TRUSTS, THIRD PARTIES AND THE FAMILY HOME: SIX YEARS SINCE *CUMMINS* AND CONFUSION STILL REIGNS

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[In Trustees of the Property of Cummins v Cummins*, the High Court of Australia developed an arguably new trusts principle in relation to third-party claims against the family home. This article explores the doctrinal implications of the principle, arguing that it has led to considerable confusion and uncertainty in subsequent case law and in the academic literature. The article also evaluates the substantive effects of the principle, arguing that it is undesirable that some women who attempt to resist third-party claims to the family home are worse off under it. The article concludes by proposing a legislative solution to remedy the doctrinal confusion and substantive deficits in this area of law.]*

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I Introduction

Legislative reform in Australia over the last 30 years or so has provided near universal statutory coverage for the determination of property disputes between separating couples.[1] Equitable doctrines, such as the trust, which used to determine outcomes between separating couples where there was no applicable legislative regime, are thus now largely irrelevant to the determination of such disputes. Equitable principles do, however, continue to apply where third parties make a claim against the property of either of the parties to the relationship.[2] In such claims, the question of 'who owns what?' in the relationship is central to the determination of the assets that are available to satisfy the third party's claim.

The application of resulting and constructive trust principles as between the parties to the relationship has traditionally provided the answer to this 'ownership' question. The broad doctrinal elements of these trusts principles had, until recently, been more or less settled since the mid-1980s.[3] In the last few years, however, an arguably new trusts principle has emerged in relation to the determination of ownership interests in the family home. In *Trustees of the Property of Cummins v Cummins* ('*Cummins*'),[4] the High Court of Australia applied a starting inference of *equal ownership* of the family home

[1] For the most recent legislative change, see *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), amending the *Family Law Act 1975* (Cth) to permit the Family Court to make orders adjusting the property interests of those who were in a de facto relationship, regardless of the gender of the parties.

[2] Such third-party claims may, for example, involve claims by creditors, the trustee in bankruptcy or beneficiaries of the deceased estate of a deceased member of a couple: see, eg, *Bryson v Bryant* (1992) 29 NSWLR 188.

[3] *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Calverley v Green* (1984) 155 CLR 242.

[4] (2006) 227 CLR 278.

in a claim by the husband's trustee in bankruptcy for an interest therein. Since the decision in *Cummins*, this inference of equal ownership ('the *Cummins* principle') has been variously applied, ignored or misinterpreted by lower courts, leading to considerable uncertainty surrounding this area of law.

This article explores the *Cummins* principle and its effect on Australian trusts law as it pertains to the family home. It traces the source of the current state of doctrinal confusion to the reasoning in *Cummins* itself, arguing that the Court failed to acknowledge that the application of an inference of equal ownership to the facts of the case necessarily entailed a change in doctrine from the principles that had been settled since the mid-1980s.

This article has two aims. The first is to introduce a degree of doctrinal clarity and transparency into this area by bringing to light and making explicit the precise nature of the change to established trusts law brought about by *Cummins*. An outline of traditional trusts principles applicable to the family home context will be followed by a close analysis of the High Court's judgment in *Cummins*, highlighting the points of difference and tension between the two. A review of post-*Cummins* case law will then be undertaken to assess how lower courts have dealt with this tension in their application and interpretation of the *Cummins* principle. This review will reveal an uneven, inconsistent and sometimes confused approach by lower courts, highlighting a need for greater doctrinal clarity and transparency.

The second aim of this article is to assess the substantive effects of the *Cummins* principle, particularly its impact on women's share of the family home. Feminist critics of *traditional* trusts law have convincingly argued that such law is gendered in the sense that women in heterosexual relationships often receive a lesser share of property than they should.[5] This article compares the 'new' *Cummins* principle with those traditional approaches in order to assess whether women fare better under this new approach, particularly in light of its 'equal' starting point for apportionment. This comparison will reveal that the application of the *Cummins* principle does not produce better overall outcomes for women, and that married women are in fact likely to fare *worse* under it. Thus, despite its rhetoric of 'equality', it is argued that the *Cummins* principle is also gendered in that it is founded on a flawed 'identical treatment' model[6] that fails to take into account women's structural disad-

[5] See, eg, Marcia Neave, 'The New Unconscionability Principle — Property Disputes between De Facto Partners' (1991) 5 *Australian Journal of Family Law* 185; Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender "Neutrality" in the Equitable Presumption of Advancement' (1994) 19 *Melbourne University Law Review* 758.

[6] See below Part IIIB.

vantage. It is proposed that a legislative solution to the beneficial 'ownership' question, based on the criteria applicable to separating partners under the *Family Law Act 1975* (Cth) ('*FLA*'), is the more satisfactory way of dealing with these 'equality' issues and in overcoming the doctrinal confusion endemic in this area of law.

II Trusts Principles in Family Property Cases

A *Traditional Trusts Principles: Authority before* Cummins

In Australia, both resulting and constructive trust analyses are commonly used by courts to determine the beneficial interests of parties in family property cases. The precise factual circumstances that may determine that one type of trust will be imposed rather than the other have not been clearly articulated. As a general rule, where the focus is on the parties' direct financial contributions to the purchase price, a resulting trust analysis will follow.[7] Where the focus is on the indirect and non-financial contributions of the parties, a constructive trust analysis tends to be applied.[8] The following section of the article provides an outline of the traditional constructive and resulting trust principles that formed the doctrinal backdrop against which *Cummins* was decided. The main focus of the discussion will be on resulting trusts because, as will be shown below, the Court in *Cummins* restricted its reasoning to resulting trust principles, omitting any mention of the constructive trust.

1 *The Constructive Trust*

A constructive trust may be imposed where the assertion of legal title by one party amounts to an unconscionable denial of a beneficial interest to another.[9] In the leading case of *Baumgartner v Baumgartner*, Mason CJ, Wilson and Deane JJ held that

> [where] the parties have pooled their earnings for the purposes of their joint relationship, … [and] [t]heir contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship [then] the appellant's assertion … that the … property … is

[7] See, eg, *Calverley v Green* (1984) 155 CLR 242.

[8] See, eg, *Baumgartner v Baumgartner* (1987) 164 CLR 137.

[9] Ibid.

> his sole property … amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust …[10]

'Contributions' considered relevant in giving rise to an entitlement to a constructive trust may go beyond direct and indirect financial contributions (including the pooling of earnings) and may, for example, include contributions made in home renovation[11] and as a homemaker and parent.[12]

A court may also impose a constructive trust where the parties had a 'common intention' as to beneficial ownership of property and one party has relied upon that intention to their detriment. The relevant intention may be evidenced by the parties' actual agreement, or it can be inferred from conduct such as the making of contributions towards the property.[13] It can also postdate the time of purchase.[14] The 'common intention' constructive trust exists alongside the unconscionability-based constructive trust described above, and both are available as a means of apportioning interests in the family home.[15]

2 *The Resulting Trust*

Under a traditional resulting trust analysis, the initial question is whether the legal title to the property reflects the parties' respective financial contributions to the purchase price.[16] If it does not, then depending on the relationship between the parties, a presumption of resulting trust, or alternatively, a presumption of advancement, will apply as a starting point for quantifying the parties' respective beneficial interests.[17] A presumption of resulting trust

[10] Ibid 149.

[11] See, eg, *Miller v Sutherland* (1990) 14 Fam LR 416, 424 (Cohen J).

[12] See, eg, *Parij v Parij* (1997) 72 SASR 153, 162 (Debelle J).

[13] See, eg, *Green v Green* (1989) 17 NSWLR 343, 354–5 (Gleeson CJ, with whom Priestley JA agreed); *Parsons v McBain* (2001) 109 FCR 120, 122 [2]–[3] (Black CJ, Kiefel and Finkelstein JJ).

[14] Cf the resulting trust, discussed below in Part IIA2.

[15] Michael Bryan, 'Constructive Trusts and Unconscionability in Australia: On the Endless Road to Unattainable Perfection' (1994) 8(3) *Trust Law International* 74.

[16] *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ).

[17] Ibid 246–7 (Gibbs CJ), 258–9 (Mason and Brennan JJ), 266–7 (Deane J); cf Murphy J: at 264–5. For a discussion regarding the underlying conceptual basis of the presumption of resulting trust, see, eg, the varying views of Robert Chambers, *Resulting Trusts* (Oxford University Press, 1997) and William Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72. Note, also, the ongoing debate about whether the presumption of advancement is properly construed as a 'presumption' at all or whether it more correctly describes a situation (relationship) where there is no reason for assuming that a trust arises:

is a presumption that those who contribute to the purchase price intend to retain a beneficial interest proportionate to their contribution.[18] A presumption of advancement is a presumption that the contributor intends to give away part or all of their contribution to the legal titleholder to the effect that beneficial interests are 'at home' with the legal title.[19] The presumption of advancement applies to parents who contribute to property in their children's names[20] and to husbands who contribute to property in their wives' names (but not the other way around, where the wife is the contributor).[21] It does not apply to other family relationships such as between de facto heterosexual[22] or same-sex partners, or extended family members.[23] The presumption of resulting trust applies to such relationships, as it does to property dealings between all others.[24]

Later financial contributions such as mortgage repayments are not generally considered to be 'contributions to the purchase price' and thus do not presumptively increase a party's share of the beneficial interest. Such contributions may, however, be taken into account on an equitable accounting between the parties.[25]

Each of these presumptions can be rebutted by evidence of the actual contrary intentions of the parties at the time of the purchase.[26] The parties' intentions at the time of purchase determine their respective beneficial interests in the property.

