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THE BASIS OF THE RESULTING TRUST: ACADEMIC THEORY AND THE COURTS

MARK A. IFE LL.B.

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MASTER OF JURISPRUDENCE

UNIVERSITY OF DURHAM

DEPARTMENT OF LAW

2000



17 JAN 2001

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The law is stated as at 30th October 1999.

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Chapter 1

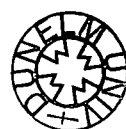
Introduction

A trust is a mechanism by which one party holds property at law which is beneficially owned by another. The trustee holds the legal title, managing the property in the same way as any other legal owner of property: the difference lies in that he manages it not for the benefit of himself but for the beneficiary, or cestui que trust. Originally, property held "on trust" was literally that. The beneficiary had no rights which could be legally enforced and it was simply a matter of trust when the settlor gave property to the trustee. However, by the end of the 1400s, the courts of equity (the Lord Chancellor's court) were beginning to enforce beneficiaries' rights.¹ Although the common law courts recognised the trustee as the owner at common law, the courts of equity recognised the beneficiary as the equitable owner.

There have been many developments in the law of trusts since the courts recognised the rights of beneficiaries, and distinctions have been drawn between different types of trust depending on the method by which they are created. Trusts can be created expressly by a settlor or can arise through operation of law. This second group consists of those trusts identified in s.53(2) of the Law of Property Act 1925 - the resulting trust, the constructive trust and a third category, often overlooked, the implied trust.² This paper will focus on the first of these categories of non-express trust - the resulting trust - and the instances in which it arises, exploring, at the same time, the academic arguments relating to its continuing development. It will, however, be seen that the constructive trust has begun to impinge on certain areas traditionally seen as employing the resulting trust, thus giving an alternate explanation to a number of cases.

¹ Riddall, *The Law of Trusts* (pub. Butterworths, 1996) p.1

² This trust arises where a seller is paid by a buyer prior to the transfer of the property which is the subject matter of the sale. In this case, until the transfer, the seller will hold the property on an implied trust for the buyer.



Until relatively recently it had been thought that the law with regard to resulting trusts was “not in doubt”.³ However, academic debate has arisen as to the true nature of such trusts and the ways in which they could be developed by the courts. Chambers believes that there has been an artificial mask created to cover the uncertainties about the nature of resulting trusts and the principles by which they operate.⁴ It is generally accepted that a resulting trust is “...a situation in which a transferee is required to hold property on trust for the transferor; or for the person who provided the purchase money for the transfer”.⁵ The person in whose favour the resulting trust arises is the person who provided the property or equitable interest vested in the person bound by the trust. Birks considers that the terminology in this area is a “great danger”. He believes, in relation to the resulting (= jumping back) trust, that more than one kind of trust can ‘result’:

“An express trust can do so. And *ex hypothesi* a resulting trust can do so. An interest ‘results’ when it jumps back to the settlor. Nevertheless, in a classification which tries to tell us how trusts come into existence, we take the risk, much magnified by an obsolete latinate usage, of saying resulting when we mean, not jumping back, but arising by presumption. It so happens that trusts arising by presumption do all result. The beneficial interest always jumps back to the settlor. But the proposition cannot be turned round. Not all jumping back trusts arise by presumption. When the quadrature is imperfect, the habit of naming something by reference to one of its characteristics, always an enemy of good taxonomy, creates unnecessary mysteries. So here, the name ‘jumping back trusts’ has deflected attention from the causative event, or events”.⁶

Academic debate has focused not on what a resulting trust is, but on whether the resulting trust arises by operation of law or whether it is dependent on an implied intention to create a trust, or a mixture of both.

Before a discussion of the situations in which a resulting trust may arise can be made, it is important to be able to define what a resulting trust actually is. Unfortunately, there seems to be “...no consensus on the principle by which the resulting trust operates”⁷ and, as Birks

³ Per Lord Reid in *Vandervell v I.R.C.* [1967] 2 AC 291, 307

⁴ Chambers, *Resulting Trusts* (pub Clarendon, 1997) p.1

⁵ Martin, *Hanbury & Martin's Modern Equity* (pub. Sweet & Maxwell, 1997) p.229

⁶ See Birks, “Misnomer” in Cornish et al. (eds.) *Restitution: Past, Present and Future* (pub. Hart, 1998) p.1

⁷ Chambers, *supra* n.4, p.1

points out: “Few lawyers will nowadays agree on this, for social pressures and analytical revisions, not to mention some wilful analytical sloppiness, have knocked the old doctrine of resulting trusts badly out of shape”.⁸

To take a general textbook definition, Riddall describes a resulting trust as one in which “...the beneficial interest springs back to the settlor”.⁹ The beneficial interest in the property transferred reverts back to the settlor and the transferee is required by equity to hold the property on a resulting trust. The essential ingredient is therefore that “...the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust”.¹⁰ A general analysis of resulting trusts was given by Megarry J in *Re Vandervell's Trusts (No. 2)*¹¹ where a number of propositions were set out. In order for a resulting trust to come into effect there must have been a transfer of, or the creation of an interest in, property. Once this has been established it is possible for a resulting trust to come into play.

We see in this classic judgment two seemingly distinct classes of resulting trust, labelled by Megarry J as “presumed resulting trusts” and “automatic resulting trusts”. The first class arises where the transfer is not made on trust, but where it does not appear from the transaction that the transferee is intended to take beneficially. Where there is an absence of consideration, or the presumption of advancement, there is a presumption that the transferee is to hold the entire interest on trust, beneficially for the transferor. Swadling believes that the label “presumed resulting trust” is misleading as he argues that what is being presumed is an intention on the part of the transferor to create a trust. He therefore prefers to label such a trust a “presumed *intention* resulting trust”.¹² As the presumed resulting trust is based on the presumed intention of the provider of the property to create it, the presumption can be rebutted by evidence to the contrary.

⁸ Birks, “Restitution and Resulting Trusts” in Goldstein (ed.) *Equity and Contemporary Legal Developments* (pub. Hebrew University of Jerusalem, 1992) p.338

⁹ Riddall, *supra* n.1, p.216

¹⁰ Per Morrison J in *Baird v Columbia Trust Co.* (1915) 22 D.L.R. 150, 151, B.C.S.C.

¹¹ [1974] Ch 269; [1974] 3 All ER 205 reversed on appeal ([1974] 3 All ER 256) but on grounds not affecting the analysis of the resulting trust.

¹² Swadling, “A new role for resulting trusts” [1996] *Leg St* 110, 113

The second class of resulting trust, the automatic resulting trust, is argued to be irrebuttable as it is traditionally seen as arising independently of intention. This trust takes effect where the transfer is made on trust but the transferor fails to dispose of some or all of the beneficial interest. Here, the transferee holds on resulting trust automatically to the extent that the beneficial interest has not been passed to him or another. The resulting trust does not establish the trust but merely reflects the beneficial interest back to the transferor.

It has been argued, and will be discussed further in this paper, that the distinction between the presumed intention resulting trust and the automatic resulting trust is not a clear one. Indeed, Chambers rejects the distinction all together, arguing that "...resulting trusts operate on precisely the same principle regardless of the situations in which they arise".¹³ For Chambers, resulting trusts arise neither through the implied intention to create a trust, nor independently of intention, but come into being where the transferor does not intend the transferee to benefit. This is a negative intention rather than a positive one. He also argues that there are more situations than the two identified in *Re Vandervell's Trusts (No. 2)* where a resulting trust will arise. On a similar line, Birks further argues that, if his paper, which he admits was "...written in a spirit of experiment",¹⁴ is correct, then simply to classify resulting trusts into two categories is "conservative".¹⁵ He proposes another series of definitions based on the notion of "non-beneficial transfer" which is intended to give a more straightforward explanation of the principles developed in case law.

This paper is not intended simply to be a description of the instances in which a resulting trust will arise, although that is an important aspect of understanding the trust. An attempt will also be made to assess the recent academic writings on the subject. Much of the paper is intended to be a critique of the ideas expounded by Dr Chambers, which follow on from the experimental writings of Professor Birks, in his comprehensive and much praised work in this area. Attempts have been made, both in the courts and in academic writings, to rely on the views of both Chambers and Birks in order to mould the development of the resulting trust. As will be seen from the discussion as to the future development in this complex area, such attempts have yet to find judicial favour.

¹³ Chambers, *supra* n.4, p.2

¹⁴ Birks, *supra* n.8, p.339

In addressing points made by Chambers, the views of other academics will be taken into account and compared. Following this, suggested alternatives will be made, and the paper concluded with an assessment of the current status of the law of resulting trusts. Although much of the development in the area has come from commercial usage, for example with regard to the arguments put forward for recovery of compound interest in *Westdeutsche*¹⁶ and in the use of the *Quistclose* trust,¹⁷ academic writings have focused more on the theory, attempting to formulate a basis on which all cases can be explained, rather than accepting that the courts may have used the law in a manner which achieves the correct decision for the case in hand but also shows the “warm sun of judicial creativity”. As such, this paper takes a similar line, although one must always bear in mind that there cannot be a hard and fast rule where decisions are taken in the light of the facts of individual cases.

¹⁵ Birks, *supra* n.8, p.361

¹⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, HL

¹⁷ *Barclays Bank Limited v Quistclose Investments Limited* [1970] AC 567

Chapter 2

Presumed Resulting Trusts

If a transferor transfers property to a transferee for no consideration then one could be forgiven for thinking that the law would presume this transfer to be a gift. This is not, however, the case where the property transferred is not land in the form of realty or leaseholds. The law appears to be that the transferor is presumed to have intended the transferee to hold the property on trust for him.¹⁸ The same occurs where a transferor transfers property into the joint names of himself and another. In this case, there is a presumption that the property is held by the two transferees on trust for the transferor, although the presumption can be rebutted by evidence of the transferor's intention, derived from the circumstances.¹⁹ Such transfers are often termed "gratuitous transfers".

A second situation where this presumption arises is where a person provides all or part of the consideration used for the purchase of property, and instructs the seller to convey the property not to himself but to a third party, or to himself and a third party jointly. Here, equity presumes that the non-contributing recipient of the property was intended by the provider of the money to hold the property purchased on trust for him.²⁰ The trust which arises in this situation is often termed a "purchase money resulting trust".

