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COMMENT:
DE FACTO RELATIONSHIP AND THE IMPUTED TRUST

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The law, be it statute, or Judge-made, must change in a changing society. It must change to reflect different social attitudes as much as to deal with different factual situations or technological advances. The wrong of unfair competition, which was said to have been discovered by Dankwerts, J. in *Bollinger* v. *Costa Brava Wine Co. Ltd.*[1] is perhaps an example of judicial reaction to problems caused by the failure of legislation to keep up with modern techniques of trading. The doctrine of imputed trusts as it was expounded by Lord Denning, M.R. in *Cooke* v. *Head*[2] is perhaps an example of judicial reaction to problems of property adjustment arising from acceptable social mores with which the law was not equipped to deal.

Permanent heterosexual relationships without the legal imprimatur of marriage, where partners live together as man and wife, known conveniently as *de facto* relationships, have become an acceptable social phenomenon, and, it would seem, will remain so. No doubt the number of such relationships in the community will increase; and the position is the same in England as it is in Australia. They are being treated by the community as an acceptable alternative to a marriage relationship. But there has been no equivalent legal adjustment to this acceptance, at least so far as property rights are concerned, by legislative change. Statute law does not treat such relationships as being in a category equivalent

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1 [1960] R.P.C. 16; [1961] R.P.C. 116.
2 [1972] 1 W.L.R. 518.

to marriage. There have been some attempts in some States of Australia to put each partner of such a relationship into the same position as a spouse, but this is really confined to claims of a surviving partner for maintenance from a deceased partner's estate under the equivalent of the New South Wales Testator's Family Maintenance etc Act, or in relation to superannuation rights, again in the case of a deceased partner. The armed services of the Commonwealth officially recognise *de facto* relationships (although strangely enough only in the case of a woman who lives with a male member of a service on a permanent *"bona fide"* domestic basis as his wife), and upon recognition (through defined service channels) the member who has a *de facto* partner immediately becomes eligible for all the service entitlements of a legally married man. But this does not affect property rights to any great extent. Otherwise there is not much in the way of legislation going for the female partner of a *de facto* relationship so far as property is concerned either in Australia or in England.

By contrast the married woman is in a very different position. Property rights of a married woman can be adjusted in a summary sort of way under the provisions of the Married Women's Property Act (in New South Wales now the Married Persons (Property and Torts) Act, 1901) or its various Australian and English equivalents, aided no doubt by the presumption of advancement which results from the marital status. More importantly there is very wide discretion to make property adjustments between married persons seeking a divorce to meet the justice of the particular circumstances, and the court is empowered to take into consideration not only "the financial contribution made directly or indirectly by or on behalf of a party . . . to the acquisition, conservation or improvement of the property, or otherwise in relation to the property" but also "the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent" (Family Law Act (Aust.) s. 79). The same applies in the United Kingdom. So that the field is wide open for consideration of almost anything that a wife has done that might have some relationship to the acquisition of family assets. It is true that the very wide ranging powers purported to have been conferred on the Family Court of Australia by the Family Law Act so to adjust the rights of parties to a marriage with respect to their property or the property of either of them were restricted to a certain extent as the result of the decision of the High Court in *Russell* v. *Russell*,[3] so that proceedings in relation to property adjustment must be ancillary to proceedings for principal relief. Nevertheless the filing of a petition for principal relief is all that is necessary to enable the court to embark upon an equitable division of family assets, and where spouses have separated to the degree that property adjustments are sought, this

[3] (1976) 134 C.L.R. 495.

hardly presents a problem. Wide powers of a similar nature to adjust property rights conferred on the courts in England by the Matrimonial Causes Act, 1973 are available to a married woman there in like fashion.

No such legislated or presumptive rights or remedies as to family-acquired or family-enjoyed property are available to a wife's counterpart in a *de facto* relationship. Although the recently tabled Report of the Anti-Discrimination Board under the presidency of Mr. David Moore[4] recommended that "all legislation which affects the parties to a marriage whether by the granting of rights, the imposition of obligations or otherwise, should be amended to include the parties to a *de facto* relationship", one is prompted to wonder whether this social ideal — if it is one — will ever be transformed into legislative reality. Many would argue that to do this would be to erode one of the pillars on which our society is held up, namely marriage, with the corresponding family unit. Legislators may well find it difficult to decide that the right time has arrived to effect such a fundamental change by Act of Parliament.