Traditionally, the leading authority on resulting trusts in Australia has been *Calverley v Green*.[27] The case involved a property dispute between a

see, eg, Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33 *Sydney Law Review* 39. These debates raise a number of interesting conceptual issues, however, these issues do not bear directly on the arguments made in this article and they are not raised in any part of the High Court's reasoning in *Cummins*. Thus, further elaboration and discussion of these issues is beyond the scope of this article.

[18] *Calverley v Green* (1984) 155 CLR 242, 246–7 (Gibbs CJ), 258 (Mason and Brennan JJ).

[19] Ibid 267 (Deane J).

[20] See, eg, *Shephard v Cartwright* [1955] AC 431, 445 (Viscount Simonds) (father to child); *Nelson v Nelson* (1995) 184 CLR 538, 548–9 (Deane and Gummow JJ), 586 (Toohey J), 601 (McHugh J) (mother to child).

[21] *Mercier v Mercier* [1903] 2 Ch 98, 100–1 (Romer LJ).

[22] *Calverley v Green* (1984) 155 CLR 242, 256 (Mason and Brennan JJ); cf Gibbs CJ: at 250–1.

[23] See, eg, *Russell v Scott* (1936) 55 CLR 440, 451 (Dixon and Evatt JJ).

[24] For an analysis of the problematic nature of the presumptions see Sarmas, above n 5.

[25] *Calverley v Green* (1984) 155 CLR 242, 252 (Gibbs CJ), 262–3 (Mason and Brennan JJ).

[26] Ibid 251 (Gibbs CJ), 261–2 (Mason and Brennan JJ), 269 (Deane J).

[27] Ibid.

separating de facto heterosexual couple who had purchased a home in their joint names. Mr Calverley paid the deposit and the remaining two thirds of the purchase price was paid by monies borrowed jointly by Mr Calverley and Ms Green. The borrowings were secured by a mortgage over the property.[28] Mr Calverley alone made the repayments under the mortgage.[29]

The New South Wales Court of Appeal had held that Ms Green had contributed to the purchase price through her joint liability to repay the mortgage.[30] The fact that she had made some contribution, and the fact that there was no evidence to show that she intended to make a gift of that contribution to Mr Calverley, meant that the legal joint tenancy in the property prevailed.[31]

The High Court agreed that Ms Green had contributed to the purchase price through her liability to repay the mortgage.[32] But a majority of the Court (Gibbs CJ, Mason and Brennan JJ, and Deane J; Murphy J dissenting) disagreed with the Court of Appeal's conclusion that in these circumstances the legal estate would prevail unless a contrary intention as to ownership was proved. The Court of Appeal's decision was therefore in 'error' because it involved a 'failure first to apply the presumption that comes into play'.[33]

The High Court affirmed the principle that in such a case the correct starting point for the determination of the parties' interests in property is not the legal title but rather the application of the equitable presumptions of resulting trust or advancement.[34] Of the majority, Mason and Brennan JJ and Deane J held that the presumption of advancement, applicable to a husband's contributions, did not similarly apply to Mr Calverley on the basis that his relationship with Ms Green was not a legal marriage.[35] Thus, the presumption of resulting trust was the appropriate starting point for consideration of both Mr Calverley's and Ms Green's contributions. There being no evidence to rebut these presumptions on the facts, their Honours held that the parties 'owned'

[28] Ibid 245–6 (Gibbs CJ), 253–4 (Mason and Brennan JJ), 267 (Deane J).

[29] Ibid 254 (Mason and Brennan JJ), 267 (Deane J).

[30] *Green v Calverley* (1982) 8 Fam LR 770.

[31] *Calverley v Green* (1984) 155 CLR 242, 254, 256–7 (Mason and Brennan JJ).

[32] Ibid 251 (Gibbs CJ), 257–8 (Mason and Brennan JJ), 267–8 (Deane J). Note that the actual repayment of the mortgage debt by Mr Calverley was not seen as a 'contribution to the purchase price' of the property and thus did not count towards quantifying his proportion of the beneficial interest. Rather, his additional contributions over and above his share were seen as a factor that might be taken into account on an equitable accounting between the parties: at 252 (Gibbs CJ), 262–3 (Mason and Brennan JJ).

[33] Ibid 262 (Mason and Brennan JJ).

[34] Ibid 246–7 (Gibbs CJ), 258–9 (Mason and Brennan JJ), 266–7, 269 (Deane J).

[35] Ibid 259–61 (Mason and Brennan JJ), 268–9 (Deane J); cf Gibbs CJ: at 250–1.

the property as tenants in common in shares proportionate to their contributions: roughly two thirds for Mr Calverley and one third for Ms Green.[36]

In a dissenting judgment, Murphy J held that both the presumption of resulting trust and the presumption of advancement should be abolished.[37] This led his Honour to the conclusion that '[t]he members of the Court of Appeal were correct in taking the view that there was no presumption which detracted from the legal title, which should prevail.'[38]

Murphy J was the only member of the Court to depart from the principle that the presumptions of equity, rather than the legal title, are the starting point for the determination of the parties' beneficial interests under a resulting trust analysis. His Honour's view has received little judicial support.[39]

Mason and Brennan JJ made some additional points by way of obiter dicta relating to beneficial ownership within a marriage. They drew a clear distinction between a marriage and a de facto partnership. They said:

> The exclusive union for life which is undertaken by both spouses to a valid marriage … remains the foundation of the legal institution of marriage … though it is no necessary element of the relationship of de facto husband and wife.[40]

In their view this distinction justified the application of the presumption of advancement from husbands to wives, but not as between de facto husbands and wives.

Mason and Brennan JJ also considered, in obiter, that there might be a further difference in the equitable principles to be applied in the determination of beneficial interests within a marriage. Their Honours referred to an

[36] Ibid 262 (Mason and Brennan JJ), 271 (Deane J). Note that the Court said there was still some factual dispute as to the exact contributions of the parties and, unless they could agree, the matter would be remitted to the Supreme Court for determination.

[37] Ibid 264–5.

[38] Ibid 265.

[39] But see the discussion Part IIB2 below for an argument that the Court in *Cummins* partially adopted the approach of Murphy J. Note also that Kirby P stated that he preferred the view of Murphy J in *Calverley v Green* but felt bound to follow the majority on the issue of the continuing application of the presumptions: *Brown v Brown* (1993) 31 NSWLR 582, 595. Sackville J remarked that there is 'a great deal to be said for Murphy J's approach': *Prentice v Cummins* (2003) 134 FCR 449, 463. See also the criticism of the presumptions by Deane J: *Calverley v Green* (1984) 155 CLR 242, 265–6. Deane J nevertheless said he would apply them because they are 'too well-entrenched as "land-marks" in the law of property': at 266.

[40] *Calverley v Green* (1984) 155 CLR 242, 259–60 (Mason and Brennan JJ) (citations omitted).

inference of joint ownership, 'espoused' by Lord Upjohn in *Pettitt v Pettitt*,[41] in the following passage by his Lordship:

> where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of an application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of evidence enabling the wife to claim an advancement to her, for it is against all the probabilities of the case unless the husband's contribution is very small.[42]

Their Honours considered that it was inappropriate to apply this inference to a de facto relationship, on the same basis that it was inappropriate to apply the presumption of advancement.[43] Their Honours concluded that:

> Such an inference is appropriate only as between parties to a lifetime relationship … It would be wrong to apply either the presumption of advancement or Lord Upjohn's inference to a relationship devoid of the legal characteristic which warrants a special rule affecting the beneficial ownership of property by the parties to a marriage. The presumption could not arise nor the inference be drawn in favour of the plaintiff in this case, which must be decided in the light of the basic presumption.[44]

Mason and Brennan JJ noted that any inference of joint ownership in marriage could disadvantage a wife who holds a legal interest greater than a joint tenancy because she would otherwise have the benefit of the presumption of advancement in her favour, thus potentially entitling her to hold a beneficial interest equal to her greater legal interest.[45] However, their Honours found it 'unnecessary now to decide whether Lord Upjohn's inference should qualify the presumption of advancement in favour of a wife'.[46]

[41] [1970] AC 777.

[42] Ibid 815, quoted in *Calverley v Green* (1984) 155 CLR 242, 259 (Mason and Brennan JJ).

[43] *Calverley v Green* (1984) 155 CLR 242, 259–60 (Mason and Brennan JJ).

[44] Ibid.

[45] Ibid 259. It should be noted that an inference of joint ownership would also disadvantage a wife who has contributed more than half the purchase price (regardless of legal title) as the presumption of resulting trust would prima facie otherwise entitle her to an interest equal to her contribution.