These trusts arise due to equity's suspicion of gifts, requiring the transferee to prove that the transfer was intended by the transferor to be a gift. If the transferee cannot, then the property will be held on trust for the transferor or, following the death of the transferor, the transferor's estate. As Bagnall J stated in *Cowcher v Cowcher* "[a] resulting trust arises where a person acquires a legal estate but has not provided the consideration or the whole of the consideration for its acquisition, unless a contrary intention is proved".²¹ Resulting

¹⁸ *Fowkes v Pascoe* (1875) 10 Ch App 343, 348; *Re Howes* (1905) 21 TLR 501

¹⁹ *Young v Sealey* [1949] Ch 278; [1949] 1 All ER 92

²⁰ *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 93

²¹ [1972] 1 WLR 425, 431

trusts can apply to any property which is capable of being held in trust, including personalty,²² choses in action²³ and equitable interests.²⁴

There are, however, certain circumstances where this presumption will not apply. The first, arguably,²⁵ relates to transfers of land, where the presumption has been removed by s.60(3) of the Law of Property Act 1925.²⁶ Prior to the 1540 Statute of Wills it was impossible to devise land at common law. As a result, it became commonplace for landowners to convey their land *inter vivos* to feoffees who would hold the land to the use of the landowner during his lifetime and on death convey it according to the wishes of the landowner. By 1535 the practice of holding land in use had become so common, with most of the land being held as such, that the Statute of Uses was passed in an attempt to end the practice, operating whenever land was transferred without consideration. The statute executed an implied trust in favour of the transferor, with the result that the legal estate was transferred from the transferee (the trustee under the implied trust) to the transferor (the beneficiary), returning the fee simple to where it had started and leaving the transferee with nothing. Whereas before, if A, having the legal estate, had covenanted that he would stand seised to the use of B, this had given B a use in the land, following the passing of the Statute, it passed the legal estate to B.²⁷ In order to make a gratuitous transfer, the conveyance to the transferee had to contain a statement to the effect that the land was conveyed “unto and to the use of” the transferee, so as to avoid the statute and allow the fee simple to be conveyed free of any trust. From 1926, however, the removal of the presumption of a trust was achieved by s.60(3) of the Law of Property Act 1925 which provides that “[i]n a voluntary conveyance a resulting trust for the grantor shall not be implied merely by

²² *The Venture* [1908] P 218

²³ *Shephard v Cartwright* [1955] AC 431

²⁴ *Re Vandervell's Trusts (No. 2)* [1974] Ch 269

²⁵ There is considerable support for the argument that there is no presumption of a resulting trust where there is a voluntary transfer of land, and although the academic debate has been recognised by the courts (see *Hodgson v Marks* [1971] 1 Ch 892, 933 and *Tinsley v Milligan* [1994] 1 AC 340, 371) it has not been resolved. See Megarry and Wade, *The Law of Real Property* (5th Ed., pub. Sweet & Maxwell, 1984) p. 471; Hackney, *Understanding Equity and Trusts* (pub. Fontana Press, 1987), pp.148-9; Gray, *Elements of Land Law* (2nd Ed., pub. Butterworths, 1993) p. 388

²⁶ For further discussion see Simpson, *A History of the Common Law of Contract* (pub. Clarendon Press, 1975); Barton, “The Medieval Use” (1965) 81 *LQR* 562; Stone, “Resulting Trusts and the Statute of Uses” (1906) 6 *Columbia LR* 326

²⁷ Maitland, *Equity: A Course of Lectures* (ed. Chaytor and Whittaker, revised Brunyate) (pub. Cambridge, 1936; reprinted 1969) p.35

reason that the property is not expressed to be conveyed for the use or benefit of the grantee”.

A second circumstance where there is no presumption of a resulting trust is where the presumption of advancement applies. Here, equity presumes that a gift was intended,²⁸ creating no trust. There will be a presumption of advancement whenever the relationship between transferor and transferee is such that equity sees the former to be under an obligation to provide for the latter. This occurs, for example, where the transferor is the father²⁹ or husband³⁰ of the transferee, or stands *in loco parentis*.³¹ However, a presumption of advancement does not arise where the transferor is the mother³² or wife³³ of the transferee, or the transferee is the mistress of the transferor.³⁴ The presumption, that the transfer was intended as a gift, can be rebutted, however, if the transferor can show that he intended the transferee to hold on trust for him.³⁵

If a transfer occurs, where the presumption of advancement applies, and the motive of the transferor was not a “proper” one, then he will not be allowed to claim that he intended the transferee to hold on trust for him.³⁶ If, however, the improper purpose of the transfer is never actually put into effect, then there will be an exception to the principle that the transferor cannot rely on his improper motive to rebut the presumption, and he may adduce the evidence.³⁷ A motive will be considered to be legally improper where, for example, the transfer occurs as a method of attempting to evade tax³⁸ or to defraud creditors.³⁹ This will be the case even if the transferee knows the motive for the transfer, enabling him to benefit

²⁸ *Re Figgis* [1969] 1 Ch 123; [1968] 1 All ER 999

²⁹ *Dyer v Dyer* (1788) 2 Cox Eq Cas 92

³⁰ *Gascoigne v Gascoigne* [1918] 1 KB 223; *Mercier v Mercier* [1903] 2 Ch 98

³¹ *Shephard v Cartwright* [1855] AC 431, 445. The presumption also applies to an illegitimate child (*Beckford v Beckford* (1774) 98 ER 763, 764), an adopted child (*Standing v Bowring* (1886) 31 Ch D 282, 287) and a stepchild (*In re Paradise Motor Co Ltd* [1968] 1 WLR 1125, 1140A).

³² A presumption of advancement will only arise as between a mother and child if she has assumed a father’s responsibility for the child. See *Bennet v Bennet* (1879) 10 Ch D 474. For further discussion see Dowling, “The Presumption of Advancement between Mother and Child” [1996] *Conv.* 242

³³ *Mercier v Mercier* [1903] 2 Ch 98

³⁴ *Soar v Foster* (1858) 4 K & J 152; *Diwell v Farnes* [1959] 1 WLR 624

³⁵ *Hoddinott v Hoddinott* [1949] 2 KB 406

³⁶ *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494

³⁷ *Tribe v Tribe* [1995] 4 All ER 236, [1995] 3 WLR 913

³⁸ *Re Emery’s Investments’ Trusts* [1959] Ch 410, [1959] 1 All ER 577

³⁹ *Gascoigne v Gascoigne*, *supra* n.30

from an improper motive (although whilst the transferor cannot adduce the improper motive in an attempt to rebut the presumption of advancement, the transferee will also be unable to use evidence of the motive to support a claim). Where there is no presumption of advancement, equity's presumption of a resulting trust will apply and there will be no need for the transferor to try to rely on his improper motive.⁴⁰

With the increased financial independence of women the presumption of advancement in relation to ownership of the matrimonial home, as laid down in *Re Eykyn's Trusts*,⁴¹ has been questioned and its application has diminished. Lord Diplock has stated that:

“...it would in my view be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples ‘presumptions’ which are based upon inferences of fact which an earlier generation of judges drew as the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era.”⁴²

Lord Denning added, in *Falconer v Falconer*, that the presumption of advancement “...found its place in Victorian days when a wife was utterly subordinate to her husband. It has no place, or at any rate, very little place, in our law today”.⁴³

The reason that equity applies these presumptions is that in certain situations “...the intention with which an act is done affects its legal consequences...”⁴⁴ and where the evidence does not disclose what the actual intention was, then the presumptions are the courts’ imputation “technique”. As Lord Diplock points out, “...presumptions of this type are not immutable”.⁴⁵ They are simply a judicial consensus developed through the case law and as such are dependent on judicial thought at any given time. The acts done by a transferor to which the presumptions apply will alter according to societal changes and judicial paradigm shift. Indeed, the use of presumptions has been described by Morris as

⁴⁰ *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL

⁴¹ (1877) 6 Ch D 115

⁴² *Pettitt v Pettitt* [1970] AC 777, 824C

⁴³ [1970] 1 WLR 1333, 1335H-1336A

⁴⁴ [1970] AC 777, 823 per Lord Diplock

⁴⁵ *Ibid.*

“[p]erhaps the greatest anachronism in modern equity”.⁴⁶ In modern relationships Morris believes that, under the established principles of equity, the determination of the question as to which of the two possible presumptions, advancement or resulting trust, is operative give rise to a number of anomalies which he feels should not be allowed to continue unresolved. His solution would be not to see the presumptions as irrebuttable rules, but rather as “inferences”. Morris takes his lead from dicta of Sir Isaac Isaacs in the Australian High Court case of *Scott v Pauly*⁴⁷ where it was suggested:

“If it ever comes to be questioned, it may be that the solution will be found in the circumstance that the ‘presumption’...is an inference which the Courts of equity in practice drew from the mere fact of the purchaser being the father, and the head of the family, under the primary moral obligation to provide for the children of the marriage, and in that respect differing from the mother. In the case of his death the inference called a presumption as to the mother might well be different from that where the father was still alive.”

From this Morris puts forward the proposition that “...an intention to advance may be inferred from the existence of a personal, social or domestic relationship which is of such a nature as to provide a rational foundation for the drawing of that inference”.⁴⁸ Rather than looking at considerations such as whether the parties have undertaken a civil or religious ceremony, Morris would rather look to the features of such a relationship including those of mutual love and affection, cohabitation or personal intimacy. This would place the presumptions, rather than as absolute rules, as evidential guides to be looked on as “...bits of the law, flitting in the twilight but disappearing in the sunshine of actual facts”.⁴⁹ It seems unlikely, however, that these presumptions will disappear altogether from the realm of resulting trusts, and so what Morris hopes for is that the “...courts exercising equitable jurisdiction will follow the approach adopted by McInerney J in *Carkeek v Tate-Jones*,⁵⁰ of regarding such presumptions as readily rebuttable”.⁵¹

⁴⁶ Morris, “Equity’s Reaction to Modern Relationships” in Oakley (ed.), *Trends in Contemporary Trust Law* (pub. Clarendon, 1996) p.276

⁴⁷ (1917) 24 CLR 274

⁴⁸ Morris, *supra* n.46, p.287

⁴⁹ Per Lamm J in *Mocowik v Kansas City, St. Joseph and Council Bluffs Railroad* (1906) 196 No 550, 551, 94 SW 256

⁵⁰ [1971] VR 691, 696

The presumption of a resulting trust

It is generally accepted that there will be a presumption of a resulting trust of a legal estate:

“...whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive - [in favour of] the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it”.⁵²

As noted above there have traditionally been two situations to which this definition applies; the first is where a transferor transfers property to a transferee for no consideration or transfers property into the joint names of himself and another; and the second is where a person provides all or part of the money for the purchase of property and instructs the seller to convey the property not to himself but to a third party, or into the joint names of himself and a third party.

1. Gratuitous Transfers (Apparent Gifts)

Where there is a transfer in the absence of consideration between two parties to which the presumption of advancement does not apply, there is a presumption of a resulting trust in favour of the transferor. This is “...absolutely orthodox equity. Only a frontal assault on the very notion of the presumption of resulting trust could upset it”.⁵³ A gratuitous transfer occurs either where a transferor transfers the whole of the legal title to property to a transferee or transfers part of the legal title, retaining part, placing it in joint names. In *Standing v Bowring*, Cotton LJ asserted that:

“...the rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *prima facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted by shewing that at the time the transferor intended a benefit to the transferee...”.⁵⁴

⁵¹ *Morris*, *supra* n.46, pp.287-288

⁵² *Dyer v Dyer*, *supra* n.29 per Eyre CB

⁵³ *Birks*, *supra* n.8, p.342

⁵⁴ (1886) 31 Ch D 282, 287

In this case a widow transferred Consols (irredeemable British government securities carrying annual interest) into the joint names of herself and her godson. Her express intention was that during her lifetime she would take the dividends and, on her death, the godson would have the benefit of the Consols. Later she tried to have the fund re-transferred into her sole name. However, the presumption of a resulting trust was rebutted as there was evidence that the plaintiff did not, when she made the transfer, intend to make the defendant a mere trustee for her, except as to the dividends.

As Riddall notes, this situation can "...lead to absurd results".⁵⁵ In *Re Vinogradoff*⁵⁶ a War Loan had been transferred into the joint names of a grandmother and her four year old granddaughter. The grandmother continued to take the dividends and on her death the granddaughter became absolute legal owner by survivorship. However, Farwell J concluded that the granddaughter had no beneficial interest as the Loan had been held by the joint legal owners on a resulting trust for the grandmother,⁵⁷ and now by the granddaughter on a resulting trust for the grandmother's estate. Riddall asks the question as to why the grandmother would wish her four year old granddaughter to be a trustee. Bearing in mind that what is being presumed by the court is the intention of the transferor at the time of the transfer,⁵⁸ it seems strange that a resulting trust was effected.

2. Purchase money resulting trusts

Where property is transferred to a recipient, but it is a third party who provides the consideration, then there will be a presumption that the recipient holds the property on a resulting trust for the provider of the purchase monies. Similarly, where property is transferred to a recipient, and the consideration is provided in part by the recipient and in part by a third party, then there will be a presumption that the property is held by the recipient on a resulting trust for himself and the third party jointly, proportionately to their contributions to the purchase price.

