

The Plight of the Unmarried

Keynote speech for 'At a Glance' conference 2017¹

Lord Neuberger, President of the Supreme Court

21 June 2017

1. As in the case of almost all other types of relationship, the law normally impinges on the relationship between cohabiting couples, whether married or unmarried, only when things go wrong – when one (or indeed both) of them dies or falls seriously ill, or, most commonly, when they fall out.
2. And when cohabitants fall out, the law has to deal with the fall-out from the falling out. At that stage it becomes apparent that it is not only the two individuals who are or were unhappy cohabitants; Chancery law – in particular, company and property law - and family law – in particular, financial remedies - are not happy cohabitants either. Indeed, some might say that property lawyers and family lawyers have something of an oil-and-vinegar quality. As a former land law barrister and former Chancery judge coming to talk at this Family law conference, I am unsure whether to see myself as an oleaginous property law Daniel stepping into a vinegary family lawyers' lions den, or an acidic Daniel visiting oily lions.
3. The fact that Chancery law and financial remedies are uncomfortable bedfellows is rather well demonstrated in the 2013 financial remedies *Prest* case². A rich man had placed a number of valuable properties in companies, which, as the trial judge, Moylan J, found in his impressive judgment, he effectively owned and controlled. His wife sought financial provision under the Matrimonial Causes Act 1973, but apparently could not get her hands on the shares in those companies as they were held by various somewhat shadowy foreign entities. This was not a case where the husband had transferred the properties to the companies at the last minute to avoid his responsibilities, as the properties had been transferred to the companies when they were purchased. Nonetheless, most family lawyers would, I think, take little persuading that, one way or another, it should be possible for the court to treat the properties as effectively owned by the husband, so that they could be transferred to the wife, to ensure that she was accorded whatever settlement the court thought appropriate. Indeed, most normal people might think that that should be the position. All the more

¹ I am very grateful to Charlotte Gilmartin for her thoughts, suggestions and research without which this talk would be less interesting and less accurate

² *Prest v Petrodel Resources Ltd* [2013] 2 AC 415

so given that the husband had continuously failed to give disclosure of documents and information as required by the court.

4. However, company lawyers, who maybe are not normal people, strictly distinguish between a company and its shareholders – even when there is only one shareholder. So there was a problem. Moylan J thought that he could treat the company and the husband as the same person because that was permitted by section 24 of the 1973 Act³. And so, to use the jargon of company lawyers, he pierced the corporate veil. In the Court of Appeal⁴, the former Family Division judge, Thorpe LJ, had little hesitation in agreeing with this, but the two former Chancery Division Judges, Rimer LJ and Patten LJ, disagreed, considering this to involve a serious heresy. So the companies kept the properties and the wife went away relatively empty-handed.
5. Thorpe LJ's view was encapsulated in two sentences towards the end of his judgment – that the majority view “present[ed] an open road and a fast car to the money maker who disapproves of the principles developed by the House of Lords that now govern the exercise of the judicial discretion in big money cases”⁵. I rather envy judges with a good turn of phrase. More tellingly in terms of how Family law judges tend to think, he said that: “the husband [has] resorted to an array of strategies, of varying degrees of ingenuity and dishonesty, in order to deprive his wife of her accustomed affluence. Amongst them is his invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends. If the law permits him so to do it defeats the Family Division judge's overriding duty to achieve a fair result”⁶. Rimer LJ, with whom Patten LJ agreed, adopted the stricter Chancery view that “the judge was wrong” because, as he went on to say, “the shareholders of a company have no interest in, let alone entitlement to, the company's assets and the same applies to a shareholder who is a 100% owner of the company”⁷.
6. The case then came to the Supreme Court, which sat seven Justices – including two former Chancery Division judges and two former Family Division Judges. The seven Justices all agreed that the Chancery Division judges in the Court of Appeal had been right about piercing the corporate veil; there was simply no basis for treating the husband as the owner of the properties when the company was the owner. For those who are interested, the Supreme Court Justices who gave reasoned

³ *Prest v Prest* FD08D01163, 4th October 2011

⁴ *Petrodel Resources Ltd v Prest* [2013] Fam Law 150

⁵ *Ibid*, para 63

⁶ *Ibid*, para 65

⁷ *Ibid*, para 71

judgments on the point expressed subtly different views as to the circumstances in which the corporate veil could be pierced, but they were all agreed that it could not be done unless there was some wrongdoing or abuse involved in the shareholder relying on the proposition that he and the company were entirely separate personalities in the eyes of the law. Mr Prest's reliance on this proposition in relation to his wife's financial remedies claim, unattractive as it might appear to many people, involved no wrongdoing or abuse. This orthodox, if to many people somewhat technical, dance of the seven Justices resulted in a case comment in the Cambridge Law Journal: "Family Division 0; Chancery Division 1"⁸.