[46] Ibid 260.

Of the Court in *Calverley v Green*, only Mason and Brennan JJ made reference to Lord Upjohn's inference. Their Honours did not cite any Australian authority to support its existence, and the statement that their Honours quoted by Lord Upjohn was itself obiter,[47] representing what his Lordship referred to as his 'own view'.[48] Mason and Brennan JJ's comments in relation to the 'inference' were thus based on scant legal authority, but they were to take on particular significance in the Court's decision in *Cummins*.

In sum then, the legal position that existed before *Cummins* provided a number of possible doctrinal bases for the resolution of family property cases. The unconscionability constructive trust, the common intention constructive trust and the resulting trust principles articulated in *Calverley v Green* formed the relevant legal background. The inference of joint ownership in marriage also formed part of that background, but it existed as poorly supported dicta rather than as established legal authority.

B Cummins*: A Shift in Traditional Trusts Doctrine?*

1 *The Background to the Case*

Relevantly, the facts of *Cummins* involved a claim by trustees in bankruptcy to an interest in the family home of Mr Cummins (the bankrupt), who was effectively joint legal titleholder of the property with his wife, Mrs Cummins.[49] Mr Cummins was a barrister who was admitted to the New South

[47] The husband in *Pettitt v Pettitt* was held not to have contributed at all to the acquisition of the property and thus Lord Upjohn's 'inference' did not apply: see [1970] AC 777, 825 (Lord Diplock).

[48] Ibid 815 (Lord Upjohn). His Lordship did however refer to *Rimmer v Rimmer* [1953] 1 QB 63 as authority for the proposition that whether the spouses should be considered equal owners or owners in some other proportions must depend on the circumstances of the case.

[49] There were additional facts and legal issues in the case that are not directly relevant to the present discussion. See *Cummins* (2006) 227 CLR 278, 285–7 [6]–[14] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). The actual case involved the trustees' claim to both the family home and some shares, both of which had been transferred respectively to Mrs Cummins and a trustee company (Aymcopic) (Mrs Cummins and the couple's children being beneficiaries of the trust) for no consideration in 1987. Both of these transfers were held to be void as against s 121 of the *Bankruptcy Act 1966* (Cth) (their main purpose was to avoid creditors). The trustees were therefore entitled to all of the shares and the joint tenancy that existed with respect to the home before the attempted transfer was effectively reinstated (but then consequently severed by the bankruptcy of Mr Cummins): at 287 [14] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). The live issue with respect to the home with which this article is concerned is the extent of Mr Cummins' (and therefore the trustees') beneficial interest in the home.

Wales Bar in 1961. He took silk in 1980.[50] He was also 'a gentleman of the turf'.[51] He lodged tax returns in 2000, for the first time since 1955.[52] Thus during his whole practice as barrister, he paid no tax.[53] Mr Cummins became bankrupt in 2000.[54] His main creditor was the Australian Taxation Office.[55]

Mr and Mrs Cummins married in 1964, and they subsequently had four children.[56] In 1970 they bought vacant land at Hunters Hill, which was registered in their joint names.[57] Mrs Cummins contributed 76.3 per cent of the purchase price and Mr Cummins contributed the remaining 23.7 per cent.[58] They built a house on the land shortly thereafter, at an additional cost of 'not less than $33 500'.[59] It is 'likely' that the funds for the building were sourced from the parties' joint resources.[60] In 1987 Mr Cummins attempted to dispose of his interest in the property by transferring it to Mrs Cummins, but the Court ultimately declared that this transfer was void pursuant to s 121 of the *Bankruptcy Act 1966* (Cth).[61] They separated in 2002.[62]

On Mr Cummins' bankruptcy, the trustees applied to the Federal Court for a declaration that he held an interest in one half of the Hunters Hill property. At first instance, Sackville J upheld the trustees' claim, relevantly holding that any presumption that the parties held the property in shares proportionate to their contributions (that is, any presumption of resulting trust) was rebutted by evidence of their intention to hold the property jointly.[63] Mrs Cummins successfully appealed to the Full Court of the Federal

[50] Ibid 284 [3] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[51] Ibid 293 [38].

[52] Ibid 285 [7].

[53] Ibid.

[54] Ibid 284 [1].

[55] Ibid 285 [6].

[56] Ibid 284 [4]–[5].

[57] Ibid 286 [13].

[58] Ibid 287 [14].

[59] The precise cost of building is not clear from the judgment. This is an inferred amount based on a covenant in a mortgage the parties took out to partially fund the building: ibid 301 [66].

[60] Ibid 304 [74].

[61] Ibid 294–7 [43]–[54]. As mentioned at above n 49, the resolution of the s 121 issue formed part of the case under consideration in this article. As this article focuses on the equitable principles applicable to determining ownership of family assets, further discussion of the Court's judgment in relation to s 121 is beyond the scope of this article.

[62] Ibid 284 [4].

[63] *Prentice v Cummins* (2003) 134 FCR 449, 469 [76] (Sackville J).

Court, but the Court's decision was based on other, unrelated grounds.[64] In obiter, however, the Court did note that the presumption of resulting trust, based on the parties' respective contributions to the purchase price of the Hunters Hill property, was not rebutted on the evidence.[65] The trustees appealed to the High Court.

2 *The High Court's Judgment*

In a unanimous joint judgment, the High Court upheld the trustees' appeal and restored the orders of Sackville J.[66] Relevantly, the Court held that the joint legal title to the Hunters Hill property reflected the parties' actual interests in the property.[67] Despite the unanimity of the Court's judgment, however, its underlying reasoning is rather difficult to pin down.[68] As the following discussion will show, there are two 'threads' to that reasoning, each of which is not necessarily reconcilable with the other.

(a) Inference of Joint Ownership in Marriage

One thread in the Court's reasoning is based on Lord Upjohn's inference of joint ownership.[69] The Court referred, with apparent approval, to Mason and Brennan JJ's dicta in *Calverley v Green* in support of the inference. Unlike Mason and Brennan JJ, however, the Court was not prepared to necessarily confine the inference to the marriage relationship. Their Honours stated that:

> It is unnecessary for the purposes of the present case to express any concluded view as to the perception by Mason and Brennan JJ of the particular and exclusive significance to be attached to the status of marriage in this field of legal, particularly equitable, discourse. It is enough to note that … in this field, as elsewhere, rigidity is not a characteristic of doctrines of equity.[70]

[64] *Cummins v Trustees of the Property of Cummins* (2004) 209 ALR 521 (Carr and Lander JJ, Tamberlin J dissenting). The Court held that Mr Cummins' purported transfer of the property to Mrs Cummins in 1987 was not void as against s 121 of the *Bankruptcy Act 1966* (Cth): at 543 [125]–[126]. It was on this basis that the Court found that the property did not form part of Mr Cummins' estate.

[65] Ibid 548–9 [154]–[158] (Carr and Lander JJ).

[66] *Cummins* (2006) 227 CLR 278.

[67] Ibid 298–304 [56]–[76] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[68] Below at Part IIC, it will be argued that this has led to considerable confusion in application of the decision by lower courts.

[69] See the Court's discussion of this principle: (2006) 227 CLR 278, 301–3 [68]–[72] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[70] Ibid 302 [69].

The Court then quoted, with approval, the following passage in Professor Scott's work *The Law of Trusts* regarding the principles to be applied in the determination of beneficial ownership of the matrimonial home:

> Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them.[71]

The Court stated that this 'reasoning applies with added force in the present case where the title was taken in the joint names of the spouses.'[72] The Court concluded that '[t]here is no occasion for equity to fasten upon the registered interest held by the joint tenants a trust obligation representing differently proportionate interests as tenants in common.'[73]

The Court added that this conclusion was strengthened in this case by 'further regard to the particular circumstances'.[74] These included: the fact that the parties were likely to have been advised of the legal effects of joint tenancy by the solicitor who acted for them in the purchase;[75] the fact that it was likely that the amount for the building of the house on the property was funded from joint funds;[76] and the fact that the 1987 attempted transfer of the property to Mrs Cummins contained a consideration of one half of the value of the property (although this was not actually paid).[77]

The Court's application of the inference to the facts of the case, together with its express endorsement of both Professor Scott's comments and Mason and Brennan JJ's dicta in *Calverley v Green*, clearly indicates that the Court considered that the inference should form part of Australian law. Thus, it would appear that, whatever the legal title, if both parties to the marriage contribute to the property then the inference operates as a starting point for the determination of their respective beneficial interests.[78] As there was little,

[71] Ibid 303 [71], quoting Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts*, (Little, Brown, 4th ed, 1989) vol 5, 197–8 § 443 (footnote omitted).

[72] *Cummins* (2006) 227 CLR 278, 303 [72] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[73] Ibid.

[74] Ibid [73].

[75] Ibid.

[76] Ibid 303–4 [74].

[77] Ibid 303 [73].

[78] The Court's comments regarding the operation of the inference where title is not in joint names are, strictly speaking, obiter.

if any, previous authority for the existence of the inference, the Court was clearly creating 'new law'.