⁵⁵ Riddall, *supra* n.1, p.225

⁵⁶ [1935] WN 68

⁵⁷ A minor cannot validly be appointed trustee of either real or personal property (s.20 Law of Property Act 1925), but can, by operation of law, as here, become a trustee.

⁵⁸ *Standing v Bowring*, *supra* n.31

Although Lord Diplock refers to “purchase money”, and in general the consideration will be cash, it can be seen from *Springette v Defoe*⁵⁹ that a resulting trust can arise whatever form the consideration takes. In this case the subject matter of the purchase was a council house which the court found to be held on a resulting trust for the plaintiff where the consideration took the form of her 11 years as a council tenant. This period translated into a 41 per cent discount on the purchase price and was held to constitute consideration for the purposes of the trust.

A trust may also arise where the purchase price is paid by more than one person. In such a case if the legal title does not mirror the contributions, there will be a resulting trust in favour of the contributors proportionately. In *Cowcher v Cowcher*⁶⁰ the court held that where the purchase price of a house had been contributed to in the proportions of one third and two thirds, then each contributor was beneficially entitled to the same proportion of the beneficial interest, which would be held by the legal owner on a resulting trust. Similarly, in *The Venture*⁶¹ a yacht was bought by two brothers each contributing equally to the purchase price. The yacht was registered in the sole name of one of the brothers and on his death his widow claimed to be entitled to the yacht absolutely. The second brother argued that the yacht had been bought on a partnership basis, whereas the widow argued that the money had been advanced by way of loan. The Court of Appeal held that as half of the purchase price had been paid by the brother there was a presumption of a resulting trust entitling him to a corresponding interest in the yacht, and “[t]hat being the presumption, it was, of course, open to the other side to displace that presumption, but it was not incumbent on [the brother] to prove more than that. It was for the other side to displace the presumption if they could...”⁶²

⁵⁹ (1992) 24 HLR 552

⁶⁰ [1972] 1 WLR 425

⁶¹ *Supra* n.22

⁶² *Ibid.*, 230 per Farwell LJ

The Court's presumption

It is important to the understanding of the application of the presumed resulting trust that what is being presumed by the Court is also understood. In other words, where there is a transfer of property to a person who does not provide any consideration, what is it that the Court is presuming when it imposes a trust? The answer is that it is "...the intention of the person who provided the property".⁶³ Unfortunately this is not as straight-forward as it seems, as judicial and academic debate has arisen as to what form this intention should take: whether it is the positive intention to create a trust in favour of himself,⁶⁴ or the negative intention of not intending to pass the benefit, or make a beneficial gift, of the property transferred.⁶⁵ As Chambers notes⁶⁶ the first argument is the most popular, although he feels that the second is the better view. Chambers also believes that the distinction is crucial to an understanding of the resulting trust and has important practical consequences.

It is generally accepted⁶⁷ that the resulting trust developed in the field of land law as a consequence of landowners' attempts to avoid the problem of not being able to devise their land. Development then followed on the lines of absence of consideration, with Lord Nottingham C describing the presumption of a resulting trust as follows: "Generally and *prima facie*, as they say, a purchase in the name of a stranger is a trust, for want of consideration...".⁶⁸ As the resulting trust evolved, the focus changed from absence of consideration to the presumed intention of the transferor.

The Australian case of *Dulow v Dulow*⁶⁹ is a case which seems to support the view that the presumption is of an intention to create a trust. In this case the plaintiff purchased

⁶³ Chambers, *supra* n.4, p.19

⁶⁴ *Fowkes v Pascoe* (1875) 10 Ch App 343, 348-9; *Gissing v Gissing* [1971] AC 886, 902; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All ER 961, 990-1; [1996] AC 669, 708; Riddall, *The Law of Trusts* (5th Ed., pub. Butterworths, 1996) p.225; Martin, *Hanbury & Martin's Modern Equity* (15th Ed., pub. Sweet & Maxwell, 1997) p. 245; Oakley, *Parker & Mellows: The Modern Law of Trusts* (6th Ed., pub. Sweet & Maxwell, 1994) p.189; Swadling, "A new role for resulting trusts?" (1996) 16 *Leg St* 110, 113

⁶⁵ Birks, "Restitution and Resulting Trusts" in Goldstein (ed.), *Equity and Contemporary Legal Developments* (pub. Hebrew University of Jerusalem, 1992) p. 346

⁶⁶ Chambers, *supra* n.4, p.19

⁶⁷ Goo, *Sourcebook on Land Law* (pub. Cavendish, 1994) p.38; Maitland (ed. Fisher), *The Collected Papers of Frederic William Maitland vol. III* (pub. Cambridge, 1911) p.335

⁶⁸ *Grey v Grey* (1677) 2 Swans 594, 597

⁶⁹ (1985) 3 NSWLR 531

properties for her sons. The Court held that from the evidence provided "...the plaintiff's intention was to reserve a beneficial interest in the properties for herself during her lifetime" and as such there arose a resulting trust of a life estate. Chambers argues, however, that such cases can also be explained in the negative; that the transferor did not intend for the benefit to pass to the recipients (in this case, until after her death).

In *Fowkes v Pascoe*⁷⁰ a testatrix purchased, both before and after she made her will, stock in the names of herself and the son of her daughter-in-law. In his judgment, Mellish LJ, when assessing the weight of the presumption, stated that in some cases "...the inference would be very strong indeed that [the transfer] was intended solely for the purpose of a trust...".⁷¹ Where there was a close relationship, as here, however, the presumption would be easier to rebut. Thus it would seem that, for Mellish LJ, the inference is whether the transferor intended a trust to arise from the transfer.⁷²

Chambers goes on to provide a detailed discussion of a number of situations in which he feels that "...the converse is not true",⁷³ i.e. where the cases cannot be explained by a positive intention to create a trust. His explanation of the Courts' reasoning is that what is presumed is *no intention to benefit the recipient*. He identifies resulting trust cases where the provider was unaware of the transfer, was incapable of creating a trust, or where property was transferred by mistake.

1. Ignorance

The first situation, termed "ignorance",⁷⁴ is where property is transferred to a third party without the knowledge of the beneficial owner. In such a case it is difficult to argue that a resulting trust arises due to the intention of the beneficial owner to create a trust. In *Ryall v*

⁷⁰ *Fowkes v Pascoe*, *supra* n. 18

⁷¹ *Ibid.*, 352

⁷² See also *Gissing v Gissing* [1971] AC 886, 902; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All ER 961, 990-1, [1996] AC 669, 708

⁷³ Chambers, *supra* n.4, p.21

⁷⁴ See Birks, *An Introduction to the Law of Restitution* (pub. Oxford, 1989 (revised edition)) pp.140-1. Birks defines this head as "...nothing to do with being unlearned or ill-educated. The word is chosen here to denote the factor which calls for restitution when wealth is transferred to a defendant wholly without the knowledge

Ryall land was purchased by an executor in his own name using proceeds from the estate. On the executor's death the beneficiaries brought a claim against the executor's beneficiaries for their legacies to be paid out of the executor's estate. They had no knowledge of the purchases, but this fact did not stop a resulting trust from being applied, with Lord Hardwicke noting that the resulting trust was excepted out of the Statute of Frauds, and stating that "...if the estate is purchased in the name of one, and the money paid by another, it is a trust notwithstanding there is no declaration in writing by the nominal purchaser".⁷⁵ A possible problem with relying on this case is that here the executor was never in the position of being the beneficial owner of the estate which he used to purchase the property. This was not a case of money used to purchase property in the name of another, but the use of trust money by a trustee to purchase property in his own name. It is therefore submitted that in such a case the trust which is imposed on the executor is not a resulting trust but a constructive trust. It is a well-established principle that a trustee cannot use trust money for his own benefit. It is "...a principle founded on no technical rule of law, but on the highest principles of morality..."⁷⁶ that any personal gain from the trust will be held on a constructive trust for the beneficiaries.⁷⁷ As the property is in a traceable form there is a claim *in rem* for the recovery of the property.

Birks notes that so long as the practical consequences implied by both the labels 'resulting trust' and 'constructive trust' are substantially the same, the precise line between the two has very little importance, except in the not unimportant intellectual business of separating different doctrines.⁷⁸ In addition, the use of trust money by a trustee for his own benefit rather than for the beneficiaries can be seen as an extension above and beyond the example of the stolen bag of coins given in *Westdeutsche Landesbank Girozentrale v Islington LBC*.⁷⁹ In this case, Lord Browne-Wilkinson stated that stolen monies are traceable in equity; however, he expressly rejects the idea that this is based on the imposition of a resulting trust. Rather, it is a constructive trust under which equity enforces the proprietary

of the plaintiff. He is unaware of the transfer. Unconscious of it. This is the most extreme case on, or more accurately before, the spectrum of vitiated intention".

⁷⁵ (1739) 1 Atk 59, 59-60

⁷⁶ *Aberdeen Town Council v Aberdeen University* (1877) 2 App Cas 544, 549 per Lord Cairns LC

⁷⁷ *A-G for Hong Kong v Reid* [1994] 1 All ER 1, PC; *Hussey v Palmer* [1972] 1 WLR 1286

⁷⁸ Birks, "Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case" [1996] *RLR* 3, 15

⁷⁹ *Supra* n.16

interest.⁸⁰ This is despite the fact that previously it was thought that a constructive trust would not arise where property had simply been stolen.⁸¹

A second case used by Chambers, by way of illustration, is *Lane v Dighton*⁸² where a husband purchased land in his own name using assets from a marriage settlement which he had persuaded the trustees to release to him. Under the trust, the husband was only entitled to an interest for life with the remainder to his wife and children. Despite the wife and children having no knowledge of the purchase,⁸³ it was found that the husband held the property on a resulting trust for them. Chambers argues⁸⁴ that the reason for this decision was that Clarke MR relied on the principle that "...if A buys land in the name of B, A may prove that he paid the consideration, and there will be a resulting trust for him".⁸⁵ As in *Ryall v Ryall* above, the problem with relying on this case is that the money used by the husband was money to which he had never owned the entire beneficial interest. This was not a straightforward case of purchase in the name of another, as it was not the beneficiaries under the trust who were making the purchase in the name of the husband, but the husband using their money to purchase property in his own name. It is respectfully submitted that this situation would no longer be decided within the realm of the resulting trust, but rather the husband would be held to hold the property on a constructive trust as a purchaser in breach of trust, for the reasons identified above. A second reason for not relying on such cases to support the argument of a resulting trust is that the cases were decided before the emphasis changed from consideration to intent. Indeed, Chambers notes that the attitude of the courts towards the resulting trust "evolved" over time to focus more on the presumed intention of the transferor rather than resting on who had provided the consideration.⁸⁶

⁸⁰ *Ibid.*, 716

⁸¹ See *Lister v Stubbs* (1890) 45 Ch D 1 where the defendant was held to be in a debtor-creditor relationship with the plaintiff. See also Smith, "Constructive Trust for Breach of Fiduciary Obligation" (1998) 114 *LQR* 14

⁸² (1762) Amb 409

⁸³ As noted by Grant MR in *Lench v Lench* (1805) 10 Ves 511, 517

⁸⁴ Chambers, *supra* n.4, p.22

⁸⁵ *Lane v Dighton* (1762) Amb 409, 411

⁸⁶ Chambers, *supra* n.4, p.20

In *Williams v Williams*⁸⁷ a father purchased some land. Following instructions from the son, the solicitor, who believed these to be the wishes of the father, made the conveyance out in the name of the son. If the father had transferred the land into his son's name, the presumption of advancement would have applied.⁸⁸ It was held, however, that as the father had given no general or particular authority to the son, "...the son must be declared to have been a trustee thereof for his father".⁸⁹ Chambers argues that the father's ignorance of the fact that the conveyance had been made into his son's name rebutted the presumption of advancement as it could not be argued that the father had intended his son to benefit, and so gave rise to a *resulting* trust. In addition he believes that the outcome "...should have been reversed if the presumption of resulting trust was either that the father intended to create a trust or that he positively intended not to benefit his son".⁹⁰ The Court did not, in this case, classify the type of trust which arose as a result of the transfer into the son's name. It would seem, however, that as the property was transferred into the name of the son due to the son's instructions to the solicitor, the trust would be constructive, based on the son's unconscionable behaviour in knowingly inducing a breach of fiduciary duty.⁹¹

Finally, Chambers cites the case of *El Ajou v Dollar Land Holdings plc*⁹² which he believes "...may herald a revival of the application of the resulting trust to these situations".⁹³ In this case, the plaintiff's agent was bribed to invest the plaintiff's money in worthless shares. This money finally ended up being invested in property owned by the defendant. The Court, at first instance, held that the plaintiff was able to trace his money in equity on the basis of his fiduciary relationship to his agent. Millett J felt that for the other victims of the fraud who were unable to take advantage of such a relationship it would "...be an intolerable reproach to our system of jurisprudence if the plaintiff were the only victim who could trace and recover his money".⁹⁴ He concluded that all the victims were able to trace on the basis that they were able to rescind the contracts made as a result of the false

⁸⁷ (1863) 32 Beav 370

⁸⁸ See above p.8

⁸⁹ *Williams v Williams*, *supra* n.87, 378

⁹⁰ Chambers, *supra* n.4, p.22

⁹¹ See *Eaves v Hickson* (1861) 30 Beav 136 where the father of the recipients of trust money, who had forged a certificate of marriage so as to deceive the trustees, was held to be responsible and liable to account for the money.