7. I think that the title of that article rather overlooked the fact that, in the Supreme Court, the *Prest* decision, rather like a football match, was a game of two halves. In the second half of its decision, Lord Sumption, with whom the rest of us agreed, went on to find for the wife on a wholly different basis, namely that of resulting trust. The companies had acquired the properties at the direction of the husband when he paid for them, and so, held the Supreme Court, although the companies owned the properties in law, they held them on resulting trust for Mr Prest, who could therefore order the companies how to deal with them. It followed that, in a financial remedies claim, Mr Prest could be ordered by the court what to tell the companies to do with the properties – ie to transfer them to the wife⁹. That can be said to be quite a bold decision and, unless explained by reference to the special, rather extreme facts of *Prest*, to represent a potential danger or even trap for creditors of such companies, who lend in the understandable belief that the company is the beneficial owner of the assets which are recorded as held in its name. In a recent article, it was explained how insolvency lawyers, very much in the Chancery camp you might have thought, would strongly prefer Moylan J's approach to that of the Supreme Court¹⁰. In his judgment, Lord Sumption was anxious to emphasise that the Supreme Court could take the resulting trust route in that case only because "presumptions may properly be made against the husband given that the defective character of the material is almost entirely due to his persistent obstruction and mendacity"¹¹.
8. Having been married to Mr Prest, Mrs Prest was, as I have mentioned, entitled to rely on legislation which gives the poorer spouse (often, but not inevitably, and less frequently than in the past, the wife) the opportunity to claim half her husband's fortune, namely the 1973 Act. In a nutshell, and ignoring the complicating effect of children, where the separating parties are married (or in a civil partnership), if one party is well off, the other party can normally expect to get their reasonable needs

⁸ C Hare, *Family Division, 0; Chancery Division, 1: piercing the corporate veil in the Supreme Court (again)* [2013] 72(3) CLJ 511

⁹ *Ibid*, paras 46 to 52

¹⁰ See eg R Tarling, *The resulting trust and the unsecured creditor* [2016] 37(10) Comp Law 299

¹¹ *Prest* [2013] 2 AC 415, para 43

catered for, and, taking that into account, they can normally expect to receive a sum approaching half the value of the money and assets which the richer party made during the marriage (or civil partnership). Judging by reports of some cases, judges are prepared to accept that the expression “reasonable needs” extends to what many people may think amounts to a pretty luxurious lifestyle¹² and there are some substantial fortunes which get close to being sliced in half as a result of a divorce¹³ on the grounds that the starting point is now an equal division¹⁴. It is no doubt because of this that there is a notion that London is “the divorce capital of the world”¹⁵.

9. What about where the separating couple are not married or in a civil partnership? Well, the quasi-matrimonial home is up for grabs. In the 2007 House of Lords case of *Stack v Dowden*¹⁶, Mr Stack and Ms Dowden had purchased a house in joint names and in which they and their children lived. Eventually, the relationship foundered and Mr Stack left. The issue was how one assessed the parties’ respective shares of the house. I found myself on my own as the sole Chancery voice, applying what I thought was the well-established resulting trust principle, namely that, in the absence of prior agreement between the parties, the first rebuttable presumption was equal shares, but, where, as here, there was evidence of the parties’ respective contributions, then in the absence of any agreement to the contrary, the shares were to be based on respective contributions to the purchase price. Lady Hale, supported by Lord Hope and, as I saw them, two renegade former Chancery Division judges, Lord Hoffmann and Lord Walker, thought otherwise. Like me, they considered that the prima facie position was that a property held in joint names was owned in equal shares by the joint owners¹⁷, but, at least where the property was their home, the doctrine of resulting trust did not apply, and confirmation of, or a departure from, equality could only be based on the whole course of dealing between the parties¹⁸. Although they thought that there was a pretty strong presumption in favour of equal shares¹⁹, they concluded that, because this was “a very unusual case” on the facts²⁰, this presumption was overridden because the course of dealings between the parties established that Ms Dowden, who had contributed more to the acquisition of the house, should have a significantly more than 50% share, which was the view I had arrived at based on the doctrine of resulting trust.