Yet nowhere in the judgment did the Court acknowledge this. It is perhaps this lack of acknowledgment that allowed the Court to evade the issue of precisely how the new *Cummins* principle might fit in with already-established trust principles. Interestingly, the second 'thread' in the Court's reasoning was based on its purported endorsement and application of those traditional principles.

(b) A Presumption of Resulting Trust Rebutted by the Evidence?

At the outset of its judgment in relation to the ownership of the Hunters Hill property, the Court affirmed that the 'generally accepted principles in this field' involve the application of the presumption of resulting trust as a starting point for the determination of the parties' beneficial interests.[79] The Court quoted, with apparent approval, the classical formulation of the presumption in *Calverley v Green*:

> in the absence of a relationship that gives rise to a presumption of advancement, [there is] a presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportions in which they contributed the purchase money.[80]

Then, in ostensibly applying these principles to the case before it, the Court asked:

> What was there to conclude … that the *face of the register* did not represent the full state of the ownership of the Hunters Hill property, and that the ownership as joint tenants was at odds with, and subjected to, the beneficial ownership established by trust law?[81]

In formulating the question in this way, the Court effectively reversed the evidentiary onus usually associated with the presumption of resulting trust, without acknowledging that it was doing so.

After framing the question to be answered in this way, the Court considered whether there was any evidence to show that the face of the register did

[79] *Cummins* (2006) 227 CLR 278, 297 [55] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[80] Ibid 297–8 [55], quoting *Calverley v Green* (1984) 155 CLR 242, 246–7 (Gibbs CJ).

[81] *Cummins* (2006) 227 CLR 278, 298 [57] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (emphasis added).

not represent the parties' intentions as to ownership of the property.[82] It concluded that the evidence in fact supported the joint title on the face of the register.[83] The presumption of resulting trust was therefore rebutted.

On the facts of the case then, the Court was ultimately able to come to the same conclusion whether it applied a starting inference of joint ownership (which was supported by the evidence)[84] or its reformulated presumption of resulting trust (which was rebutted by evidence that the parties intended to hold the property jointly). Given that the Court reached the same outcome based on both threads of its reasoning, it was not required to resolve the question of how the two threads might be reconciled if the factual matrix did not produce sufficient evidence of intention. This issue, together with further questions regarding the doctrinal cohesion and scope of the *Cummins* principle, will be discussed in the section that follows.

3 *The Doctrinal Implications of the High Court's Judgment*

There is little doubt that, after *Cummins*, the inference of joint ownership in marriage now forms part of Australian law. It has the endorsement of a unanimous joint judgment of the High Court of Australia. Yet the emergence of the *Cummins* principle has given rise to a series of unresolved doctrinal questions involving its compatibility with existing trusts principles and its scope of operation. How, for instance, does it fit in with traditional resulting trust principles affirmed in *Calverley v Green*? Is it confined to marriage or does it also extend to other marriage-like relationships? Does it only apply to the 'matrimonial' home, or does it extend to other assets of the parties? How is it to be reconciled with the presumption of advancement of a wife? These questions of scope and compatibility are explored below.

One of the more far-reaching questions left unanswered by the *Cummins* judgment is how the inference of joint ownership is to be reconciled with the basic presumption of resulting trust. As noted above, the Court based its reasoning in the case on both the inference and its own (unacknowledged) reformulation of the presumption of resulting trust. On the facts as found, evidence of the parties' intentions both supported the inference of joint ownership *and* rebutted the presumption of resulting trust.[85] Thus, on either approach, the result in the case was the same. However, if there had been an

[82] Ibid 298–301 [57]–[67].

[83] Ibid.

[84] Ibid 303–4 [73]–[74]. As noted above in Part IIB2(a).

[85] See the discussion above at Part IIB2(b).

absence of such evidence of intention, then neither the starting inference (of equality) nor the starting presumption (of resulting trust) would have been rebutted and each approach would have produced a divergent outcome. This would have exposed a fundamental contradiction in the Court's dual reasoning: if there is an inference that the parties hold beneficial title jointly then it cannot also be presumed that they hold in shares proportionate to their contributions (when those contributions are not equal). The inference and the presumption each pull in different directions. They are different starting points for an analysis of the parties' intentions, and you cannot have two different starting points.

There is no doubt, of course, that the same result can be reached under both approaches if the evidence of intention is strong enough to support a conclusion as to ownership one way or the other (as it was in *Cummins* itself). But starting presumptions or inferences are really only useful and decisive when the evidence of intention as to ownership is too sparse to reach a definitive conclusion. In such cases the starting inference or presumption will usually determine the result. The fundamental question left unanswered in the *Cummins* judgment is, in the absence of sufficient evidence as to intention, which starting point does one use? As the question of the compatibility (or otherwise) of the two approaches did not arise on the facts of *Cummins*, the Court was able to bypass this fundamental question.

It is probably fair to speculate that the correct legal position would be that, for the matrimonial home at least, the inference of joint ownership would qualify the presumption of resulting trust that has traditionally operated in relation to a wife's contributions. This is likely to be the case given the Court's clear adoption of Professor Scott's statement regarding the equality of interests in marriage.[86] Thus, the correct starting point in such cases would be the inference of equality rather than the presumption of resulting trust. This would effectively mean that there is no longer any scope for the application of the presumption of resulting trust in the matrimonial home context.

Another issue left unresolved by the *Cummins* judgment is how the inference of joint ownership is to be reconciled with the traditional presumption of advancement of a wife by her husband. If legal title to property is held jointly and the wife has contributed less than half of the purchase price, then both the inference and the presumption of advancement would produce the same starting point for analysis: that is that the beneficial title to the property is held jointly. Where the wife holds a legal interest greater than a joint

[86] See the discussion above at Part IIB2(a).

tenancy, then, on an application of the presumption of advancement, she would be presumed to have a beneficial interest equal to her greater legal interest. However, under the inference of equality, it would be inferred that she holds the property jointly with her husband.[87] Thus, depending on the facts, the inference of joint ownership will either overlap entirely with the presumption of advancement of a wife or it will be in conflict with it. In the latter case, the only options available for resolution of the conflict are that the inference must either give way to the presumption or it must override it.

The presumption of advancement did not arise on the facts of *Cummins*, as the property was held jointly and Mrs Cummins rather than Mr Cummins provided the greater share of the purchase price.[88] The Court did, however, mention the presumption in passing.[89] In doing so, it made no mention of the potential for conflict between it and the inference of joint ownership, let alone propose a solution to this conflict. In contrast, during their obiter discussion of the inference in *Calverley v Green*, Mason and Brennan JJ did advert to the potential conflict.[90] But their Honours considered it 'unnecessary' to decide on that occasion whether the inference 'should qualify the presumption of advancement in favour of a wife.'[91]

After *Cummins* then, it is unclear what the position might be where the inference of joint ownership is in conflict with the presumption of advancement of a wife. But given the Court's strong endorsement of Professor Scott's statement, discussed above, that joint ownership will be inferred regardless of where legal title may lie, it is arguable that the correct approach is that the inference will override the presumption of advancement of a wife.[92] If that is the case, then it would effectively render the presumption of advancement of a wife moribund, at least in the matrimonial home context. Thus, as the inference most likely also overrides the presumption of resulting trust in relation to a wife's contributions,[93] this would mean that the traditional

[87] See also the discussion by Mason and Brennan JJ: *Calverley v Green* (1984) 155 CLR 242, 259.

[88] Thus on a traditional trusts analysis, the presumption of resulting trust would be applicable to Mrs Cummins' greater contribution.

[89] There is a passing reference to the presumption: *Cummins* (2006) 227 CLR 278, 298 [55] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[90] *Calverley v Green* (1984) 155 CLR 242, 259–60.

[91] Ibid 260. In *Cummins*, it is noted that Mason and Brennan JJ raised this issue: (2006) 227 CLR 278, 301–2 [68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[92] See Scott and Fratcher, above n 71 and accompanying text.

[93] See the discussion above at Part IIB2(b).

resulting trust principles affirmed in *Calverley v Green* no longer have a role to play in the determination of interests in the matrimonial home.

While it appears clear that the inference of joint ownership applies to marriage, it is unclear whether it extends to other marriage-like relationships. In *Cummins*, it was unnecessary for the Court to decide this point, as the facts of the case involved a traditional marriage. But as already noted, the Court did leave open the possibility that the inference might extend beyond marriage.[94] The Court's comment in this regard, that 'rigidity is not a characteristic of doctrines of equity',[95] is strongly indicative of an open attitude to the issue.

The discussion of judicial responses to *Cummins*, below, will show that the courts have taken a cautious approach to this issue by thus far restricting the application of the inference to the marriage context.[96] Yet it is strongly arguable that such caution is ill-founded given the highly suggestive dicta in *Cummins* indicating the inclusion of a broader range of relationships. If this is correct and the inference does indeed extend beyond marriage, then a further question arises as to the types of relationships that are within its scope. Does it, for instance, apply to heterosexual de facto relationships, or to same-sex de facto relationships as well? Could it apply to siblings who live together? One can only speculate that if the inference does indeed extend beyond marriage, then it is likely that it will be confined to relationships that are considered to be most 'marriage-like'.