Equity Judges have not been reluctant to move into this field of adjustment of property rights after the termination of a *de facto* relationship. Those who support the need for Judge-made law in the courts to change to meet the needs of a changing society have a doughty protagonist in Lord Denning, M.R. In the eyes of his Lordship traditional property rights ought not to be permitted by the courts to stand in the way of social justice, and his views on this subject could hardly be put in better words than his own in *Davis* v. *Johnson*:

> I venture to suggest that that concept about rights of property is quite out of date. It is true that in the 19th century the law paid quite high regard to rights of property. But this gave rise to such misgivings that in modern times the law has changed course. Social justice requires that personal rights should, in a proper case, be given priority over rights of property. In this court at least, ever since the war we have acted on that principle.[5]

I shall not pause to consider whether his Lordship's efforts in this regard have got the success they deserved or deserved the success they have got. But he certainly applied his philosophy with respect to the adjustment of property rights between partners to a *de facto* relationship in an attempt to achieve a just and equitable result.

He did so through the medium of trusts, and then of contract. The object was to equate the law relating to property rights in a marriage and *de facto* relationship, and to do so to the extent that there was a legal equivalent between the two relationships commensurate with their social equation. That this was the object is to be inferred from what his Lordship said in *Cooke* v. *Head*:

> In the light of recent developments, I do not think it is right to approach this case by looking at the money contributions of each

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[4] Incidentally one time Teaching Fellow, Faculty of Law, University of Sydney.
[5] [1978] 2 W.L.R. 182 at 190.

> and dividing up the beneficial interest according to those contributions. The matter should be looked at more broadly, just as we do in husband and wife cases. We look to see what the equity is worth at the time when the parties separate. We assess the shares at that time. If the property has been sold, we look at the amount which it has realised, and say how it is to be divided between them. Lord Diplock in *Gissing* v. *Gissing* [1971] A.C. 886, 909 intimated that it is quite legitimate to infer that:
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> > "the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of".
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> Likewise with a mistress.[6]

And this object is also to be inferred from the type of conduct of the parties which can be taken into account. And how better to effect the equation than to utilise the equitable doctrine of trusts. In *Eves* v. *Eves* Lord Denning said this:

> In strict law she was no claim on him whatever. . . . And a few years ago even equity would not have helped her. But things have altered now. Equity is not past the age of child bearing. One of her latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world and we have nourished it.[7]

Lord Diplock, using language in *Gissing* v. *Gissing* reminiscent of his great predecessors said:

> A . . . trust . . . is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired.[8]

Not very different from a passage in the 27th Edition of Snell's Principles of Equity where it is stated that a trust is "imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties".[9]

I should turn aside to note that Lord Denning's approach has found favour not only in England but elsewhere. Thus Holland, J. in the Equity Division of the Supreme Court of New South Wales in the case of *Valent* v. *Salamon*[10] found, in a *de facto* relationship case, that there was no actual common intention that could be inferred, but was prepared to impute to the parties the requisite intention on the basis "that their words and conduct in relation to these properties were such that they are to be treated as having had the intention" that there should be some

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[6] *Cooke* v. *Head, supra* n. 2 at 521.
[7] [1975] 1 W.L.R. 1338 at 1341.
[8] [1971] A.C. 886 at 905.
[9] *Snell's Principles of Equity* (27th ed. by R. Megarry and P. V. Baker, 1973) p. 185.
[10] 8th December, 1976, unreported.

joint interest in the home in which they had lived. His Honour not only relied upon Lord Reid's expressions of views in *Gissing* v. *Gissing*[11] (*supra*) but also upon those of Mahoney, J. in *Doohan* v. *Nelson*[12] where that Judge found a trust on the basis of "common intention or as a result of judicial imputation". In New Zealand, White, J. followed the same approach in *Frazer* v. *Gough*,[13] and so did Jones, J. in the Supreme Court of Western Australia (see *McRae* v. *Woolley*).[14]

But the trail of judicial legal reform is not an easy one to break. The relatively newly discovered wrong of unfair competition has, in New South Wales, fallen at the hand of Powell, J. in *Cadbury-Schweppes Pty. Ltd.* v. *The Pub Squash Co. Pty. Ltd.*[15] And the newly called imputed trust has not been met with approval in New South Wales by two of the Judges of the Court of Appeal in *Allen* v. *Snyder*.[16]

Allen v. *Snyder* was a case in which the woman partner in a *de facto* relationship claimed a beneficial interest in a house of which the male partner was the legal owner, the claim being raised as a defence to ejectment proceedings. So the matter was heard in the Common Law Division of the Supreme Court; and it is interesting to note that Glass, J.A., who wrote the first judgment in the Court of Appeal, was concerned to note at the outset that the appeal raised for consideration "a new field of discord liable to explode into litigation".[17] The woman partner had there furnished the house in which the partners had lived for eight years or so, out of her own funds, although the house itself had been purchased by the male partner. Whether or not her claim to an interest in the realty was unsustainable on any equitable basis, the Judges who comprised the court took the opportunity of expressing views about the Lord Denning approach to trusts in such a situation.