¹² See eg *Robson v Robson* [2011] 1 FLR 751

¹³ Eg *Charman v Charman i* [2007] 1 FLR 1246, para 1, where it I recorded that the wife was awarded £40 million, when she already had £8 million, and the parties’ combined assets were £131 million

¹⁴ *White v White* [2001] 1 AC 596, 605 and *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618

¹⁵ See eg R. Dyson, *English Courts still top the league for generous divorce payouts* Daily Telegraph, 16 December 2013

¹⁶ *Stack v Dowden* [2007] 2 AC 432

¹⁷ *Ibid*, para 56

¹⁸ *Ibid*, para 61

¹⁹ *Ibid*, para 68

²⁰ *Ibid*, para 92

10. That case taught me two things. First, when sitting in a multi-judge court, one tends to feel particularly strongly about a case in which one dissents. Lord Ackner, a former Law Lord, reflected that proposition when he said that “one only dissents where one’s sense of outrage at the majority decision outweighs one’s natural indolence”²¹. I thought that my colleagues had taken two wrong turnings to get the right answer: the rejection of the resulting trust doctrine seemed to me heretical, but if it was right, there seemed to me to be no good reason to depart from it on the facts²². The second thing I learned was that, if you wanted to influence your colleagues in the House of Lords you should not hold back too long in circulating your judgment. By the time I disseminated my dissenting judgment, my colleagues had mentally moved on, and were less engaged on what they thought of as a somewhat historic case. If, which I hope it does not, that problem ever surfaces in the Supreme Court, it does so pretty rarely, because we adopt a rather more collegiate approach to judgments. However, the fact remains that I was, like John the Baptist, a voice crying in the wilderness²³.
11. When the Law Lords morphed into the Supreme Court in 2009 I went off to become Master of the Rolls, and, in my absence, Lord Walker and Lady Hale (supported by Lord Collins, Lord Wilson and Lord Kerr) in the case of *Jones v Kernott*²⁴ effectively confirmed the rejection the resulting trust principle in relation to “the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage”²⁵, and emphasised that “a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on”²⁶, a point underlined by the 2008 Court of Appeal decision in *Fowler v Barron*²⁷, where one cohabiting joint owner, who had contributed nothing to the cost of buying the house or servicing the mortgage was nonetheless held entitled to a 50% share of the beneficial ownership. I may have characterised it as heresy in the past, but I must now accept the *Stack v Dowden* orthodoxy, as in *Jones* the Supreme Court ensured that, as the supporter of the resulting trust I, or at least my views, duly suffered the same fate as John the Baptist. Interestingly, they also held that, where a property is acquired in the name of one of the two unmarried cohabitants not in a civil partnership, the other could still be

²¹ Quoted in footnote 189 in A Patterson, *Final Judgment: The Last Law Lords and the Supreme Court*, p 112, footnote 189

²² A view which was not only mine: “Commentators have struggled to identify why *Stack v Dowden* was an unusual case: the fact that their finances were kept separate does not mark it out as such (and empirical research has shown that couples may pool their assets in practice even if they keep separate accounts), and the fact that they made unequal financial contributions is similarly unremarkable. The case thus inevitably poses a challenge for those seeking to apply it” – Rebecca Probert, *Cohabitation: Current Legal Solutions* (2009) 62(1) *Current Legal Problems* 316, p 333

²³ The Gospel according to St John chap 1, v 23, based on Isaiah chap 40, v 3

²⁴ *Jones v Kernott* [2012] 1 AC 776

²⁵ *Ibid*, para 25

²⁶ *Ibid*, para 19

²⁷ *Fowler v Barron* [2008] EWCA Civ 377

awarded a share based on that which “the court considers fair having regard to the whole course of dealing between them in relation to the property”²⁸. However, in *James v Thomas*²⁹, on rather similar facts to *Fowler v Barron*³⁰, save that the house was in the sole name of one partner, it was held that the other partner had no interest.