⁹² [1993] 3 All ER 717; decision reversed at [1994] 2 All ER 685

⁹³ Chambers, *supra* n.4, p.22

and fraudulent misrepresentations. This would re-vest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim.⁹⁵ Once this occurred, Millett J saw no difference between their position and that of the plaintiff, who could rescind the purchases for the bribery of his agent; the trust that he felt to be operating was "...not some new model remedial constructive trust, but an old-fashioned institutional resulting trust".⁹⁶ Chambers argues that the resulting trust, identified by Millett J, arose even though at the time of the transfer the plaintiff was unaware of the situation and so could not have intended for there to be a transfer on trust.⁹⁷ Millett LJ, as he then was, admitted that in reaching his decision in *El Ajou* he was:

"...concerned to circumvent the supposed rule that there must be a fiduciary relationship or retained beneficial interest before resort may be had to the equitable tracing rules. The rule would have been productive of the most extraordinary anomalies in that case, and its existence continually threatens to frustrate attempts to develop a coherent law of restitution. Until the equitable tracing rules are made available in support of the ordinary common law claim for money had and received, some problems will remain incapable of sensible resolution".⁹⁸

Whether this is good law, rather than simply an attempt by Millett J to circumvent another rule, is thus debatable. If he is correct about the trust which arises then this reasoning does seem to support the proposition put forward by Chambers that the resulting trust is based on a lack of intention to benefit the person to whom the property is transferred, rather than on an intention to create a trust in their favour, for example, because he is unaware of the transfer. It is respectfully submitted, however, that these cases can be seen as either unreliable or decided on the basis of a resulting trust where a constructive trust would now be more appropriate, and so do not give great weight to Chambers's academic argument.

⁹⁴ *El Ajou*, *supra* n.92, 734

⁹⁵ The High Court of Australia in *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 390 preferred to see this trust as constructive rather than resulting in nature.

⁹⁶ *El Ajou*, *supra* n.92, 734. This statement was, however, *obiter dicta* and as such was not commented upon by the Court of Appeal.

⁹⁷ Chambers, *supra* n.4, p.23

⁹⁸ *Bristol & West Building Society v Mothew* [1996] 4 All ER 698, 716

2. Incapacity

The second situation where Chambers believes the presumption *cannot* be an intention to create a trust is where the transferor does not have the legal or mental capacity. He uses the Canadian case of *Goodfellow v Robertson*⁹⁹ in an attempt to illustrate that where the transferor is of unsound mind a resulting trust will apply due to there being no “assenting mind”. He notes that the evidence of incapacity does not act to rebut the resulting trust, whereas if the intention was to create a trust, one would expect the opposite to be true, and so a resulting trust cannot be based on an implied intention to create a trust. One assumes that this argument is based on the fact that a trust cannot be created by a person who does not have capacity. Capacity to create a trust is “...in general, the same as capacity to hold and dispose of any legal or equitable estate”.¹⁰⁰ With regard to persons of unsound mind, under the Mental Health Act 1983 where a patient is incapable of managing his affairs any *inter vivos* disposition or settlement made by him will be void, if a receiver has been appointed,¹⁰¹ under the same principles as the old law.¹⁰² If a receiver has not been appointed then the question is whether the person concerned is capable of understanding what he is doing once it has been fully explained to him.

It is submitted, however, that this is not a correct interpretation of how the presumption of a resulting trust is rebutted. Rather than showing that it would not be possible for the transferor to have a legal intention to create a trust, it is incumbent on the transferee to show evidence of an intention inconsistent with such a presumption. The resulting trust will stand until the transferee can put forward evidence of a positive intention inconsistent with the imposition of a trust, rather than passive evidence of inability to create a trust.

3. Mistake

The third situation identified is where property has been transferred by mistake and the court has held that the recipient holds the property on trust for the transferor. Chambers

⁹⁹ (1871) 18 Gr 572

¹⁰⁰ Pettit, *Equity and the Law of Trusts* (pub. Butterworths, 1997) p.39

¹⁰¹ Mental Health Act 1983 ss. 94 and 99

¹⁰² See *Re Walker* [1905] 1 Ch 160, CA; *Re Marshall* [1920] 1 Ch 284

does not go into detail about the cases he uses to support this argument,¹⁰³ but does point out that the courts have rarely *classified* the trusts in such situations.

In *Leuty v Hillias*¹⁰⁴ property was sold in an auction. The first lot, sold to the plaintiff, comprised of land contained in two leases; that of number 20 and the adjacent number 21. The second lot, sold to the defendant, comprised solely the house in the lease of number 21. However, when the conveyances were taken from the vendor, the plaintiff received only the property contained in the lease of number 20, with the defendant receiving all the property contained in the lease of number 21. The court held that as the defendant had received more than was included in his contract, he became "...merely a trustee of the excess"¹⁰⁵ and as such the plaintiff was entitled to an assignment from the defendant. Lord Cranworth LC did not, however, go on to classify the type of trust which had arisen or debate the principles on which it had arisen.

A similar situation arose in *Craddock Brothers v Hunt*¹⁰⁶ where a parcel of land was divided and sold, part to the plaintiffs and part to the defendant. However, a mistake arose in transferring the oral agreement into the written form, embodying the mistake into the conveyance which transferred part of the land paid for by the plaintiffs to the defendant. The Court held that as the land had been paid for by the plaintiffs, the defendant became a trustee of the legal estate for the plaintiffs and must be ordered to convey it to them.

In *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd.*¹⁰⁷ the plaintiff bank paid \$2 million to a second bank for account of the defendant bank. The court held that "...a person who pays money to another under a factual mistake retains an equitable property right in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right".¹⁰⁸ In arriving at this decision, however, Goulding J stated, "I am fortified in my opinion by the speech of Viscount Haldane LC in *Sinclair v*

¹⁰³ *Leuty v Hillias* (1858) 2 De G & J 110; *Craddock Brothers v Hunt* [1923] 2 Ch 136, CA; *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd.* [1981] Ch 105

¹⁰⁴ (1858) 2 De G & J 110

¹⁰⁵ *Leuty v Hillias*, *supra* n.103, 122

¹⁰⁶ [1923] 2 Ch 136, CA

¹⁰⁷ [1981] Ch 105

¹⁰⁸ *Chase Manhattan*, *supra* n. 103, 119

Brougham".¹⁰⁹ *Sinclair* has since been overturned by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*,¹¹⁰ and so must throw the decision in *Chase Manhattan* into doubt. In addition, rather than seeing this as a resulting trust, Hudson argues that the case should be "...more properly regarded as one of unjust enrichment or remedial constructive trust because of the absence of any recognisable fiduciary relationship between the parties".¹¹¹

4. Unenforceable Intention - *Hodgson v Marks*

Chambers continues to develop his theory, attempting to assess the case of *Hodgson v Marks*.¹¹² In this case the plaintiff had executed a voluntary transfer of her house to her lodger who became the sole registered proprietor. It had been orally agreed, however, that the beneficial ownership of the house was to remain with the plaintiff. This was an oral trust of land, void under s.53(1)(b) of the Law of Property Act 1925 which states that "...a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust...". If Mrs Hodgson, the plaintiff, was to be held to have retained her beneficial interest, the courts would have to overcome this difficult obstacle. Ungood-Thomas J, at first instance, accepted the argument of the plaintiff that equity does not allow statute to be used as an instrument of fraud. The Court therefore held that s.53(1) should not apply to this case and Mrs Hodgson retained her interest under the oral trust. At the appeal, three arguments were put forward by the plaintiff to support her claim for the beneficial interest. The first was that which had been accepted by Ungood-Thomas J, that for the defendant to plead the statute would be contrary to the general principle that the statute should not be used as an instrument of fraud. In the alternative, the second argument was that the plaintiff had only transferred the legal title and that the equitable title had never left her, as such the case was not one which fell within s.53(1) but was rather a constructive trust within s.53(2). The third argument, again in the alternative, was that, if there was an attempt to create an

¹⁰⁹ *Ibid.*

¹¹⁰ *Westdeutsche, supra* n.16, 713 (per Lord Browne-Wilkinson), 718 (per Lord Slynn of Hadley) and 738 (per Lord Lloyd of Berwick)

¹¹¹ Hudson, *Equity and Trusts* (4th ed., pub. HLT Publications, 1995) p.122; see also *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 390 per Brennan J

¹¹² [1971] 1 Ch 892

express oral trust which failed for lack of writing, there was, in the light of accepted evidence that a gift to the lodger was not intended, a resulting trust for the plaintiff which was excepted from the requirement for writing by virtue of s.53(2).

In the Court of Appeal, Russell LJ, giving judgment for the Court, held that s.53(1) could be relied upon by the defendant, contrary to the view expressed by Ungood-Thomas J, and following that, the express oral agreement or declaration of trust could not be effective as such. The Court noted, however, that the evidence seemed clear that the transfer was not intended to operate as a gift, and so there seemed no reason that a resulting trust should not arise, unaffected by the operation of s.53(1). Russell LJ continued, stating that:

“It was argued that a resulting trust is based upon implied intention, and that where there is an express trust for the transferor intended and declared - albeit ineffectively - there is no room for such an implication. I do not accept that. If an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust, whether the failure be due to uncertainty, or perpetuity, or lack of form. It would be a strange outcome if the plaintiff were to lose her beneficial interest because her evidence had not been confined to negating a gift but had additionally moved into a field forbidden by section 53(1) for lack of writing. I remark in this connection that we are not concerned with the debatable question whether on a voluntary transfer of land by A to stranger B there is a presumption of a resulting trust. The accepted evidence is that this was not intended as a gift, notwithstanding the reference to love and affection in the transfer, and section 53(1) does not exclude that evidence”.¹¹³

In his book, *An Introduction to the Law of Restitution*, Birks gives an analysis of the ruling in *Hodgson v Marks*.¹¹⁴ He believes that Mrs Hodgson's equitable fee simple was restitutionary as it had the effect of causing her lodger to give up “...precisely the increment in his wealth obtained at her expense”.¹¹⁵ In addition, he argues that her interest could not have been brought into existence by consent. If it had, its conformity to a restitutionary measure would simply have been by chance. Birks's reasoning for this argument is that the manifestations of intent or consent were “...expressed in a manner

¹¹³ [1971] 1 Ch 892, 933 per Russell LJ

¹¹⁴ Birks, *supra* n.74, pp.58-62

¹¹⁵ Birks, *ibid.*, p.59

which meant that they had to be ignored”.¹¹⁶ Express trusts come into existence as a result of the settlor’s intention but “...because of s.53(1), this was not an express trust”. He also argues that the trust was not one based on the intent of the settlor as inferred from the facts (one which he terms an “implied trust”): to argue the contrary would be an effective repeal of s.53(1) as every oral declaration which ought to be in writing under s.53(1) would then take the benefit of s.53(2) as an implied declaration.