Mahoney, J. A. was not prepared to disown the notion of imputed trusts to the extent that his two brother Judges were. After referring to the English cases which I have been discussing, his Honour said:

> I, therefore, do not see the cases . . . as establishing any great salient in the existing law of trusts. They do not require any fundamental re-framing of the principles, so far as they operate in the context of such relationships. They are, I think, to be seen as applications of those principles to individual facts, and as illustrations of the conclusions to which, in the application of those principles, individual judges may come.[18]

But the other two Judges took a much narrower view. They held that no trust can be found to exist in commonly enjoyed property in the

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[11] *Gissing* v. *Gissing*, *supra* n. 8.
[12] [1973] 2 N.S.W.L.R. 320 at 329.
[13] [1975] 1 N.Z.L.R. 138.
[14] 15th August, 1975.
[15] Equity Division, 8th August, 1978 (although I understand an appeal is being sought direct to the Privy Council in this case).
[16] [1977] 2 N.S.W.L.R. 685.
[17] *Id.* at 688.
[18] *Id.* at 708.

absence of an actual common intention of the parties enjoying it that the property should be beneficially owned by them in certain proportions. The court, according to their view, when finding that a trust exists, is merely giving effect, by way of declaration of that trust, to an actual intention that the property in question should be owned in certain proportions by the parties, one of whom claims to be entitled to an interest in it.

However it is conceded by the two Judges who expressed or supported this view, that the actual intention of the parties may be unexpressed. Yet it is said that there can be no imputed trust concept. The court will, so it seems, find that contributions by one family party to the acquisition of family property in the name of the other, in a situation where neither has expressed any thoughts about the matter, give rise to a trust of that property because they must have had a common intention of joint ownership in proportion to their contributions, whereas the court will deny, in similar circumstances, that justice and equity demands the imputation of a like trust based merely upon the fact that the same family party has put the same amount into the acquisition of the same property.

Well, I think it is simply unreal to suggest that the basis of the trusts which the court has found to exist in this matrimonial or quasi-matrimonial set up is one of actual intention. To say that it ought to be inferred that the parties had an actual intention that family assets should be owned as to, say, a one third or a one twelfth or a one whatever share by one party because that is roughly what the court finds to be, in a contested hearing, what the financial contributions of that party amounted to when the parties separated, does not make legal sense to me. In fact the court, in proper cases, attributes an intention to the parties when it is fair to do so, just as it has in the case of a resulting trust. In the case of a resulting or implied trust, where there is no expressed agreement, evidence of the conduct and contributions of the parties with respect to the disputed property is the way in which an implied intention is imputed to the parties, and the Australian cases indicate that this is the basis of an implied trust. In cases where such trusts are found to exist there are rarely or never contributions made because of any actual common intention that there should be a proportionate benefit to the contributor; the proportion is only worked out by the court after the parties have fallen into dispute. In my view the court calls in aid when it is proper to do so, a trust to meet the justice and equity of the case where what ought to be joint property ought to be so because its acquisition or improvement has been or has been facilitated by the joint effort.

The imputed trust seeks only to do just this. It can be used to do justice between parties to a *de facto* relationship. The one is no more to be looked at askance legally than the other socially. Hopefully the judicial move into law reform to keep pace with social change in this

area will be allowed to continue. In relation to a husband and wife relationship, Omrod, L.J.[19] recently had occasion to quote with approval the words of Scarman, L.J. in *Calderbank* v. *Calderbank*:

> At the end of the day after a very careful judgment the judge came to a fair and sensible decision, and, speaking for myself, I rejoice that it should be made abundantly plain that husbands and wives come to the judgment seat in matters of money and property upon a basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life. It does not follow that, because they come to the judgment seat on the basis of complete equality, justice requires an equal division of the assets. The proportion of the division is dependent upon circumstances.[20]

The parties to a *de facto* relationship cannot yet claim that the law does the same for them. But equity has shown that the notion of trust can be used as one means of achieving social justice. There is not much wrong with the way Lord Denning put its use in *Hussey* v. *Palmer*:

> By whatever name it (a trust) is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it.[21]

But whether the same use can be made of it in New South Wales now remains a question.

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[19] *R.* v. *P.* [1978] 1 W.L.R. 483 at 490.
[20] [1976] Fam. 93 at 103.
[21] [1972] 1 W.L.R. 1287 at 1289-1290.