12. So, while the resulting trust principle had been effectively killed off in the cohabitants home context in *Stack* and *Jones*, it then rode to the rescue in the financial provision context in *Prest*. It is fair to say that that does not mean that there is any inconsistency between *Prest*, on the one hand, and *Stack* and *Jones* on the other. The resulting trust principle still survives intact generally, for instance between an individual and a company as *Prest* implies, but it does not apply in relation to a property in which cohabitants live together. In particular, in the case of an unmarried couple, the court will presume that their home is equally owned beneficially if it is held in joint names, and may conclude that it is equally owned beneficially do so even if it is held in the name of only one party. But if the accommodation was owned by one of the parties before the relationship started and remained so owned, it may often be difficult for *Stack* to assist the other party, unless he or she contributed to the mortgage repayments or to improvements. And it is also worth emphasising that, if the cohabitants lived in rented accommodation, as many do³¹, the *Stack* line of cases is of questionable value to the other party.

13. I say “questionable” value, because the general presumption is, I think, that the legal principles developed in *Stack* and in *Jones* do not extend to other assets, and indeed in *Jones*, as I have mentioned, the court expressly limited it to “the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage”³², although they half-extended it to a case where the house or flat was in the name of one of them. However, the fact that the *Stack* principle was limited in this way does not mean that there is no possibility that the courts will start to develop a judge-made quasi-matrimonial financial remedies jurisdiction in relation to assets other than the parties’ home. If the courts are prepared to hold that an ex-cohabitant has an interest in the home they lived in even though it is held in the sole name of the other ex-cohabitant, it may not be that big a step to say that such an interest exists in other property, assets or money held in the name of one of them. The decision last month of the Privy

²⁸ *Ibid*, paras 52 and 51(4)

²⁹ *Jones v Thomas* [2007] EWCA Civ 1212

³⁰ See footnote 27

³¹ See Rebecca Probert, fn 22, p 334

³² *Ibid*, para 25

Council in *Marr v Collie*³³ may give a nod in that direction³⁴, but if it does it is no more than a very slight arguable nod. It is right to add to avoid misunderstandings, that in the case of cohabitants with children, the court has a statutory power³⁵ to order periodical payments, a lump sum, the settlement of property, or a transfer of property, directly to the child or to a third party for the benefit of the child.

14. So when it comes to marriages or civil partnerships breaking up, the poorer party appears to do rather well by international standards: he or she gets up to half the assets the richer party has obtained during the marriage³⁶ – unless the circumstances are unusual – for instance (subject to the Supreme Court holding otherwise) the marriage has been very short³⁷. In the case of unmarried relationship breaking up, the poorer party has a good prospect of getting a 50% share in the quasi-matrimonial home if it is jointly owned, a reasonable prospect of getting a share if it is in the sole name of the richer party, but a no more than very highly speculative prospect of getting any interest or share of other assets, property or money held by the richer party – unless there are children of the relationship. Of course, if there are assets in joint names or assets to whose acquisition the poorer party has specifically contributed, or if the richer party has made promises or inducements to the poorer party, the poorer party will be in a stronger position.

15. But, generally speaking, there is a stark difference between the position of the poorer former spouse and the poorer former co-habitant. Subject to the value of the assets of the richer ex-spouse, the poorer party will get what he or she needs, or, if more, possibly up to half the assets of the richer party; a poorer ex-cohabitant may well get half the home, but will be hard pushed to get anything more.

16. Unless the courts are prepared to be what Sir Humphrey would call courageous, it is ultimately a question for the legislature not the judges whether this stark and potentially substantial difference is justified. The moral commitment involved in, and characterised by, marriage, the social and religious status of marriage, and the desirability of encouraging marriage may all be thought by many people to justify this difference. But no doubt there will be many other people who feel that this distinction between married and unmarried cohabitants is out-dated and unjustified. Both sides of the argument

³³ [2017] UKPC 17

³⁴ See *Ibid*, paras 353-57

³⁵ Schedule 1 of the Children Act 1989

³⁶ *White v White* [2001] 1 AC 596

³⁷ *Sharp v Sharp* [2017] EWCA Civ 408

can point to the civil partnership legislation³⁸ for support. Those in favour of the distinction can say that it shows that it shows that the law still considers status to be important; those against the distinction can say that it shows that the importance of marriage is disappearing. At the moment, it seems to me that the judicial developments over the past ten years suggest that the judiciary have moved the law on from treating homes of unmarried cohabitants like any other property owned by more than one person in a non-domestic context to treating it in a way which may be as close to the treatment of property in a matrimonial context as it is possible for judge-made law properly to go. If Chancery law won *Prest*, Family law certainly won *Stack*.