If the inference of joint ownership extends beyond marriage, then its arrival signals an even greater move away from long-established trust principles. If, for example, it extends to heterosexual de facto relationships,[97] then *Calverley v Green* (which concerned a de facto relationship) would almost certainly be decided differently today. In fact it would be decided precisely in the way that the Court of Appeal decided that case, in a judgment that was ultimately overruled by the High Court on the basis that the Court of Appeal was in 'error' because it failed 'first to apply the presumption [of resulting trust] that comes into play'.[98]

[94] *Cummins* (2006) 227 CLR 278, 302 [69] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See the discussion above at Part IIB2(a).

[95] Ibid.

[96] See discussion below at Part IIC2. Cf *Bilson v Rogers* [2008] NSWSC 469 (16 May 2008) [22] (Jagot AJ) which shows that courts are willing to ignore *Cummins* in de facto cases.

[97] Heterosexual de facto relationships, possibly together with same-sex de facto relationships, might be considered the most 'marriage-like' relationships outside of marriage.

[98] *Calverley v Green* (1984) 155 CLR 242, 262 (Mason and Brennan JJ). See also the discussion above at Part IIA2.

It is therefore curious that in a judgment that is suggestive of an extension of the inference to other marriage-like relationships, the Court in *Cummins* both endorsed the principles in *Calverley v Green* and applied the inference of joint ownership yet made no reference to the conflict that may arise between the two. It is perhaps a further indication of the fact that the *Cummins* judgment raises more questions than it answers, and it is consistent with the Court's evasion of the other contradictions in doctrine that arise as a result of the development of the inference.[99]

Another question that arises as to the scope of coverage of the inference is whether the inference applies to family property generally, or whether it is confined to the family home. The property in question in *Cummins* had been the family home, but a number of the 'authorities' cited by the Court in support of the inference do not appear to confine its scope in this way. Mason and Brennan JJ's comments regarding the inference in *Calverley v Green*, for example, refer to 'property' in general rather than the family or matrimonial home.[100] Similarly, Lord Upjohn's original comments on the inference also refer to the 'property' of the parties in general. Both of these 'authorities' are mentioned in the *Cummins* judgment, with apparent approval.[101]

On the other hand, when referring to Professor Scott's passage on the inference, the Court made specific reference to its applicability to the 'matrimonial home', as does Professor Scott himself, within the passage.[102] Given this and the fact that the Hunters Hill property itself had been the family home, one interpretation of the judgment would be that the inference applies to the family home only, and that other family assets are to be dealt with under the presumptions of resulting trust or advancement (as the case may be). But the mixture of terminology used by the Court in its discussion of the inference makes it difficult to determine with certainty whether its application is to be so confined.[103]

[99] See especially the discussion above at Part IIB3 where the conflict in the Court's 'dual' reasoning is discussed.

[100] (1984) 155 CLR 242, 259. See also the discussion above at Part IIB2(a).

[101] *Cummins* (2006) 227 CLR 278, 301–2 [68]–[72] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also the discussion above at Part IIA2.

[102] Ibid 302–3 [71] and the discussion above at Part IIB2(a). See also Scott and Fratcher, above n 71 and accompanying text.

[103] As will be seen in the discussion of judicial responses to *Cummins*, below, subsequent judgments have thus far restricted the application of the inference to the matrimonial home. If this is correct, then there is continued, albeit restricted, scope for the operation of the presumptions of resulting trust and advancement in marriage where investment and other assets outside the matrimonial home are concerned.

It is clear that the Court's judgment in *Cummins* leaves open a number of important questions as to both the scope of application of the inference and its compatibility with long-established trusts principles. A close analysis of the case and its effects on traditional trusts principles shows not only that the inference of joint ownership is now clearly a part of Australian law, but also that it signals a significant change from existing trusts doctrine. The emergence of the *Cummins* principle, as well as the change in doctrine that it effects, has been under-theorised and little understood in subsequent case law and academic commentary.

C *The Aftermath of* Cummins*: Confusion Reigns*

1 *Academic Consideration*

The *Cummins* decision has, surprisingly, received little academic attention. Most of the academic literature has virtually ignored the decision, seeing it as simply an affirmation of the principles in *Calverley v Green*.[104] Only a small number of academic commentators have recognised that the decision signals a shift away from traditional trust principles.[105] Apart from a small number of such acknowledgments, there has been an absence of any sustained academic analysis of the potentially far-reaching effects of the decision, and little acknowledgement of, let alone engagement with, the fundamental contradiction involved in the two threads in the Court's reasoning.[106]

[104] Most standard trusts commentaries merely mention the case in passing: see, eg, J D Heydon and M J Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) 914; G E Dal Pont, *Equity and Trusts: Commentary and Materials* (Lawbook, 5th ed, 2011) 805, 807–8; Lee Aitken, 'Re-Calibrating Interests: Co-Ownership in Equity' (2007) 81 *Australian Law Journal* 266, 270.

[105] See, eg, Lisa Sarmas, 'Women and Trusts' in Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 464; Matthew Harding, 'Defending *Stack v Dowden*' [2009] (4) *Conveyancer and Property Lawyer* 309, 318–22 (where the author acknowledges the change in doctrine brought about by *Cummins* in a necessarily brief discussion of the case in the context of an article focusing on another jurisdiction). See also Thomson Reuters, *Ford and Lee: The Law of Trusts* (at 15 October 2008) [21.200] where the authors acknowledge (albeit in passing) that *Cummins* may have effected a change in doctrine:

> In Australia the High Court has been reluctant to apply the presumption of resulting trust to determine beneficial title where a husband and wife have contributed in unequal shares to the purchase of a family home, the registered title being taken as joint tenants. … It is too early to assess whether reliance on [Professor Scott's] and similar commentaries on the principles of the law of resulting trusts will alter the traditional rules as they are applied to other relationships, or to the purchase of property where the registered title is held by the husband and wife as tenants in common.

[106] See the discussion above at Part IIB3.

The decision has received greater attention in brief 'practitioner-oriented' articles.[107] In one such article, Stephen Mullette argues that the 'trusts law' aspects of the case signal a break from previous trusts doctrine. In a necessarily brief analysis aimed at practitioners, he notes that *Cummins* creates a new presumption of equal ownership for married couples.[108] He concludes that 'the fight for the family home has entered a whole new era. Hold on tight, the ride is about to get bumpy.'[109]

Interestingly, Mullette's analysis provoked a swift rebuttal in an article authored by the legal team representing the trustees in the *Cummins* case itself. In a brief response to Mullette, Bernard Coles, Robert Newlinds and David Cowling argue that Mullette is incorrect in asserting that *Cummins* creates a 'new rule' whereby equal ownership is presumed in marriage. They assert that the case was decided on the conventional basis that 'there was sufficient evidence, *in the circumstances of the case*, to rebut the usual presumption [of resulting trust].'[110] In arriving at their conclusion, the authors selectively refer only to that part of the Court's reasoning that deals with evidence that they purport shows that the presumption of resulting trust was rebutted.[111] The authors make no mention whatsoever of the Court's explicit discussion of the inference of joint ownership nor indeed of the Court's clear adoption of Professor Scott's passage on equal ownership in marriage.[112]

This (albeit limited) exchange of views on the effect of *Cummins* in the practitioner-oriented literature is a welcome change from the virtual absence of such discussion in the academic literature. However, the necessary brevity

[107] See, eg, Simon Lipp, 'High Court Rules on *Cummins* Matter' (2006) 6 *Insolvency Law Bulletin* 129; Stacey Taylor and Gerard Breen, 'Cummins Trustees Triumphant' (2006) 17 *Journal of Banking and Finance Law and Practice* 126; Stephen Mullette, 'The Family Home Not as Safe as Houses' (2006) 44(7) *Law Society Journal* 64; Stephen Mullette, 'Frontline: The Family Home: *Cummins* et Seq' (2006) 18(2) *Australian Insolvency Journal* 18; Bruce Provan, 'Whose Name Should We Put the House in?' (2007) 27(2) *Proctor* 17; Bernard Coles, Robert Newlinds and David Cowling, 'High Court Result Was Common Sense, Not New Law' (2006) 18(4) *Australian Insolvency Journal* 12.

[108] Mullette, 'Frontline: The Family Home: *Cummins* et Seq', above n 107, 19.

[109] Ibid 20. See also Mullette, 'The Family Home Not as Safe as Houses', above n 107, 67.

[110] Coles, Newlinds and Cowling, above n 107, 12 (emphasis in original).

[111] Ibid.

[112] See the discussion above at Part IIB2(a). This omission is curious given that in his submissions as counsel for the trustees before the High Court, Bernard Coles QC himself cited Professor Scott and *Pettitt v Pettitt* [1970] AC 777, 815 (Lord Upjohn) in support of his own submission that where married couples are concerned, 'the better inference is that they intended to be joint beneficial owners': *Cummins* (2006) 227 CLR 278, 282 (during argument).

of this work means that it is lacking in sustained analysis of the judgment and its implications.

