largely by mothers. Men benefit economically insofar as their labour as breadwinners is paid for and under their control'.[104] There are some questions here

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[100] See S Degeling and M San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' (2014) 36 *Sydney Law Review* 69 for a critique of this, particularly because these services are already undervalued in the market. Regardless, the authors state that 'the gendered norms that identify, construct and value such services in other areas of private law, such as torts, are not present in unjust enrichment in the same way' (pg 70)..

[101] *Kelly v Solari*, above n 94.

[102] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349.

[103] JC Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (OUP, 2000).

[104] W Wiegers, 'Commodification and the Allocation of Care and Responsibility for Children' (2017) 67 *University of Toronto Law Journal* 206, 213.

as to whether the defendant could subjectively devalue the enrichment on the basis that he did not value it and so it is not an enrichment to him personally.[105] The saving of necessary expenditure is an incontrovertible benefit which cannot be subjectively devalued, as it is an increase in wealth. Further, if the defendant has requested these services from the claimant, he will be unable to argue he does not value them. There has been some pushback against this analysis: in *Walsh v Singh* it was argued that 'if dashed expectations of a long-term domestic relationship open the door to unjust enrichment claims, a wide range of claims which the concept of unjust enrichment was never meant, and is ill equipped, to deal with will come marching through'.[106] If one is to swap the words 'unjust enrichment' with the words 'constructive trust', this statement remains true. Whether these doctrines were created to deal with the problems in front of us is irrelevant. What is relevant is whether they can work to deal with cohabitation disputes. Brian Sloan, calling the decision 'unfortunate', has made the point that 'it is questionable whether the constructive trust or proprietary estoppel are any more equipped to deal with "domestic" cases than are the principles of unjust enrichment'.[107] As has been explained above, the judge's conclusion that unjust enrichment cannot work in this context should be rejected.

Where the claimant has shown that they have enriched the defendant at their expense due to a mistaken belief, she will be entitled to restitution for unjust enrichment. For our purposes, this means that the claimant must have enriched the defendant at her expense because she mistakenly believed she was a common law wife. If the basis on which the enrichment was transferred is mistaken, restitution is required. The test is whether the claimant intended the defendant to have the enrichment unconditionally, in all events (in which case no claim is

[105] *Benedetti v Sawiris*, above n 98. Subjective devaluation of work within the home may well, in some cases, impede an unjust enrichment claim in this context. However, for reasons of space subjective devaluation will not be discussed in any detail here.
[106] *Walsh v Singh*, above n 99, [67].
[107] Brian Sloan, *Informal Carers and Private Law* (Hart, 2013) 129.

possible), or alternatively whether the claimant intended the defendant only to have the enrichment on the condition her mistaken belief was correct:

> (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.
>
> (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend.[108]

This was endorsed in *Deutsche Morgan Grenfell*, where it was held that the claimant must show they would not have enriched the defendant 'but for' their mistake.[109] It does not matter that the claimant was able to discover the mistake (and therefore that the claimant themselves were negligent),[110] as long as it can be said that 'if he had known of the true state of the facts or of the law at the time of the [enrichment] he would not have made it'.[111] In our situation, therefore, the claimant must show that she would not have enriched the defendant – whether by for example paying mortgage instalments or organising domestic labour so she takes on the majority of childcaring – if she had known she had no rights as a common law wife. It would *not* be a requirement for her to have been induced into the cohabitation itself by her mistake; her mistake need only be the cause of her enriching the defendant.