17. A conceptual consequence of this difference is that a court considering the distribution of property between ex-spouses is engaging on a very different exercise from a court considering the distribution of property between ex-cohabitants. Again ignoring the complicating effect of children (if I may put it in that slightly off-hand way), a court dealing with ex-cohabitants looks almost exclusively to the past, whereas a court dealing with ex-spouses is also, indeed in many cases more so, looking to the present and the future. In the case of the ex-cohabitants' home, the court looks at the whole course of dealing between the parties, and in the case of other assets, who acquired them and what promises were made – all looking back. In the case of ex-spouses, while the past is often highly relevant, the court looks to the poorer party's likely future needs and the richer party's current assets. And, while the “yardstick of equality”³⁹ permeates throughout the matrimonial assets, it currently only applies to cohabitants' property insofar as it is in joint names and, to a somewhat unclear extent, to the cohabitant home if not in joint names.
18. A judge in a case concerning either an unmarried or a married couple will ultimately want to find an award which achieves “fairness” between the parties, and cases under the 1973 Act and cases such as *Jones v Kernott* demonstrate that this can be done in the case of both married and unmarried couples. While the power is very wide in the case of a married couple, cases such as *Prest* show that there are limits to the power. On the other hand, it seems probable that the power is very circumscribed in a case concerning unmarried couples.
19. There are of course other features of difference between break-ups between civil partners and spouses on the one hand and unmarried cohabitants on the other. Unmarried cohabitants can agree in advance how their assets, including their home, will be held with a fair degree of confidence that

³⁸ Civil Partnership Act 2004

³⁹ Per Lord Nicholls in *White v White* [2001] 1 AC 596

their agreement will be enforced by the court. *Stack* and *Jones* only apply in cases where there is no contractual arrangement between the parties as to how their home is to be beneficially owned⁴⁰. On the other hand, as the 2010 *Radmacher* case⁴¹ established, a pre-nuptial agreement in the case of spouse or civil partners is not so secure. And the uncertainties and benefits of re-opening financial remedy orders, highlighted in the 2015 *Vince v Wyatt* case⁴², would not, at least normally, apply to claims between formerly unmarried co-habitants.

20. As mentioned at the start of this talk, the plight of the unmarried when contrasted with the married does not only come about when the couple fall out. What about the position when one co-habitant dies? If a co-habitant dies without making a will, the other co-habitant is thrown back on the provisions of the Family Provision legislation⁴³. Provided that they have lived with the deceased for at least two years as the husband, wife, or civil partner of the deceased is entitled to “such financial provision as it would be reasonable in all the circumstances of the case for [him or her] to receive for his or her maintenance”⁴⁴. If they had not lived together as spouses or civil partners for two years, the surviving cohabitant can only recover anything to the extent that he or she was “immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased”⁴⁵. (In a case twenty years ago, I decided that co-habitants did not need to have had a sexual relationship in order to be living together as husband and wife⁴⁶.)

21. A surviving spouse on the other hand is entitled to everything if there are no descendants, and, if there are, to all the personal property, the first £250,000 and half the remaining estate⁴⁷. So, if the deceased is still married, but has left the spouse to cohabit with another person, possibly many years ago, and the deceased has made no will and had no children, the surviving spouse scoops the pool, subject to the surviving co-habitant being able to claim something under the 1975 Act – and the survivor will only get what is reasonable in the circumstances for his or her maintenance.

22. If the deceased has made a will, and the cohabitant is cut out from the will, then, provided he or she has lived with the deceased as a spouse or civil partner for two years, the surviving cohabitant is entitled, in the same way as in an intestacy, to claim “such financial provision as it would be

⁴⁰ See eg *Stack* [2007] 2 AC 432, para 54

⁴¹ *Radmacher (formerly Granatino) v Granatino* [2011] 1 AC 534

⁴² [2015] 1 WLR 228

⁴³ Inheritance (Provision for Family and Dependents) Act 1975

⁴⁴ Section 1(1)(c) and section 1(2)(b) of the 1975 Act

⁴⁵ Section 1(1)(e) of the 1975 Act

⁴⁶ *Re Watson (deceased)* [1999] 3 FCR 595

⁴⁷ <http://theprobatedepartment.co.uk/no-last-will/>

reasonable in all the circumstances of the case for [him or her] to receive for his or her maintenance”. On the other hand, if the deceased was married, a surviving spouse is entitled to claim “such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance”⁴⁸. No two-year rule, no requirement for living together, and no limitation to maintenance.