Given the mixed response to *Cummins* in the academic and practitioner press, it is not surprising that the case has also received a mixed judicial response. In this context also, it has variously been ignored, cited as authority in support of the principles in *Calverley v Green* and used to support an inference of joint ownership.

2 *Judicial Response: Six Years of Case Law*

Over the six years since *Cummins* was decided, the inference of joint ownership has been applied in a number of mainly first-instance decisions involving married couples, and with a few exceptions, it has been virtually ignored by appellate courts and in cases that do not involve formally married couples or the matrimonial home.

In *Pascoe v Nguyen* the Federal Magistrates Court applied the inference, holding that half the matrimonial home, legal title to which was held jointly by the wife and her bankrupt husband, was available to the husband's creditors.[113] The wife had argued that she should receive a greater share of the property based on what she claimed were her greater contributions and the resultant presumption of resulting trust in her favour. The Court, however, declined to follow this approach, stating that there was insufficient evidence to support the wife's factual claim about her contributions and that the case was to be decided according to the *Cummins* principle of equal ownership.[114] The application of the *Cummins* principle in this instance therefore worked against the interests of the non-bankrupt wife and assisted the trustee. An appeal to the Full Court of the Federal Court, which was based predominantly on a challenge to the factual findings of the Federal Magistrate, was dismissed.[115] The Full Court made no comment whatsoever on the Federal Magistrate's reliance on the *Cummins* principle.

In *Rangott v Sharp*[116] the Federal Magistrates Court again applied the *Cummins* principle this time in a claim by the *wife's* trustee in bankruptcy. Legal title to the property was in the joint names of the couple, the husband having contributed 76 per cent of the purchase price. In granting the trustee a one half interest in the property, the Court relied on *Cummins*, stating that 'it

113 *Pascoe v Nguyen* [2007] FMCA 194 (2 March 2007) [30] (Raphael FM).

114 Ibid [29]–[30].

115 *Nguyen v Pascoe* [2007] FCAFC 181 (13 November 2007).

116 [2007] FMCA 324 (27 March 2007).

will be difficult for a non-bankrupt spouse who provided a greater proportion of the purchase price to argue that he or she should have any more than 50 per cent of the equity.'[117] The application of the *Cummins* principle in this case again worked in favour of the trustee. An appeal to the Full Court of the Federal Court was dismissed predominantly on grounds unrelated to this reasoning.[118] Interestingly, the Full Court again made no mention of the Federal Magistrate's invocation of *Cummins* to support this conclusion, once again ignoring the case and bypassing an opportunity to consider it, as it had in the *Pascoe v Nguyen* appeal.

The *Cummins* principle was also applied by the Federal Magistrates Court in *Official Receiver v Huen*, a case involving a joint legal tenancy and a bankrupt husband.[119] The Court opined that, in circumstances where the parties were married and the property is held in joint names, the inference of joint ownership is not rebuttable.[120] On this basis the Court held that the husband's creditors were entitled to half of the property, despite the fact that, two years prior to the bankruptcy, he had moved out of the matrimonial home and had signed an agreement stating that his wife owned 100 per cent of the property (following a history of domestic violence perpetrated by him).[121] Again, the application of the *Cummins* principle worked in favour of the trustee and against the interests of the non-bankrupt wife. On appeal, the Full Court of the Federal Court overruled the Federal Magistrate's decision, holding that the wife had the full interest in the property.[122] On this occasion the Full Court *did* refer to the *Cummins* principle and affirmed it.[123] However the Full Court overruled the Federal Magistrate on the issue of the irrebuttability of the inference, holding that the inference *was* rebuttable and could be displaced by an express or constructive agreement between the parties, which was present in this case.[124]

[117] Ibid [25], [28]–[29] (Mowbray FM).

[118] *Sharp v Rangott* (2008) 167 FCR 225.

[119] *Official Receiver v Huen* [2007] FMCA 304 (16 March 2007).

[120] Ibid [37] (Lucev FM).

[121] Ibid [47], [50], [71], [85].

[122] *Huen v Official Receiver for Official Trustee in Bankruptcy* (2008) 248 ALR 1.

[123] Ibid 13–14 [55] (Ryan, Moore and Tamberlin JJ).

[124] Ibid 13 [55], 20 [70], 23 [81]. Note that the Full Court stated that there had been a joint endeavour between the couple that the property would be a home for the wife and their children and that she would meet all the liabilities in relation to the property and would make no further claim on the husband: at 20 [70].

In *Draper v Official Trustee in Bankruptcy*, the Full Court of the Federal Court had an opportunity to consider the *Cummins* principle in a case that fell squarely within its ambit of operation — a dispute between a wife and her husband's creditors regarding the jointly-held matrimonial home.[125] The Court held that the wife was entitled to at least half of the property and potentially the whole property on a number of possible bases, including a possible constructive trust, express trust and/or equitable accounting.[126] Of the Court, only one member, Rares J, made brief mention of the *Cummins* principle, but his Honour considered that there was evidence to rebut the inference in the circumstances of the case.[127] The other members of the Court completely ignored it. The Court's sidelining of *Cummins* in this instance worked (presumptively) in favour of the non-bankrupt wife.

Thus, first-instance federal courts have tended to apply the inference,[128] and this application has tended to work presumptively in favour of the trustee and against the interest of the non-bankrupt spouse (usually the wife). On the other hand, the inference has been received with little enthusiasm by appellate courts, which have virtually ignored it. This has tended to ameliorate the pro-trustee 'bias' of the inference on appeal.

A similar trend has also emerged in the Family Court, where the inference has been applied in mainly first-instance decisions and ignored at the appellate level. In *Foley v Foley*, the Court held (applying the inference) that, despite the wife's assertion that she contributed over 90 per cent of the purchase price, the husband's creditor was entitled to claim against half of the property (legal title to which was in the joint names of the couple).[129] Here, the application of the inference again worked presumptively in favour of the trustee and against the non-bankrupt wife.

[125] *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53. This was on appeal from a judgment of the Federal Magistrates Court in *Draper v Official Receiver* [2005] FMCA 1371 (23 September 2005). Note that the judgment at first instance preceded the *Cummins* case.

[126] See *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53, 69 [59] (Mansfield J), 72 [76], 73–4 [82]–[89], 76–80 [96]–[116] (Rares J), 86–92 [144]–[165] (Besanko J). The Court remitted the matter back to the Federal Magistrates Court for rehearing.

[127] See ibid 73 [82] (Rares J). Mansfield J cites *Cummins* for a point unrelated to the inference of joint ownership: at 65 [44].

[128] See also the first-instance Federal Court case of *Combis v Jensen [No 2]* (2009) 181 FCR 178, 195–6 [50]–[52] where Collier J clearly affirms and applies the *Cummins* inference in interlocutory proceedings. The substantive issue in this case involved possible voidable transfers of property by a bankrupt husband to a wife pursuant to a financial agreement under the *FLA*. Cf *Official Trustee in Bankruptcy v Brown* [2011] FMCA 88 (20 May 2011) [30] (Driver FM).

[129] (2007) 38 Fam LR 71, 81–8 [43]–[75] (Bennett J).

In *Lemnos v Lemnos* the Family Court again applied the inference, but on the specific facts involved in the case, the inference here actually worked presumptively against the trustee.[130] The property in question was in the bankrupt husband's name alone, yet the Court held that the wife had a beneficial interest in half of the property, thereby making the other half only available to the husband's creditors.[131] An appeal to the Full Court of the Family Court was, however, allowed on the basis that the trial judge erred in his exercise of discretion under the *FLA*.[132] The Full Court did not mention the *Cummins* case at all, holding instead that the wife's interest should be reduced to less than half on the basis that she should 'take the good with the bad' in the marriage and therefore share in the debts of her husband.[133]

State courts have also taken a mixed approach. In New South Wales, there has been a greater willingness to apply the inference, at least in the determination of interests in the matrimonial home. The facts in *Permanent Custodians Ltd v Yazgi* involved a mortgagee bank's claim over the family home in circumstances where the husband had forged the wife's signature on the mortgage.[134] In that case the Supreme Court of New South Wales considered that the inference of joint ownership applied so that the relevant property was held jointly despite the fact that the wife had contributed most of the purchase price.[135] The application of the inference thus worked presumptively against the defrauded wife's interest. And in *Van den Heuvel v Perpetual Trustees Victoria Ltd*, the New South Wales Court of Appeal indicated its approval of the *Cummins* principle in another case involving a husband who forged his wife's signature on a mortgage of a home in the joint names of the couple.[136]

In *Buffrey v Buffrey*, however, where the interests in an *investment* property were in issue, Palmer J completely ignored the inference and actually cited

[130] (2007) 38 Fam LR 594.

[131] Ibid 607 [66], 611 [95] (Le Poer Trench J).

[132] *Trustee of the Property of Lemnos v Lemnos* (2009) 41 Fam LR 120, 156 [181] (Coleman J), 175 [292] (Thackray and Ryan JJ).