For the sake of completeness Birks distinguishes the type of trust that he feels arose in the case, although as he points out “the characterisation of Mrs. Hodgson’s interest as restitutionary does not...depend on our knowing whether it arose under a resulting or a constructive trust”.¹¹⁷ He feels that the “*Hodgson* trust” is better considered constructive rather than resulting, the reason for this being contained in a general discussion on the characteristics of the resulting trust. Birks argues that the term “resulting trust” can apply to two situations. The first is termed “resulting in pattern”. This simply means that what happens is that the subject matter of the trust returns to the transferor. As Birks points out, this can happen whether the trust is by express intention, implied intention or no intention (as with the constructive trust), and so cuts across the other trust classifications. The second situation Birks terms “resulting in origin”. This relates to the way the trust originates, the returning of the subject matter to the transferor being the result. It is these trusts which are now classified as automatic resulting trusts and presumed resulting trusts.

For Birks, the *Hodgson* trust could not have been an automatic resulting trust, which arises where an express trust fails. For such a trust to apply there must have been a transfer to a trustee upon trust which then fails, and as he has already argued, an express trust could not have occurred in this situation. He also argues that it is difficult to regard this as a presumed resulting trust, as statute has cancelled or at least thrown into doubt such a presumption in respect of transfers of land.¹¹⁸ In addition, Russell LJ said that the Court need not be concerned with this debate, and so the trust as was applied could not have been a presumed resulting trust. Birks therefore believes that the best way of seeing the trust in

¹¹⁶ Birks, *ibid.*, p.59

¹¹⁷ Birks, *ibid.*, p.60

¹¹⁸ See above p.7

Hodgson is as “resulting in pattern”, which would not carry it outside of s.53(1), but constructive in origin - a constructive restitutionary trust.

Birks has himself, however, rejected this complex argument in favour of his second explanation based on his “non-beneficial transfer” analysis of the definition of the resulting trust.¹¹⁹ He continues to reject the possibility of an automatic resulting trust as “...there was no question of construing the transfer as having been made on express trust, since statute requires a written declaration of an express trust of land”.¹²⁰ The possibility of a resulting trust arising out of an apparent gift is also rejected as, following from his first argument, the court did not enter into the s.60(3) debate. Birks argues that it would be wrong to assume that a resulting trust could only arise in these situations, his theory being that a resulting trust can arise “...wherever the evidence shows that the transfer was non-beneficial - that is, that it was not intended to accrue to the benefit of the transferee”.¹²¹ He believes that a resulting trust arose in *Hodgson* because Mrs Hodgson was able to show that the transfer was not a beneficial gift to her lodger:

“*Hodgson v Marks* is thus authority in support of the proposition that resulting trusts are those trusts which carry the interest back in the event of any non-beneficial transfer which fails to indicate the persons for whom the non-beneficial transferee is to hold, the non-beneficial nature of the transfer being established either by presumption (in the case of apparent gifts) or by evidence. The *Hodgson* trust itself is a resulting trust arising by affirmative proof of non-beneficial transfer”.¹²²

Chambers develops this argument believing that the case is not one concerning the presumption of a resulting trust.¹²³ This is because there is evidence of the transferor’s intention - there is no need to make any presumptions. Mrs Hodgson intended to create a trust, and this, for Chambers, proves a lack of intention to transfer the beneficial interest. He believes that, as the Court had evidence as to the intention to create a trust, the essential element giving rise to the resulting trust was an identified absence of intention to benefit

¹¹⁹ Birks, *supra* n.8, p.363

¹²⁰ Birks, *ibid.*

¹²¹ Birks, *ibid.*, p.364

¹²² Birks, *ibid.*

¹²³ Chambers, *supra* n.4, p.25

the recipient. He also argues that the presumption of resulting trust cannot be of a different intention to that which, if proven, gives rise to the resulting trust.

It is, however, respectfully submitted that there is an alternate explanation to that given by Birks and Chambers as to the application of s.53(1) of the Law of Property Act 1925 to oral trusts of land. It can be argued that s.53(1) does not state that it is impossible to attempt an express oral trust of land, but where there is such a trust it will fail due to the fact that it does not comply with the statutory formalities of evidence in writing. It seems strange to argue that there was never an express trust in *Hodgson v Marks*, as if the subject matter had been personalty there would have been no question that a trust was in force.¹²⁴ Once it is established that Mrs Hodgson did create an express trust, it is possible to argue that this trust never actually came into force as it immediately failed due to s.53(1). Russell LJ was not concerned with the presumed resulting trust and the arguments concerning s.60(3) of the Law of Property Act 1925, as the resulting trust which arose was an automatic resulting trust based on the failed express oral trust, and not a presumed resulting trust which, it has been argued, cannot arise where the transfer concerns land. In support of this is the argument which is used by Birks in his first interpretation of the case. He states that it would be an effective repeal of s.53(1) if the trust which arose was based on the intention of the transferor to create a trust.¹²⁵ The resulting trust cannot therefore be a presumed [intention] resulting trust, in the traditional sense. The only other explanation, following the law as it was at the date of the case and ignoring more recent academic argument, is that the trust envisaged by Russell LJ, when he stated that where "...an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust",¹²⁶ is an automatic resulting trust.¹²⁷ It would not be an effective repeal of s.53(1) if the trust was an automatic resulting trust, as where the express oral trust was in favour of a third party this would not be upheld by the automatic resulting trust, but the beneficial interest would always result back to the transferor and not the intended beneficiary.

¹²⁴ *Paul v Constance* [1977] 1 WLR 527

¹²⁵ See Birks, *supra* n.74, p.59

¹²⁶ *Hodgson v Marks*, *supra* n.25, 933

¹²⁷ The arguments as to the basis and true nature of the automatic resulting trust is developed in Chapter 6

5. Improbable Intention

The final situation used by Chambers, as an example of how a lack of intention to benefit is a better explanation for what is being presumed by the court than an intention to create a trust, is where he believes that an intention to create a trust is improbable on the facts.¹²⁸ It is argued that this is the case where the recipients are minors at the time of the transfer. The argument was put forward in *Re Vinogradoff*¹²⁹ that the transferor must have known that a minor cannot be appointed as a trustee, and so the intention of the transferor could not have been so to attempt. Chambers argues that if there was no actual intention to create a trust then the resulting trust must have arisen due to a *lack* of intention to benefit the recipient.¹³⁰

The Need to Distinguish

The question thus arises as to whether there is really a need to spend so much time attempting to rationalise the notion of intention behind the presumption of a resulting trust. It seems that Chambers has spent much time trying, and it is submitted unsuccessfully, to fully support his theory through a number of cases. Clearly there can never be a presumption of the intention of the transferor where there is clear evidence of his or her actual intention, as this would make a mockery of the law. If it is clear what the transferor's intention was then this must be followed. It is submitted, however, that where there is no clear evidence on the facts, and the presumption of advancement does not apply, a resulting trust will arise based on the presumption. It is then for the recipient to show that what was intended was a gift - it is for him to rebut the presumption. In this way the presumption "...performs much the same function as the civil onus of proof".¹³¹ If a resulting trust arises due to a lack of intention to benefit the recipient, the argument could be advanced that it would then be for the transferor to show this, thus shifting the burden of proof, or at best, equalising it. From a policy point of view this would be unacceptable based on the rationale of existing case law.

¹²⁸ Chambers, *supra* n.4, p.25

¹²⁹ [1935] WN 68. See above, p.12

¹³⁰ Chambers, *supra* n.4, p.26

¹³¹ *Muschinski v Dodds* (1985) 160 CLR 583, 612 per Deane J

Chapter 3

Possible developments of the presumed resulting trust?

Arguably it does not matter whether the presumption arises because the intention of the transferor was to create a trust or because there was no intention from the transferor to benefit another, unless one is attempting to argue that it should apply to a wider range of situations than those already identified. It seems to be for this reason that Birks and Chambers have tried to analyse the intention behind the presumption. They argue that, if it is the case that the presumption is based on a lack of intention to benefit the recipient, then the resulting trust has a much greater role to play in the law of restitution. If they are not correct about the presumption then they have no basis to continue their arguments. In particular, Birks argues, from restitutionary principles, that the definition of the resulting trust should be extended and used to fill a gap in the law of “subtractive unjust enrichment”. This would give the plaintiff a proprietary remedy where he has transferred property under a mistake or when property has been transferred under a contract where the consideration wholly fails. A resulting trust would arise following a mistaken payment as the mistake would vitiate the actual intention, and under the failed contract due to the failure of a condition.

Birks's Arguments

1. Mistaken Gifts

Without explaining how he reaches his conclusion, Birks states that “...it should be emphasised that the presumption of resulting trust is a presumption of non-beneficial transfer or, in other words, a presumption that the transferor did not intend the transferee to receive for his own benefit”.¹³² In this way Birks is able to theoretically integrate the law of resulting trusts into the law of restitution as he uses the presumption as an addition to the ‘unjust’ factors which are relied on by plaintiffs claiming restitution. An ‘unjust’ factor is a description of a situation where, if coupled with the enrichment of the defendant at the

¹³² Birks, *supra* n.8, p.346

expense of the plaintiff, the plaintiff can insist on restitution. If an 'unjust' factor is present then the plaintiff can argue that there was not a 'perfect' intention to benefit the defendant, vitiating his decision-making process. Birks argues that the presumption of a resulting trust acts in the same way - showing no intention (or an imperfect intention) to benefit the transferee, and in addition, as a consequence of this argument, whenever there is an 'unjust' factor a resulting trust will arise based on this, in the same way as it is based on the presumption. A resulting trust will thus arise whenever the plaintiff has a claim for unjust enrichment.

Birks uses as an example, the case of *Fairhurst v Griffiths*.¹³³ Here, the plaintiff had transferred money to the defendant at a time when he was in dispute with his wife, as he did not want her to have access to it. Later, following a reconciliation, he wanted to get the money back. The Deemster concluded that at the time of the transfer there was sufficient evidence to show that the intention of the transferor was to make an absolute gift of the money. As Birks points out, in equity this situation is "...certainly suitable for the presumption of resulting trust",¹³⁴ with the evidence being used by the defendant to rebut the presumption. Under the common law, however, the position is different. In order for the plaintiff to recover the money, as was argued, under the cases of money had and received, he would have had to show that the gift could be recovered for mistake, and that he had made such an operative mistake. As the evidence was clear that there was no mistake, his claim failed.