23. The significance of a surviving co-habitant’s claim being limited to what is reasonably required for his or her maintenance is apparent from the recent decision of the Supreme Court in the *Ilott* case decided earlier this year⁴⁹. It did not concern a claim by a co-habitant but by an estranged daughter, but the principle it established and confirmed is applicable to all claims under the 1975 Act except by surviving spouses and civil partners. As Lord Hughes said⁵⁰, “[t]he concept of maintenance is no doubt broad, but ... it cannot extend to any or everything which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living”. And, as he also explained, “[t]he level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case” and “is not limited to subsistence level”⁵¹. The limitation to maintenance in the case of a surviving co-habitant therefore places such a person in a significantly worse position than a surviving spouse or civil partner.

24. However, in a slightly different context, the Supreme Court this year could be seen as striking a blow in favour of surviving unmarried cohabitant. In the Northern Irish *Brewster* case⁵², Ms Brewster had lived together with Mr McMullan for ten years and they then became engaged to be married. Two days later, Mr McMullan, sadly, died. He worked for a government agency, whose rules for payment for death in service were governed by secondary legislation. Those rules entitled a surviving spouse or civil partner of a deceased employee to a pension, but a surviving unmarried cohabitant was only entitled to a pension if he or she had been formally nominated for a pension by the employee concerned. Due to an oversight, Mr McMullan had not nominated Ms Brewster and the agency therefore refused to pay her a pension. She contended that the requirement for nomination in the case of a surviving unmarried partner, when there was no such requirement for surviving spouses or civil partners represented unlawful discrimination contrary to article 14 of the European Convention on Human Rights.

⁴⁸ Section 1(1)(a) and section 1(2)(a) of the 1975 Act

⁴⁹ *Ilott v The Blue Cross* [2017] 2 WLR 979

⁵⁰ *Ibid*, para 14

⁵¹ *Ibid*, para 15

⁵² *In the Matter of an Application by Denise Brewster for Judicial Review (Northern Ireland)* [2017] 1 WLR 519

25. The suggestion that this requirement was justified because it helped ensure that only those in longstanding relationships would qualify was rejected by Lord Kerr, with whom the other members of the Court agreed. He explained that “the making of a nomination [would add] nothing to” a requirement that was already included in the rules, namely that a surviving unmarried partner must “show that she or he was in a longstanding relationship with the deceased scheme member and that they were either financially dependent on or financially interdependent with the deceased”⁵³. Lord Kerr then went on to reject other arguments which were said to justify the requirement for nomination in the case of unmarried partners when no such nomination was required for married partners or partners in a civil partnership. He therefore concluded that this discriminatory rule was “manifestly without reasonable foundation”⁵⁴, and also disproportionate⁵⁵, and that it was therefore unlawful and unenforceable.
26. Despite the claimant being unmarried then, the Supreme Court saw no justification for difference in treatment as compared with married couples, at least in this case. I have heard it suggested that this judicial recognition of the status of unmarried cohabitants and their entitlement to comparable treatment to those who have married, will turn out to be a significant step towards saving the unmarried from their former plight. I agree that it may well be that there will be future cases where cohabitants successfully challenge the unequal treatment which they have experienced as against married cohabitants. However, it must be remembered that the Supreme Court in *Brenster* accepted in principle that there could be different treatment; they merely decided it could not be justified in that particular case in the light of the specific regulations.
27. The appropriate legal regulation of married and unmarried relationships is inevitably sensitive to social policy considerations including questions as fundamental as the desirability of marriage as a legal institution. Recent cases in relation to both sorts of relationships demonstrate that leaving it to the common law to lead the process of reform can result in litigants being left in a position of some uncertainty. The advantages of comprehensive legislative guidance may seem attractive. But it is fair to say that the absence of such legislation leaves the judiciary freer to do what seems right to them, albeit very much within limits. The dilemma is yet another example of the tension between certainty and fairness, which is faced so often by lawyers and policy-makers. For the time being at least, and in the absence of legislative intervention, I think that the unmarried can expect a rougher ride than

⁵³ *Ibid*, para 43

⁵⁴ *Ibid*, paras 55-65

⁵⁵ *Ibid*, paras 66-67

their married counterparts, at least when relying on the law to deal with the fall-out from their falling out.

David Neuberger

21 June 2017