[133] Ibid 165 [245] (Thackray and Ryan JJ).

[134] [2007] NSWSC 279 (30 March 2007).

[135] Ibid [129]–[131] (Harrison AsJ). An appeal to the Court of Appeal was allowed on grounds unrelated to the parties' respective beneficial interests in the property: see *Yazgi v Permanent Custodians Ltd* (2007) NSW ConvR ¶56-195.

[136] *Van den Heuvel v Perpetual Trustees Victoria Ltd* (2010) 15 BPR 28 647. The *Cummins* principle is referred to by Young JA at 28 674 [197], with the apparent agreement by Hodgson JA and Basten JA on this point. It should be noted that the discussion of *Cummins* in this case was brief and relevant only to the resolution of a side issue in the case.

Cummins as authority in support of the traditional presumptions of resulting trust and advancement.[137] The context of the case involved an attempt by the husband to protect the property against a claim to half of it by the wife's ex-employer, which alleged that the wife had defrauded it of large sums of money. Legal title to the property was held jointly, but the husband had made most of the contributions to the purchase price of the property. The Court applied the presumption of resulting trust to the wife's contributions and the presumption of advancement to the husband's, holding that the presumption of advancement in favour of the wife was rebutted by the evidence, ultimately giving the husband an 87.24 per cent interest.[138] Given the joint legal title and the factual findings as to the respective contributions of the parties, the application of the traditional presumptions of resulting trust and advancement in this instance produced the same starting point (joint ownership, albeit rebutted by evidence of intention) as the *Cummins* principle would have produced if it had been applied.

Outside of New South Wales, state courts have ignored the inference altogether. In *Campana v Western Australia* one issue before the Court was whether the Western Australian government could place a freezing order over a married couple's home in circumstances where the husband had been convicted of drug-related offences.[139] In determining the extent of the freezing order over the relevant property (and therefore the husband's ownership interest in it), the Court applied the principles from *Calverley v Green*, making no mention whatsoever of the *Cummins* principle or indeed of the *Cummins* case at all.[140] The Court concluded that the couple had made equal contributions to the property and thus the husband's interest amounted to 50 per cent. Given these factual findings, the final result in this case would have been the same had the Court applied the *Cummins* principle.

Similarly, in the Victorian case of *Piroshenko v Grojsman* Warren CJ ignored *Cummins* in an application by a woman against her ex-husband to remove a caveat he had placed on what had been the matrimonial home.[141] Legal title to the property was in the woman's name alone; she had obtained the loan to finance the property and she most likely paid most of the deposit. The marriage had lasted for a short time only, the woman having obtained an

[137] *Buffrey v Buffrey* (2006) 12 BPR 23 619, 23 621–3 [14] (Palmer J).

[138] Ibid 23 625–7 [32]–[43].

[139] [2008] WASC 230 (30 October 2008).

[140] Ibid [43]–[62] (Jenkins J). This was despite the fact that the property was in the joint names of the couple.

[141] (2010) 27 VR 489.

intervention order against the husband. In her judgment, Warren CJ made no mention of the inference of joint ownership in marriage and relied on traditional resulting trust principles (including the presumption of advancement of a wife by a husband) to remove the caveat on the basis that the ex-husband could not establish an interest in the relevant property.[142] Had the *Cummins* principle been applied in this case, the woman would have been presumptively worse off in her claim for the full interest in the property.

The *Cummins* principle was also ignored in *Kopilovic v Gatley [No 2]*, a case involving a seizure and sale order against the wife's interest in the family home. Legal title to the property was held jointly by the wife and husband. Acting Master Chapman relied on the principles of *Calverley v Green*, including the presumption of advancement, to find that the wife, who had not financially contributed to the purchase, nevertheless had a 50 per cent interest in the home.[143] Given the factual findings regarding the relevant contributions made by the parties, the presumptive starting point (equal ownership) was the same as it would have been had the Court applied the *Cummins* principle.

Finally, despite the High Court's strong suggestion in *Cummins* that the inference of equality is unlikely to be limited to formal marriage, cases involving de facto couples have consistently ignored this possibility.[144] Courts have continued to decide such cases on the basis of traditional resulting trust principles, with no mention of the inference of equality or the *Cummins* case at all.[145]

Thus, the overall picture that emerges on a review of the case law since *Cummins* is one of doctrinal confusion and inconsistency. In cases involving formally married couples and the division of the family home, federal and family courts of first instance have tended to apply the inference whereas their appellate counterparts have tended to bypass and/or ignore it. At the state level, the inference has been ignored in this context, except in New South Wales, where it has been accepted at both first instance and on appeal.

[142] Ibid 496 [33].

[143] *Kopilovic v Gatley [No 2]* [2010] WASC 196 (3 August 2010) [15]–[19].

[144] See, eg, *Bilson v Rogers* [2008] NSWSC 469 (16 May 2008); *White v O'Neill* [2010] NSWSC 1193 (22 October 2010); *Haley v Perkins* [2010] NSWSC 1091 (1 October 2010); *Leeson v Reichstein* [2009] ACTSC 157 (4 December 2009); *Tayles v Davis* (2009) 3 ASTLR 222.

[145] Unsurprisingly, the traditional presumptions of advancement and resulting trust have continued to be applied to other family relationships such as parents and children and siblings: see, eg, *McCoy v Caelli* (2010) 4 ASTLR 132; *Minassian v Minassian* [2010] NSWSC 708 (6 July 2010); *Wilkinson v Chief Commissioner of State Revenue* [2011] NSWADT 121 (26 May 2011).

More consistency surrounds those cases involving de facto couples, where the inference has not been applied. And in the one case[146] dealing with the division of an investment property within a marriage context, the *Cummins* principle similarly has not been applied.

The fact that (post-*Cummins*) courts have taken a bifurcated approach to the division of the matrimonial home is of particular concern, as it creates considerable doctrinal uncertainty for practitioners, clients and, indeed, for the courts as well. It is difficult to understand why this bifurcation of approaches has occurred along the lines that it has. As noted, in terms of its effect on case outcomes, it would appear that the application of the *Cummins* inference (by federal and family courts of first instance and in New South Wales) has tended to work presumptively in favour of the trustee (or other third party) and against the interest of the non-bankrupt spouse (usually the wife). On the other hand, the non-application of the inference (by appellate courts and state courts other than those in New South Wales) has tended either to favour the non-bankrupt spouse or made no difference to the result (given the facts).

As argued above, it is the view of this author that, post-*Cummins*, the inference of equal ownership, rather than the traditional presumptions of resulting trust and advancement, is the correct doctrinal starting point for the determination of beneficial interests in the matrimonial home (at least). This replaces the presumption of resulting trust and advancement in this context and signals a clear departure from the legal position pre-*Cummins*. In this respect, it is submitted that those courts that have applied the inference to the matrimonial home since *Cummins* have taken the correct doctrinal approach.

The question remains open as to whether courts have taken the correct approach by not applying the *Cummins* inference in the de facto home and investment property contexts. It is true that, as *Cummins* was itself a 'matrimonial home' case, these issues did not arise directly for decision. But one could argue that, at least in relation to the former issue, the correct doctrinal approach is that courts should heed the strong (albeit obiter) suggestion in *Cummins* that the inference is unlikely to be confined to the formal marriage relationship.[147]

[146] *Buffrey v Buffrey* (2006) 12 BPR 23 619, 23 624 [21] (Palmer J).

[147] *Cummins* (2006) 227 CLR 278, 302 [69] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). On the 'precedential' status of High Court dicta, see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), where the High Court was highly critical of the New South Wales Court of Appeal for making a decision that 'flew in the face of seriously considered dicta uttered by a majority of this Court'.

While it may be the case that, post-*Cummins*, the inference of joint ownership is the correct doctrinal starting point for the determination of beneficial interests in the (formal and de facto) family home, a question remains as to whether it is a *desirable* starting point. The analysis of the case law since *Cummins* (and indeed, the case of *Cummins* itself) has shown that the application of the inference often tends to presumptively favour the interest of the trustee over that of the non-bankrupt spouse (usually the wife). The following section of the article takes a closer look at the substantive effects of the application of the inference in a range of contexts and evaluates the desirability or otherwise of this approach.

III From Doctrine to Substance: The Gendered Consequences of an 'Equal' Starting Point

A *Comparison of Outcomes under the* Cummins *Principle and Traditional Trust Principles*

It has already been noted that in cases where the parties' intentions cannot be clearly discerned, the starting inference or presumption applied to the case will be determinative of the ultimate outcome. Thus, in such circumstances, unless the contributions of the parties are equal, the inference of joint ownership will produce a different outcome to that produced by the application of traditional trust principles. The following table compares the expected outcomes of such cases under the *Cummins* inference and the relevant traditional presumptions in a range of circumstances. The lightly shaded area in the table highlights those circumstances in which the woman in the relationship is presumptively *worse* off under the *Cummins* principle as compared to her position under the relevant traditional presumptions.