Birks argues that if the defendant successfully rebuts the presumption of a resulting trust by showing that the transfer was intended as a gift, but the plaintiff puts forward the argument that the transfer was vitiated by a fundamental mistake, then following from his argument that a resulting trust should arise whenever there is an 'unjust' factor (lack of 'perfect' intention flowing from a fundamental mistake being such a situation):

"[n]o court would wish to be manoeuvred into the position of having to deny the existence of a trust in the case of a mistake affirmatively proved while having been ready to infer

¹³³ (1987-1989) Manx LR 374, High Court of the Isle of Man (His Honour the Deemster Corrin). See also (1989) 15 *Commonwealth Law Bulletin* 1295

¹³⁴ Birks, *supra* n.8, p.342

such a trust by presumption: the plaintiff who proves a non-beneficial transfer cannot be in a weaker position than one who merely relies in a shift of the onus of proof to the defendant".¹³⁵

Birks's arguments are questioned by Swadling who believes that relying solely on the idea that resulting trusts arise due to the presumption that there was no intention to benefit the recipient is fundamentally flawed. After taking us through what he sees as a brief history of the resulting trust, Swadling concludes that the point of the presumption is simply to shift the burden of disproving a trust onto the transferee.¹³⁶ He then argues that once it is accepted that the trust arises as a result of a presumption that that was what the parties intended, Birks's theory falls. A resulting trust cannot arise where there is a transfer based on a mistaken payment, as this was not the intention of the parties at the time of the transfer. The intention was that the payment should go to the transferee absolutely.

In *Lady Hood of Avalon v Mackinnon*¹³⁷ a mother made an appointment of a sum of money to her younger daughter, and later, anxious to put her elder daughter in an equally advantageous position, made a similar appointment to her by deed poll. There had been an earlier appointment to the elder daughter of an even larger sum, which the mother had entirely forgotten. Eve J rescinded the second deed on the basis that the mother's intention was fundamentally vitiated by her mistake. Goff and Jones comment that if the rescission of a deed can be justified by mistake, then it would be "...unfortunate if such a mistake should not be sufficient to ground recovery of money".¹³⁸ For Birks, this recovery in restitution would be based on the application of a resulting trust. Swadling, however, believes that although the mother's intention to make a gift to her daughter was vitiated by the mistake, the facts clearly showed that it was not her intention to make her daughter a trustee of the property. It would be inappropriate for the court to make a presumption of the intention of the transferor, as in this case the actual intention was known. A resulting trust cannot operate in such a situation, but only where "...there is no other explanation of the transaction".¹³⁹

¹³⁵ *Ibid*, p.347

¹³⁶ Swadling, *supra* n.12, 115

¹³⁷ [1909] 1 Ch 476

¹³⁸ Goff and Jones, *The Law of Restitution* (4th ed., pub. Sweet & Maxwell, 1993) p. 122

¹³⁹ *Batstone v Salter* (1875) LR 10 Ch App 431, 433 per Lord Cairns LC

Birks's resulting trust presumption, that of non-beneficial transfer, can only be rebutted by positive evidence of an intention to make a gift. Where there is a mistake, this intention is vitiated and so the presumption stands unrebutted. If the presumption is of an intention to transfer on trust, however, then evidence of a positive intention to give is only one situation where the presumption will be rebutted. Swadling argues that:

“[a]ny evidence which is inconsistent with the implication of an intended trust will do, and evidence of a mistaken motive in making an absolute gift falls within that category. There is, consequently, no room for a presumed intention resulting trust in a case of mistaken gift.”¹⁴⁰

2. Failure of Consideration

Birks then considers his perceived relationship between the resulting trust and a second ‘unjust’ factor, that of failure of consideration. As illustration, he uses the hypothetical example of a Villager who pays an Activist £1000 to help resist the building of a motorway.¹⁴¹ If the motorway construction is immediately cancelled then the Villager, as a result of the frustrated contract between himself and the Activist who is bound by the contract to apply the money for the specific purpose, will have a personal claim at common law for restitution of his £1000. The question is then posed as to whether the Villager also has a proprietary claim in equity against the Activist under a resulting trust.¹⁴²

Birks believes that, following on from his conclusions relating to mistaken payments, it “...is extraordinarily difficult to resist the conclusion that Activist is not a trustee for Villager”.¹⁴³ The reasons for this, he believes, are four-fold. The first is that if equity imposes a resulting trust, based on non-beneficial transfer, where there is gratuitous

¹⁴⁰ Swadling, *supra* n.12, 117

¹⁴¹ Birks, *supra* n.8, p.348

¹⁴² Birks structures his fact pattern in such a way as to avoid arguments that the money was given to Activist on a purpose trust. As he points out, such a trust would fail (see *Morice v Bishop of Durham* (1805) 10 Ves 522; *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC) as it is not for a charitable purpose and, not being for the benefit of an ascertainable group of individuals, it would not be saved under the rule in *Re Denley's Trust Deed* [1969] 1 Ch 373.

¹⁴³ Birks, *supra* n.8, p.350

transfer and the presumption is unrebutted, then in order to act consistently, it should also impose a resulting trust where the transferor's intention is qualified by evidence that the money was to be used for a specific purpose, and that purpose has failed. For Birks it would be "...inconsistent to presume a trust where there is no evidence of non-beneficial intent and refuse to see a trust where there is proof that the transfer was not intended for the benefit of the transferee".¹⁴⁴

As has already been seen, this explanation of the presumption has been criticised by Swadling who prefers the view that equity presumes that the parties intended a trust where there is a transfer without consideration. As such, there would be no inconsistency between the positions identified by Birks as the *prima facie* resulting trust would be rebutted by the evidence that the intention of Villager was not to make Activist a trustee of the money for him, but that the money should be used in a campaign against motorway construction.

Birks's second reason is that if the money had been transferred on an express trust and the consideration for this trust had failed, either in its intended basis or due to the extinction of a class of beneficiaries, then there would be a resulting trust. Examples of transfers made in contemplation of marriages which later do not occur and benevolent funds where there is a surplus after the purpose has been fulfilled are given. This comparison with express trusts is criticised at length by Swadling who notes the weaknesses in the cases used by Birks as illustrations. With regard to the 'failed marriage' cases, in *Essary v Cowlard*¹⁴⁵ there was no argument as to the nature of the relief sought and certainly no mention of a resulting trust; the only question was whether the settlement would stand if the couple later married following a period of cohabitation. Similarly, *Bond v Walford*¹⁴⁶ was concerned with the same question but where there had not yet even been a settlement, and *Re Garnett*,¹⁴⁷ a case of ante-nuptial settlement, was decided on the ground of mistake. With regard to the final case, *Re Ames' Settlement*,¹⁴⁸ Swadling notes that "...since it involved a pre-nuptial covenant to settle which was only performed after a 'marriage' which was later

¹⁴⁴ *Ibid.*

¹⁴⁵ (1884) 26 Ch D 191

¹⁴⁶ (1886) 32 Ch D 238

¹⁴⁷ (1905) 93 LT 117, 119

¹⁴⁸ [1946] Ch 217

retrospectively annulled had taken place...” it can also be decided on the ground of mistake.¹⁴⁹

Swadling also treats those marriage settlement cases concerned with nullity with suspicion as:

“[i]t seems that the Ecclesiastical Courts, when granting a decree of nullity, exercised a jurisdiction over the husband’s property to the extent of ordering restitution of the wife’s dowry. This jurisdiction was transferred to the secular courts by s 5 of the Matrimonial Causes Act 1859 ... and still persists in the form of s 24(1)(c) Matrimonial Causes Act 1973. It may be, therefore, that these cases lay down no general principle but merely entail the exercise of a jurisdiction peculiar to the annulment of marriage”.¹⁵⁰

Turning to Birks’s second set of cases relating to benevolent fund surpluses, Swadling argues that these cases are equally as weak. *Re Abbott Fund Trusts*¹⁵¹ concerned a fund collected in order to look after two deaf and dumb sisters. The question raised was what should happen to the surplus on the death of the last surviving sister. Stirling J held that as the money had never been intended to be the property of either sister and was to be used for a particular purpose, any surplus would therefore be held on a resulting trust for the donors.¹⁵² Swadling asks, “[b]ut what sort of resulting trust is this? Is it an example of a presumed intention resulting trust? or is it instead a case of a trust which failing *ab initio* gives rise to an automatic resulting trust?”¹⁵³ If the sisters were not entitled to the absolute beneficial interest, then this must have been a trust for a private purpose and, as it preceded the decision in *Re Denley’s Trust Deed*, would have been void.¹⁵⁴ The fund would therefore have been held on an automatic resulting trust from the start, although this question of validity was never raised. Goff J simply followed this decision in *Re West Sussex*

¹⁴⁹ Swadling, *supra* n.12, 119

¹⁵⁰ *Ibid.*

¹⁵¹ [1900] 2 Ch 326

¹⁵² See also *Re Hobourn Aero Components Limited’s Air Raid Distress Fund* [1946] Ch 86, [1945] 2 All ER 711, for a similar result where there was a non-charitable donation and the donor known, but cf *Re Osoba* [1979] 2 All ER 393, [1979] 1 WLR 247 where the donation was seen as an absolute gift with a special purpose attached, rather than a gift to be used solely for that purpose.

¹⁵³ Swadling, *supra* n.12, 119

¹⁵⁴ See *supra* n.142.

*Constabulary's Widows, Children and Benevolent (1930) Fund Trusts*¹⁵⁵ without discussion.

These cases do not, therefore, fully support Birks's analysis that property transferred on trust for which the consideration later fails will be held on resulting trust for the transferors. In addition, to compare situations where there is an express trust to those where there is not must be fundamentally flawed in that, under an express trust the trustee is never intended to be the beneficial owner, but where the giving is not subject to a trust this is not the case. Under an express trust which fails, the trustee cannot take the beneficial ownership and so must hold the property on trust for another. In Birks's example, the money transferred to Activist is not subject to a trust. Activist therefore takes beneficially, and it would seem strange that as the purpose has failed, equity would reverse the beneficial interest in the money. Villager has a claim in restitution for the money at common law, and so there would be no reason for equity to take this step, raising Villager's claim to a proprietary level. There does not seem to be a policy reason for the imposition of a trust where the transferor has a satisfactory claim for the recovery of his property at common law.

The third argument raised by Birks is that of a discussion of the principles in *Barclays Bank Ltd v Quistclose Investments Ltd*¹⁵⁶ and *Re EVTR*,¹⁵⁷ situations where it can be argued that equity provides a remedy where recovery at common law does not supply a satisfactory solution. In *Quistclose*, during the closing stages of Rolls Razor Ltd's collapse, Quistclose lent money to the company expressly and solely for the purpose of paying a dividend on the company's shares. Before that could be done, the company went into liquidation. The court found that the money, having been lent for a particular purpose which had failed, was held on a resulting trust for the lender. In *Re EVTR* a friend advanced money to be used to purchase particular equipment for use in a business. The money was later refunded to the company and the court held that as the money was not

¹⁵⁵ [1971] Ch 1. In this case, however, the court held that there was no resulting trust, with the property going to the Crown as *bona vacantia*, as the money had been put up on a contractual and not a trust basis.

¹⁵⁶ [1970] AC 567

¹⁵⁷ [1987] BCLC 646, CA. See also Schmitthoff, "Specific loan not part of the general assets of the company" [1987] *JBL* 250

being used for its intended purpose the lender was allowed to claim an equitable proprietary remedy to it, under a *Quistclose*-type resulting trust.

Birks argues that whatever the exact explanations for these cases are it would be “indefensible to distinguish between those cases and the case of *Activist* now under discussion”.¹⁵⁸ The only way that Birks believes the two situations could be distinguished is if the *Quistclose*-type transfers are seen as effective express trusts which fail,¹⁵⁹ and the transfer to *Activist* as different in that the giving cannot be seen as on trust due to the abstract nature of the purpose. However, this is seen as an arbitrary distinction, and it is argued that the law should not make a remedy available depending solely on whether the purpose is seen as abstract rather than redounding to the benefit of an ascertainable class of beneficiaries. Birks prefers the explanation that there is a resulting trust whenever the transferor did not intend the recipient to hold beneficially, and did not indicate who should take beneficially, whether there is an initial valid trust or not. As for not indicating a beneficiary, Birks allows that, for some anonymous subscriptions for a purpose, the collection box situation, which later fails, the money should be seen as abandoned leading to a conclusion of *bona vacantia*. He would not, however, extend this interpretation beyond such facts as make it a reasonable construction of the giver’s intent.