It should be noted that the situation *may* be different where the defendant has knowingly induced the mistaken belief. In these circumstances, a less strict contributory cause test may be

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[108] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695. Formatting added.
[109] *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558.
[110] *Kelly v Solari*, above n 94.
[111] *Deutsche Morgan Grenfell Group plc v IRC*, above n 109, [59].

applied, where it is sufficient to show that the claimant's mistaken belief was *one* cause of the defendant's enrichment.[112] So, where the defendant has told the claimant that she need not worry because she is protected as a common law wife, the claimant may have much more chance at success in an unjust enrichment claim. This argument appears to be based on an analogy with the court's approach to the recission of contracts induced by misrepresentation.[113] There is little judicial authority for this approach, but it makes sense, at least in the cohabitation context. 'But for' causation – where the claimant would not have enriched the defendant had she known the truth – suggests that the claimant's mistake must be the sole cause of the enrichment. In the intimate relationship context, however, parties act for a range of reasons simultaneously. The claimant may have given up her job to stay at home and look after the children because she believed she would be protected as a common law wife. However, she may also have done so because she merely wishes to help her partner, or because she would prefer to look after her children than to work, or because it is a financially stronger choice. In many cases, these reasons may all be true at the same time, and there may not be a singular causative motivation. To require 'but for' causation in this context is to ignore the reality of the complex social ties that exist within the home. Where the defendant has knowingly misrepresented the position to the claimant, he intentionally positions himself as dominant in the power dynamic within the home. It is difficult to see why the claimant, given this reality, should need to show 'but for' causation. This is especially true as, unlike in the commercial context, there are no concerns as to the defendant's security of receipt.

How mistaken must the claimant have been? In *Pitt v Holt*,[114] Lord Walker distinguished between first, an incorrect conscious belief (which can be termed an active mistaken belief);

[112] G Virgo, *The Principles of the Law of Restitution* (OUP, 3rd ed 2015) 187, citing *Edgington v Fitzmaurice* (1885) 29 Ch D 459.
[113] C Mitchell, P Mitchell and S Watterson, *Goff and Jones' The Law of Unjust Enrichment* (Sweet & Maxwell, 10th ed, 2022) para 9–63.
[114] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

second, an incorrect tacit assumption (a passive mistaken belief); and third, mere causative ignorance (no belief at all). Lord Walker suggests that 'mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference'.[115] This means that the claimant must have a belief in their legal rights (even if it merely a passive assumption) – having no belief or assumption either way cannot be considered a mistake.

The presence of some doubt in the claimant's mind need not necessarily prevent a claim. The key is whether the claimant was taking a risk by enriching the defendant. In *Deutsche Morgan Grenfell*, Lord Hoffmann suggests that:

> 'Contestants in quiz shows may have doubts about the answer ("it sounds like Haydn, but then it may be Mozart") but if they then give the wrong answer, they have made a mistake. The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money.'[116]

This would suggest that the question is whether the claimant could be said to be taking a risk that she was wrong and was not protected as a common law wife when enriching the defendant. However, the question makes little sense in the cohabitation context, and appears to suggest a commercial relationship between the parties. It cannot be said with any real accuracy that couples, when making decisions within the relationship, are knowingly or intentionally taking any economic risks. Most couples do not consider what will happen when they break up, either

[115] Ibid 109.
[116] *Deutsche Morgan Grenfell Group plc v IRC*, above n 109, [26].

because they do not wish to think about it or because they do not think it will occur. Gillian Douglas, Julia Pearce and Hilary Woodward, for example, found in their study of separated cohabitants that confidence in their relationship was one reason they did not protect themselves legally.[117] Some preferred not to think about separation, some assumed it would not happen to them, and some did not ask questions for fear they would not like the answer. One cohabitant, for example, said that 'it runs counter to your natural instincts … planning to fail'. Another reflected that 'it didn't even cross my mind … when I look back, I think what a silly woman you were. Now I think I didn't ask the questions because I didn't want to know the answers'.[118] Several studies have shown this so-called optimism bias, which can be defined as 'a favourable difference between the risk estimate a person makes for him- or herself and the risk estimate suggested by a relevant, objective standard'.[119] For example, in a study by Lynn A Baker and Robert E Emery,[120] the respondents where relatively accurate when estimating the objective frequency and effects of divorce. However, when assessing the likelihood that the respondent would personally get a divorce the median response was 0 percent. This has been recognised judicially – in *Midland Bank v Cooke* for example Waite LJ noted that:

> 'When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure […] For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together […] It would be anomalous, against that background, to create a range of homebuyers who were beyond

[117] G Douglas, J Pearce and H Woodward, 'Money, Property, Cohabitation and Separation' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart, 2009).
[118] Ibid 144.
[119] J A Shepperd and others, 'Taking Stock of Unrealistic Optimism' (2013) 8 *Perspectives on Psychological Science* 395, 396.
[120] L A Baker and R E Emery, 'When Every Relationship Is Above Average—Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 *Law and Human Behaviour* 439.

> the pale of equity's assistance […] simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.'[121]

It is meaningless against this background to suggest that, in enriching the defendant on the belief that she is in a common law marriage, the claimant is taking a risk that she is wrong. Such thought is unlikely to have crossed her mind, and the question presupposes a relationship in which benefits flowing back and forwards were continually accounted for. Baker and Emery note the potential harm:

> 'A more realistic appreciation of the risk and likely consequences of divorce […] might at the margin affect various choices made during marriage. Among the most common such decisions are whether to be a full-time homemaker or have a career in the paid workforce; how many children to have and when to have them; and how long to stay out of the paid workforce following the birth of a child. Young women may be particularly disadvantaged by their idealism since, following divorce, the typical wife suffers a substantial decline in her standard of living in comparison.'[122]

It may be that the success of unjust enrichment in this context depends on the type of couple. Anne Barlow and Janet Smithson have separated cohabitants into four 'categories' – 'ideologues' (those who do not marry for ideological reasons); 'pragmatists' (those who choose whether to marry or cohabit based on legal and financial consequences); 'romantics' (those who will only marry when the time is right, and see cohabitation as a step towards marriage);

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[121] *Midland Bank v Cooke* (1995) 27 HLR 733 (CA), 746.
[122] Baker and Emery, above n 120, 448.

and 'uneven couples' (where one party wants to marry but the other does not).[123] If unjust enrichment law requires a causative ('but for') mistaken conscious belief or passive assumption, then it appears that it is the pragmatists who would most likely succeed in a claim for restitution. This is because they are more likely to have made decisions within their relationship based on their understanding of the law. Further, when undertaking significant life events – moving in together, the birth of children, giving up a job – the couple may have more of a mind for the legal consequences of the decision and therefore might be more likely to be acting according to their belief of what the law is. In day-to-day life, however, the causation requirements of unjust enrichment may well prevent the claimant from being able to show that she has enriched the defendant because of her mistake.

Unjust enrichment may be useful for a claimant where they can show that they have made decisions within their relationship which enriched the defendant where their mistaken belief in common law marriage was the operating cause in the making of these decisions. This will be perfectly possible for some claimants, but the strict test of 'but for' causation means that many claimants will not be able to adequately show that the enrichment was caused by the claimant's mistaken belief. The above discussion therefore suggests that unjust enrichment could be useful for *some* claimants where they have enriched their partner due to their mistaken belief in common law marriage. This is particularly true where the defendant has intentionally misrepresented the law to the claimant, where the test of causation is less strict. However, where the mistake is spontaneous and not induced by the defendant, many claimants will not be able to claim due to the strict causation rules.

[123] A Barlow and J Smithson, 'Legal Assumptions, Cohabitants Talk and the Rocky Road to Reform' [2010] CFLQ 328.

Conclusions

It is useful to separate this article's findings into (a) situations where the defendant has wilfully misrepresented the position to the claimant; and (b) where both parties are mistaken or where the claimant is mistaken without the defendant intentionally inducing it.