Table 1

Proportionate contribution to purchase price	Legal title	Presumption of resulting trust / presumption of advancement	Inference of joint ownership
Married			
H = 75%, W = 25%	Joint	Joint *(PrAdv)*	Joint
	H only	H = 75%, W = 25% *(PrRT)*	Joint
	W only	W = 100% *(PrAdv)*	Joint
H = 25%, W = 75%	Joint	H = 25%, W = 75% *(PrRT)*	Joint
	H only	H = 25%, W = 75% *(PrRT)*	Joint
	W only	W = 100% *(PrAdv)*	Joint
Heterosexual de facto			
H = 75%, W = 25%	Joint	H = 75%, W = 25% *(PrRT)*	Joint
	H only	H = 75%, W = 25% *(PrRT)*	Joint
	W only	H = 75%, W = 25% *(PrRT)*	Joint
H = 25%, W = 75%	Joint	H = 25%, W = 75% *(PrRT)*	Joint
	H only	H = 25%, W = 75% *(PrRT)*	Joint
	W only	H = 25%, W = 75% *(PrRT)*	Joint

(H = husband; W = wife; PrAdv = presumption of advancement; PrRT = presumption of resulting trust; shaded area = woman is worse off under the Cummins *principle).*

As can be seen, where a married woman has contributed less to the purchase price than her husband, and legal title is in her husband's name, she is in a better position under the *Cummins* principle than she would be under the old presumptions. Where she has contributed less and legal title is jointly held, the starting inference or presumption is the same under both principles. In all other circumstances, she is worse off under the *Cummins* principle, including where legal title is taken in her name alone and all cases where she has contributed a greater share of the purchase price.

If the inference is applicable to heterosexual de facto couples,[148] then where the man has contributed a greater share of the purchase price, the woman is better off under the *Cummins* principle than under the traditional presumption of resulting trust. Where the woman has contributed a greater share, then she is worse off under the *Cummins* principle. On the assumption that women often contribute less in money terms[149] then, generally speaking, de facto wives are probably better off under the *Cummins* principle. As noted above, however, courts have thus far continued to apply the traditional presumption of resulting trust rather than the *Cummins* principle to such relationships.

As compared to traditional equitable principles then, the *Cummins* principle is a step backwards for wives, but (if applicable) may represent an improvement for women in heterosexual de facto relationships. Thus, at least on the surface, the replacement of traditional trusts principles with the *Cummins* principle produces mixed, but most likely worse, outcomes for women.

B *Problems with an 'Identical Treatment' Model of Equality in the Context of Women's Structural Inequality and Differences between Women*

Some will inevitably argue that, whatever the substantive outcome, an equal starting point is in tune with modern notions of equality between the sexes. Therefore, the argument goes, legal rules or presumptions should reflect this and older, paternalistic notions of treating wives (for example), differently, should be abolished in the name of equality.[150]

I have argued elsewhere that this 'identical treatment' model of equality is highly problematic because it is blind to structural inequalities and power differences that exist between men and women.[151] The evidence that women as a group suffer such disadvantage is overwhelming. Women are paid less when they are in paid employment, they do less paid work as a result of their disproportionately high contribution to the work of the family home and the

[148] A discussion of the effect of the inference on non-heterosexual couples is beyond the scope of this article. It should be noted, however, that if the inference is extended to heterosexual de facto couples, it is also likely that it would be extended to non-heterosexual de facto couples, as the exclusion of the latter could hardly be justified on any reasonable basis.

[149] This assumption can be made in light of gender pay inequality: see Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2010: Overview* (16 March 2011) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6306.0>.

[150] See, eg, *Brown v Brown* (1993) 31 NSWLR 582, 600 (Kirby P).

[151] See Sarmas, above n 5, 764–5.

care of children and other family, and they have less superannuation.[152] Women are worse off than men after divorce, often facing poverty.[153] In a context such as this, 'same' treatment does not equate to 'equal' treatment.

Thus, the mere fact that married women are worse off under the *Cummins* principle is of great concern. A new rule that makes some women worse off in a context where there is pre-existing structural disadvantage will clearly work to further entrench that disadvantage.

Women's undoubted structural disadvantage in relation to men should not, however, blind us to the differences that exist between women.[154] There are, for instance, vast disparities in wealth between women. While some may have little sympathy for the relatively wealthy Mrs Cummins in her battle against the Australian taxpayer, the impact of losing a greater share of family property to creditors would undoubtedly have a more severe impact on the living standards of women on the lower end of the socio-economic spectrum.[155] And while some heterosexual women in de facto relationships may be better off under the *Cummins* principle, it is impossible to foresee how women in non-heterosexual relationships would fare.

[152] See Australian Bureau of Statistics, *Employee Earnings and Hours*, above n 149; Australian Bureau of Statistics, *Australian Social Trends, March 2009: Trends in Household Work* (23 December 2009) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40March%202009>; Australian Bureau of Statistics, *Australian Social Trends, March 2009: Trends in Superannuation Coverage* (20 September 2010) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features70March%202009>.

[153] The phrase the 'feminization of poverty' refers to this phenomenon: see Lenore J Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, 1985) ch 10.

[154] See Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

[155155] See, eg, Grania Sheehan and Jodie Hughes, 'Division of Matrimonial Property in Australia' (Research Paper No 25, Australian Institute of Family Studies, March 2001), wherein the authors note that, even where women from 'low asset' households get a greater than 50 per cent share of assets in Family Court proceedings (which they generally do), they still face considerable poverty post-separation. A 50 per cent starting point for apportionment, as provided by *Cummins*, would therefore clearly be inadequate to ensure that women in such households, whose partners have faced bankruptcy (and who they often subsequently divorce) do not live the rest of their lives in poverty. But even regardless of the wealth of the household, the issue of how much family property women receive also needs to be looked at in the context of the phenomenon that feminists have identified as sexually transmitted debt, where a woman pays for the consequences of her husband's getting into debt, often as part of a business over which the woman has very little control or indeed knowledge: see the discussion in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 114–29 (and the references cited therein). Any rule that works to give the husband's creditors a share of family assets (in particular, the family home) needs to be looked at in the context of the phenomenon of sexually transmitted debt.

It is submitted that the only way to adequately deal with the complexity of issues surrounding third-party claims to family property is to adopt a more nuanced approach that takes women's structural inequality and the differences amongst women into account. Unfortunately, equitable doctrine, whether in the form of the *Cummins* principle or indeed under the traditional presumptions, is ill-equipped to adequately do this. A legislative response to the issue may therefore be necessary.

C *A Legislative Response*

It is submitted that the application of equitable principles in this area be replaced by a statutory approach modelled on s 79 of the *FLA*. Section 79 gives the Family Court a structured discretion to divide family property between separating couples. It requires the Family Court to take into account a range of factors, including the parties' financial and non-financial contributions, as well as their future needs and earning capacities.[156] This ability to take future needs into account in particular sets s 79 apart from equitable doctrines which are backward-focused only. Thus, distributions under s 79, albeit far from adequate,[157] are better able to take into account and remedy disadvantages faced by women as a result of structural inequality.

In *Cummins* the Court stated that '[t]he extent to which … statutory innovations [such as the *FLA* s 79] may bear upon further development of the principles of equity is a matter for another day.'[158]

Recent changes to the Family Court's jurisdiction, which now give the Family Court power to make orders with respect to third party creditors' interests (in a separating couples context), may facilitate the development foreshadowed by the Court in *Cummins*.[159] Potentially, this extension of the Court's jurisdiction to cover third-party claims to family property could result in a diminution of the use of equitable principles. Arguably, the Court could first divide the couple's property via its structured discretion under s 79 and then allocate interests to third parties based on the bankrupt party's post-s 79

[156] *FLA* s 79(4).

[157] See, eg, Belinda Fehlberg, Juliet Behrens and Rae Kaspiew, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 468, 572–3.

[158] *Cummins* (2006) 227 CLR 278, 302 [70] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[159] *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) sch 5; *FLA* s 79(10)(a).

share of the assets. The Court has not, however, taken this approach thus far.[160]

Given the Family Court's reluctance to take a more nuanced, s 79 approach in the bankruptcy context, and the fact that cases not involving separating couples continue to be heard in courts that have no jurisdiction to apply s 79 anyway, it is necessary to enact separate legislation that deals specifically with third-party rights to family property. A legislative response modelled on s 79 would give courts a guided discretion pursuant to which they must take into account not only the parties' contributions, but factors such as the future needs of the non-bankrupt partner.

IV Conclusion

Whatever one's view of the *Cummins* principle, it is clear that there has been a lack of doctrinal clarity and consistency in this area of the law. This article has attempted to address this problem by peeling away the layers of obfuscation that have surrounded the principle, thereby revealing its inconsistency with traditional trusts concepts and the need to acknowledge that *Cummins* created 'new' law. This article has also attempted to evaluate the principle from the perspective of substantive outcomes for women, arguing that an equal starting point for apportionment may not pay sufficient regard to issues of structural inequality and difference. Finally, a legislative solution based on s 79 of the *FLA* is proposed as a preferable way of dealing with third-party claims to family property.

[160] See *Trustee of the Property of Lemnos v Lemnos* (2009) 41 Fam LR 120.