Swadling accepts that a distinction, between the *Quistclose* situation and that of *Villager*, resting solely on specificity of purpose would be arbitrary and unsustainable.¹⁶⁰ He argues, however, that it does not follow from this that *Villager* should have an interest under a *Quistclose*-type trust as he has difficulty in classify the *Villager/Activist* situation as the same as that which arose in *Quistclose*. This is due to the particular circumstances which he believes must be prevalent before a *Quistclose*-type trust can exist. He argues that such a trust can exist only in a bankruptcy situation where certain conditions as to intended purpose and the manner in which the money is banked are fulfilled. Alternatively, the *Quistclose* trust can be seen, not as resulting, but as a two limb express trust based on the express intention of the parties at the time of the transfer. Chambers rejects this two limb argument, preferring to see the entire property being transferred at law, subject to

¹⁵⁸ Birks, *supra* n.8, p.351

¹⁵⁹ An effective express trust which fails gives rise to an *automatic* resulting trust.

restrictions as to purpose, with a resulting trust arising where the purpose can no longer be fulfilled.

Swadling's reasoning on this proposition is not as compelling as those arguments advanced against the other assertions of Birks. However, the equation of failure of consideration and failure of purpose is also rejected by Goode who identifies that:

“...failure of purpose in the *Quistclose* sense is not at all the same as failure of a promised counter-performance or of an anticipated event. The former denotes a payment which, expressly or by implication, is to be applied in a particular way and if not so applied is to be returned. In other words, the sum paid is not at the free disposal of the payee; the payment is conditional on its application to the designated purpose and cannot be used in any other way. By contrast, where £1,000 is paid towards the expenses of opposing the construction of a new motorway, the payment is not impressed with any trust or made subject to any condition whatsoever as to the manner in which it is to be applied. The payee is free to spend the whole sum on anything he chooses; it is entirely his affair whether he covers the expenses with money paid to him or with a bank loan or with his other money”.¹⁶¹

Birks's final argument is that the case of *Sinclair v Brougham*¹⁶² can be understood as covering the case of Activist. In *Sinclair v Brougham* a building society operated a banking business which was held to be *ultra vires*. The depositors had transferred their money to the building society for the purpose of being placed in the bank accounts so as to entitle them to the normal relationship between a bank and its customers. Birks argues that the consideration for the transfers (the declared basis on which they were made) was the execution of that purpose and it would be artificial to say that there was an express trust which failed *ab initio* for want of *vires*.¹⁶³ On the other hand, he argues, if it was seen as the consideration, consisting in the purpose, which had failed, and with the transfer being shown not to have been intended as a beneficial transfer to the building society, a resulting trust would attach. In support, Birks quotes Viscount Haldane LC who stated that:

¹⁶⁰ Swadling, *supra* n.12, 120

¹⁶¹ Goode, “Proprietary Restitutionary Claims” in Cornish et al. (eds.), *Restitution: Past, Present & Future* (pub. Hart, 1998) p.75. See further discussion on the *Quistclose* trust below at Chapter 7.

¹⁶² [1914] AC 398

¹⁶³ Birks, *supra* n.8, p.353

“...it was *ultra vires* of the society to undertake to repay the money. But it was none the less intended that in consideration of giving such an undertaking the society should be entitled to deal with it freely as its own. The consideration failed and the depositors had the right to follow the money so far as invalidly borrowed into the assets in which it had been invested, whether those assets were mere debts due to the society or ordinary securities, but that was their only right”.¹⁶⁴

From this passage it seems that the proprietary remedy made available to the depositors was based on a failure of consideration. The actual form of this remedy is not characterised. Birks argues, however, for the appropriateness of terming it a resulting trust based on his non-beneficial transfer definition.

Swadling identifies a number of reasons why *Sinclair v Brougham* should not be taken as authority for Birks's thesis.¹⁶⁵ The first is that the House of Lords did not consider the question as to whether property passed. It was conceded by counsel for the building society that property had not passed due to the invalidity of the contracts, but on a purely procedural point argued against a proprietary claim as the depositors had not pleaded it in any of the lower courts.¹⁶⁶ In addition, Swadling points to the Privy Council case of *Ayers v South Australian Banking Corpn*¹⁶⁷ which had not been cited in the House. In this case the Privy Council had held that even though a contract had been held to be *ultra vires*, property could in fact be passed “...either in goods or in lands, under a Conveyance or instrument which, under the ordinary circumstances of law, would pass it”.¹⁶⁸ Secondly, the decision of the House in *Sinclair* was based on the implied contract theory of restitution under which the depositors had no claim at law as “...the law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid”.¹⁶⁹ The implied contract theory of restitution has since been discredited¹⁷⁰ and Swadling argues that a finding that a proprietary remedy was available might not now be made. The view expressed by Goff and Jones is that “...a

¹⁶⁴ [1914] AC 398, 422-3

¹⁶⁵ Swadling, *supra* n.12, 125

¹⁶⁶ [1914] AC 398, 406-408

¹⁶⁷ (1871) LR 3 PC 548

¹⁶⁸ *Ibid.*, 559. See also Swadling “Restitution for No Consideration” at [1994] RLR 73, 80-84

¹⁶⁹ Per Lord Sumner [1914] AC 398, 452

proprietary claim should never lie where a person has merely given credit to another, whether the loan transaction is valid or not”.¹⁷¹

It seems that none of the four reasons put forward by Birks give unequivocal support to his theory that failure of consideration should give rise to a resulting trust. In fact, if we take the view that the presumed intention is that of creating a trust then any evidence that the transferor did not intend to create a trust in favour of himself, that is, any evidence that the money was to be used by the transferee for a specific purpose, will be enough to rebut the presumption and allow the transferee to take beneficially. This does not mean, of course, that the transferee is left without a remedy where there is a failure of consideration, only that, as was seen where the transfer is based on mistake, the claim will be at law rather than being elevated to a proprietary level by equity.

The reason for the discussion as to whether the presumption of a resulting trust is one of non-beneficial transfer or not, is due to the desire for the resulting trust to have a relevance in the law of restitution. Does it in fact matter whether restitution is achieved at common law or through equity? It is submitted that it does. To raise restitutionary claimants *in personam* at law to claimants *in rem* in equity would not be limited to the two situations identified by Birks, that of mistaken transfers and failures of consideration, but would extend to all areas of unjust enrichment, and it is submitted that such a fundamental change to the law would be undesirable. Swadling argues that this would “...destroy much of the substance of the present law since it has no room for the fine-tuning which currently takes place. It can, for example, draw no distinction between the types of pressure or mistake which should or should not give rise to a restitutionary claim”.¹⁷²

This debate over the principles which determine when a remedy is proprietary and when it is not is what Worthington describes as “[o]ne of the more pressing problems facing commercial lawyers today”.¹⁷³ Two concerns are voiced about expanding the scope of equitable proprietary intervention in commercial transactions. The first is that of the

¹⁷⁰ The action is no longer seen as based on implied contract but on unjust enrichment. See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32

¹⁷¹ Goff & Jones, *The Law of Restitution* (4th ed., pub. Sweet & Maxwell, 1993) p.84

¹⁷² Swadling, *supra* n.12, 131

¹⁷³ Worthington, *Proprietary Interests in Commercial Transactions* (pub. Clarendon, 1996) p.v

perceived uncertainty, identified by Swadling, which would be a natural ramification of any fundamental changes to this area. For Worthington, however, this need not be a problem as she sees the rules of equity as being as susceptible to precise definition as those of the common law.¹⁷⁴ The second concern is that as equitable rules are most useful on a defendant's insolvency they discriminate against the defendant's other unsecured creditors. Worthington argues that the defendant's unsecured creditors are only entitled to property which belongs beneficially to the defendant, and it misconceives the situation to regard the matter as a contest between two innocent parties - the plaintiff and other general unsecured creditors. The rules do not permit arbitrary discretion, but simply define the proprietary entitlements of the defendant and the plaintiff.¹⁷⁵ It is submitted, however, that this argument is flawed in that, if Birks's thesis is correct and a resulting trust should arise in situations where previously the only remedy was at common law, a previously unsecured creditor will have his position raised above that of his fellow unsecured creditors. It is therefore imperative that the arguments relating to the circumstances in which a resulting trust arises are clarified so that the parties to a transaction will know in advance whether any claim in the future will have the advantages afforded by proprietary interests.

Worthington's Analysis

Under the heading "*Transfers of Property in the Absence of a Contract or According to the Terms of a Void Contract*", Worthington provides her own analysis of resulting trusts and the possibilities of equitable intervention.¹⁷⁶ In doing this she uses, as examples, the cases of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, where money was transferred by mistake, and *Sinclair v Brougham*, where money was transferred under the terms of an *ultra vires* contract. In both these cases the transferees became insolvent and the plaintiffs were held to have retained an equitable interest in the funds originally transferred, thus having their positions raised above those of the other unsecured creditors. Birks has stated that *Sinclair* is to failure of consideration what *Chase Manhattan* is to mistake,¹⁷⁷ and so it would seem that a clearer understanding of these cases is essential,

¹⁷⁴ *Ibid.*, p.147

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*, p.148

¹⁷⁷ Birks, *supra* n.8, p.355

especially as little attention was paid in the cases to the reasons for the retained equitable interests.

In such situations, transfers by mistake and under void contracts, legal title is transferred, leaving the original owner with personal common law remedies such as conversion or money had and received. A proprietary remedy, such as that advanced by equity, would be preferable, especially as it would be coupled with the comprehensive tracing rules used to identify property in which the interest persists. Worthington advances two possible explanations for the decisions in *Chase Manhattan* and *Sinclair*.¹⁷⁸ The first is that equity is duplicating the common law remedies without adding to them. The second is that of a presumed resulting trust.

The less favoured first explanation is that, where the original owner has a personal remedy at common law, that remedy will give the original owner priority on insolvency so long as the property remains identifiable in the transferee's hands.¹⁷⁹ Although the legal title is transferred, the original owner's claim to a sum of money is secured, and is thus seen to be a type of equitable charge over the property to secure its value. The cases might be explained if equity's role was to duplicate this common law situation, regarding the original owner as retaining a proprietary interest by way of lien over the property.

Worthington's preferred explanation is that, where a transferee acquires legal title to property without providing consideration in circumstances where a gift was not clearly intended, equity will regard the property as being held on a resulting trust. This is a slight variation on the non-beneficial transfer thesis of Chambers and Birks. Rather than being a transfer where there was no intention to benefit, Worthington focuses on a transaction which is not intended to be a gift. Again, this is contrary to the traditional view expounded by Swadling, that a resulting trust will apply where there is a transfer without consideration and the transferee cannot rebut the presumption that the transferor intended to create a trust. This explanation is preferred over the first as Worthington argues that "...the very

¹⁷⁸ Worthington, *supra* n.173, p.150

¹⁷⁹ See Goff and Jones, *The Law of Restitution* (4th ed., pub. Sweet & Maxwell, 1993) p.78; Khurshid and Matthews, "Tracing Confusion" (1979) 95 *LQR* 78

nature of the impugned transaction suggests that a trust is a better response than a lien: the original owner ought to be able to recover the property *in specie*, not merely its value".¹⁸⁰

Worthington examines the cases on voluntary transfers where equity imposes a resulting trust. She believes that in order to rebut the presumption the transferee must prove that a gift was intended, and that:

"...this rule rests on the somewhat cynical assumption that a transferor does not intend to benefit another without receiving consideration in return; equity makes this assumption in the absence of proof to the contrary. The transferee, as a volunteer, must accept the equities. This is despite the fact that the transferee is the legal owner".¹⁸¹

The first condition, in this analysis, for the imposition of a resulting trust is that there is a transfer for no consideration. Where there is no contract then an absence of consideration is generally apparent from the facts.¹⁸² Where there is a contract, it is argued that there will be a similar absence of consideration if the contract is held to be void. This is because the transferee's obligations to provide consideration are not legally binding, are non-enforceable, and not subject to an action for damages.¹⁸³ This is not, however, the situation where the recipient fails to provide the agreed consideration. There is a distinction between an absence of consideration and a failure of consideration. The failure of consideration is much more common in the field of commercial transactions, and Worthington argues that the resulting trust analysis is not attracted here as equity refuses to grant an original owner any type of restitutionary proprietary relief where one contracting party does not perform according to the terms of the contract.¹⁸⁴

The second condition is that no gift must have been intended. If the transfer is made pursuant to a contract then it is clear that a gift was not intended. Where there is no contract, however, as the debate between Birks and Swadling illustrates, there is some controversy. Worthington notes that in the commercial arena this situation only arises in

¹⁸⁰ Worthington, *supra* n.173, p.151

¹⁸¹ *Ibid.*

¹⁸² This was, according to Worthington, the situation in *Chase Manhattan*.