Some cases will involve the defendant wilfully inducing the claimant to believe in common law marriage. This might involve an attempt to prevent the claimant pressing for the formalisation of their relationship or otherwise to retain the powerful position of the more legally knowledgeable party. Of course, proving that the defendant intentionally misrepresented the position to the claimant may be difficult. However, if it can be evidenced the claimant may have a few options. If it is related to property – "You need not be a legal owner of this property as you are my common law wife" – the spurious excuse cases in the common intention constructive trust may mean that the claimant can show she has acquired a beneficial interest in the property. Further, at the quantification stage a false belief in common law marriage *could* influence the 'whole course of dealings' discretion. These sorts of cases also seem a perfect candidate for proprietary estoppel, where the claimant has acted to her detriment in reliance on the defendant's misrepresentation. This requires the claimant to have a belief as to her rights in specific property – this may well be the case, but will not *always* be the case. Proprietary estoppel should be available here whether it involves a representation or passive acquiescence. Finally, the claimant may also be able to claim in unjust enrichment, where there is no need for a proprietary nexus at all. Here, the claimant must simply have enriched the defendant at her expense, which will often exist on the facts. The causation requirements for both proprietary estoppel and unjust enrichment in this situation seems to be contributory cause, where the misrepresentation is *one* of the causes for the detrimental reliance or enrichment, respectively.

The more difficult scenario however is where the claimant's mistake has not been intentionally induced by the defendant. The defendant may or may not have also been mistaken and may or may not have encouraged the belief. Again, the belief should be taken into consideration at the quantification stage of common intention constructive trust application as part of the nature of the parties' relationship. Proprietary estoppel requires the defendant to have encouraged the claimant though as suggested, that encouragement may come from merely standing by. If the defendant is also mistaken then proprietary estoppel by representation should be possible, but not acquiescence. Unjust enrichment does not require the defendant to have encouraged the belief and neither does it matter whether the defendant was also mistaken, however, the strict 'but for' test of causation applied in these circumstances might inhibit its usefulness.

There is therefore ultimately no uniform answer as to the legal consequences of belief in the common law marriage myth. The myth varies both as to the specific beliefs of the claimant and the way in which the claimant comes to believe in it. The law would most likely be favourable to the claimant where the defendant has encouraged the belief, especially knowing it is false, and where the belief is one of rights in specific property. In this case, all three doctrines examined would be useful. In the scenario where the claimant is able to choose between multiple causes of action, the question arises as to which might be more beneficial. There is no easy answer to this, and would depend on the evidence available, but proprietary estoppel appears to be able to both deal with a greater variety of situations *and* offers a greater flexibility in terms of remedy. The common intention constructive trust can only result in a beneficial share of the family home (therefore requiring sale of the house) and unjust enrichment requires a personal monetary payment. The added flexibility of proprietary estoppel may be beneficial in allowing the court to fashion a remedy for the claimant's circumstances.

The financial harms caused by the common law marriage myth have been well established. This analysis of the law shows that there may also be legal consequences to believing in the

myth. Where the claimant has been disadvantaged by belief in the myth, she *may* be able to make a successful claim against her former partner. Of course, litigation is still an expensive and uncertain endeavour, to the extent that is often prohibitive of the financially weaker party making a claim. This is for several reasons, including the absence of legal aid, the risks of a costs order against the claimant and the uncertainty of the law. However, the potential success of any claim may play a part in mediation. The common law marriage myth has previous been considered important for public policy reasons, as a rationale for increasing rights of unmarried cohabitants. Legislation in the area is still vital, but the Government is unlikely to act in the short-term.[124] Otherwise, belief in the myth has been thought a background issue in the case law, simply part of the factual matrix and often not mentioned by counsel or judges. The analysis in this article suggests however that a mistaken belief in legal rights caused by belief in the common law marriage myth may be highly relevant for legal claims between former partners.

[124] As part of a recent statement in the House of Lords that the Law Commission is to announce a review of financial provision on divorce, Lord Bellamy made it clear that cohabitation reform would not be part of that review. See HL Deb 8 March 2023, vol 828, col 791.