¹⁸³ Worthington argues that such a legal nullity is the explanation for the decision in *Sinclair*.

¹⁸⁴ Worthington, *supra* n.173, p.156

general where there is a transfer based on a mistaken liability, as in *Chase Manhattan*, which is clearly inconsistent with intended gift to the transferee. For Worthington, the problems arise where there is an intended gift but the intention is somehow flawed. In such a situation she argues that equity's response is to distinguish between intention and motivation:

“if the flaw negates the transferor's *intention to give*,¹⁸⁵ then the principles described [above] will apply and the property will be held by the transferee on resulting trust; if, on the other hand, the flaw only negates the transferor's *motive for giving*, equity will not intervene to return the property to the transferor.¹⁸⁶ Admittedly, the distinction is not always easy”.¹⁸⁷

This analysis - that where a contract is void, the transfer is made for no consideration and with no intention to give, and so the transferee, being a volunteer, cannot insist on full legal and equitable title as he holds on a resulting trust - is based on the dicta of Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington LBC*,¹⁸⁸ whose views were confirmed by the Court of Appeal.¹⁸⁹ Hobhouse J considered that:

“...any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient, but in equity the property in the money remains with the payer. The recipient holds the money as a fiduciary for the payer and is bound to recognise his equity and repay the money to him...it is unconscionable that the recipient should retain the money”.¹⁹⁰

¹⁸⁵ As where intention is vitiated by duress or undue influence; arguably misrepresentation and mistake will rarely have this effect.

¹⁸⁶ *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 is not inconsistent with this. Eve J allowed a second deed of appointment to be rescinded because the plaintiff had entirely forgotten an earlier appointment. This is not the same as imposing a resulting trust on property mistakenly transferred. It is more akin to allowing the plaintiff to renege on a promise to make a gift, something which is unexceptional with promises not embodied in a deed. The deed changes the matter little: a promise to make a gift, even in a deed, is not specifically enforceable in equity; nor could the donee obtain damages for breach of contract, since no loss could be proved. But contrast Goff and Jones, *The Law of Restitution* (4th ed., pub. Sweet & Maxwell, 1993) p.121-2

¹⁸⁷ Worthington, *supra* n.173, p.152

¹⁸⁸ [1994] 4 All ER 890, 890-956 QBD

¹⁸⁹ [1994] 1 WLR 938, 952 per Leggatt LJ, and 946-7 per Dillon LJ; [1994] 4 All ER 890, 956-971

¹⁹⁰ [1994] 4 All ER 890, 929

This decision, which has been accorded some careful attention in the academic journals,¹⁹¹ was later overturned in the House of Lords, in a decision described as “potentially of great importance of business lawyers”¹⁹² and “as controversial as it is important”.¹⁹³

¹⁹¹ Birks, “‘When Money is Paid in Pursuance of a Void Authority...’ - A Duty to Repay?” [1992] *PL* 580; Burrows, “Note” (1993) 143 *NLJ* 480; Birks, “No Consideration: Restitution After Void Contracts” (1993) 23 *UWALR* 195; Cowan, “Note” (1993) *LMCLQ* 300; Swadling, *supra* n.168, 73; Burrows, “Swaps and the Friction Between Common Law and Equity” [1995] *RLR* 15

¹⁹² McCormack, “Proprietary Claims and Insolvency in the Wake of *Westdeutsche*” [1997] *JBL* 48, 48

¹⁹³ Birks & Swadling, “Restitution” [1996] *All ER Annual Review* 366, 373

Chapter 4

The Decision in *Westdeutsche*

Islington LBC, one of a number of rate-capped councils to enter into interest rate swap agreements with banks, entered into such an agreement with Westdeutsche to run for ten years. An interest rate swap is an agreement between two parties by which one party (the 'fixed rate' payer - Westdeutsche) agrees to pay the other (the 'floating rate' payer - Islington) interest on a notional principal sum at a fixed rate over a certain period. The floating rate payer agrees to pay the fixed rate payer interest on the same notional sum at a floating rate determined by reference to a market rate, such as LIBOR. Generally, the fixed rate payer will make an up-front payment to the floating rate payer with the result that the rate of interest payable by the fixed rate payer is reduced. It was thought that the receipt of this up-front payment by the council would not be caught by the statutory provisions controlling the council's borrowing powers. However, the Queen's Bench Divisional court in *Hazell v Hammersmith and Fulham Borough Council*¹⁹⁴ gave judgment, which was subsequently upheld by the House of Lords,¹⁹⁵ that swap contracts entered into by local authorities were *ultra vires* and therefore void.

Westdeutsche had made an up-front payment of £2.5 million, and pursuant to the agreement Islington had made periodic payments totalling £1,354,474 leaving a shortfall of £1,145,526. Islington made no further payments under the agreement following the *Hazell* decision, and so Westdeutsche brought a claim against them for repayment of the balance of its up-front payment with interest.

At first instance, Hobhouse J held that the bank was able to recover the balance of the upfront payment on two grounds: the first was at common law via an action for money had and received, on the ground that the money had been transferred for 'no consideration'; secondly, at equity, the bank could assert an equitable proprietary claim to the money following from the decision in *Sinclair v Brougham*¹⁹⁶. In addition, as a result of this

¹⁹⁴ [1990] 2 QB 697

¹⁹⁵ [1992] 2 AC 1

¹⁹⁶ [1914] AC 398

equitable proprietary claim, it was held that the court had authority to award compound interest. Islington LBC's appeal from this decision was rejected by the Court of Appeal, who affirmed Hobhouse J's findings both at common law and in equity. The only change that was made to the initial decision was that the interest should run from the date of the upfront payment, 18 June 1987, rather than from 1 April 1990. Hobhouse J had chosen this date as the bank had received an equivalent payment from Morgan Grenfell which they had used to 'lay off' the risk and so were only out of pocket from the date that the council stopped payments. Secondly, by this date the council had begun to set aside sums with which to pay the bank in the event that they were later found liable so to do. The Court of Appeal also held that the bank was entitled to recover the money in equity on the ground that the council held the up-front payment on a resulting trust for them since the consideration had wholly failed and the council had been unjustly enriched at the bank's expense.

The council appealed to the House of Lords on the comparatively narrow question of the award of compound interest to the bank, and not as was hoped by academics, on the number of decisions arrived at by the Court of Appeal. Hopes thus receded of an authoritative statement on the numerous issues raised by the case. It was common ground between the parties that, in the absence of express agreement or custom, the court had no jurisdiction to award compound interest either at law or under s.35A of the Supreme Court Act 1981, but that there were limited situations in which the courts of equity could. In the absence of fraud, however, the only circumstance in which compound interest could be granted was where the defendant, as a trustee or other fiduciary, had made an improper profit at the plaintiff's expense. In this case, then, the only way the bank could claim compound interest was if the council owed fiduciary duties to it with respect to the up-front payment. Lords Goff and Woolf (dissenting) rejected this conventional view believing that the equitable jurisdiction to award compound interest should be available in the case of personal claims at common law and should be exercised on the facts. The majority (Lords Browne-Wilkinson, Slynn and Lloyd) did not agree with this argument, holding that the issue had been before Parliament in 1934 and in 1981 and the opportunity to expand the jurisdiction was not then taken. To do so now would be to usurp the role of the legislature. They were not prepared to treat the problem as a new one which fell to be

considered as part of the judicial development of the law of restitution founded on unjust enrichment.

There is much to be said for the minority view,¹⁹⁷ especially as, when looked at from a commercial point of view, it would seem unconscionable for the council to make a profit out of an agreement which was void because it had exceeded its powers in entering into it. Indeed, the decision had been seen as representing "...a victory for technocrats over realists in the House of Lords".¹⁹⁸ As Cope points out, "...the importance of the decision goes beyond the question of compound interest".¹⁹⁹ This is because if the traditional view was not to be extended in any way, the bank would have to show a trust or fiduciary relationship. The Court of Appeal accepted the bank's submission that, following *Sinclair*, the legal title in the money paid under the void contract passed to the council but the bank retained the equitable interest, and concluded that such a situation, where the legal title was vested in one person but the equitable interest remained in another, gave rise to a resulting trust. The House of Lords were unanimous, however, in their rejection of that conclusion.

Sinclair overruled

The House of Lords used their power under the *Practice Statement (Judicial Precedent)*²⁰⁰ to depart from the decision in *Sinclair*. Although four of their Lordships decided to overrule *Sinclair*, Lord Goff was not prepared to go as far, as he believed that the *Sinclair* decision was not directly in point in the case and so thought it beyond his powers to overrule the previous House of Lords decision.²⁰¹ Rather, Lord Goff preferred to distinguish the case, believing that it should stand as a response to the problem that a personal remedy in restitution is excluded on grounds of public policy in the case of *ultra*

¹⁹⁷ See Lawson-Cruttenden and Phillips, "Compound Interest" (1996) 146 (6761) *NLJ* 1391

¹⁹⁸ Clutterbuck (ed.), "Finance: Interest Rate Swaps - No Compound Interest on Return of Money Paid Under Void Contracts" (1996) 6 (7) *LG&L* 1, 3

¹⁹⁹ Cope, "Note: Compound Interest and Restitution" (1996) 112 *LQR* 521, 522

²⁰⁰ [1966] 1 *WLR* 1234

²⁰¹ Mitchell notes, in "Case Notes: *Westdeutsche* in the House of Lords" (1996) 10 (3) *TLI* 84, 86, that Lord Goff's position on this is inconsistent with the previous decisions of the House of Lords in *R v Shivpuri* [1986] 2 *WLR* 988 and *R v Howe* [1987] *AC* 417; [1987] 2 *WLR* 568 where the cases overruled were not directly in point to the cases in hand. It follows that either one of these lines of authority is wrong, or the power to overrule is governed by different principles in the context of civil and criminal proceedings.

vires borrowing contracts, rather than as a principle of general application.²⁰² In such a case those who advance money will not be denied appropriate relief. McCormack describes this reticent response as "...a fairly striking manifestation of judicial pusillanimity. Observations about timorous judicial souls spring to mind".²⁰³

The decision in *Sinclair* had long been seen as problematic²⁰⁴ and although it had stood for nearly 80 years Lord Browne-Wilkinson displayed none of Lord Goff's reservations, seeing it as "...a bewildering authority: no single ratio decidendi can be detected; all the reasoning is open to serious objection...".²⁰⁵ The House of Lords in *Sinclair* had rejected the claim by the *ultra vires* depositors to recover in quasi-contract on the basis of monies had and received on the grounds that quasi-contract was based on an implied contract which would itself be *ultra vires* and therefore void. As Lord Browne-Wilkinson pointed out:

"Subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay".²⁰⁶

This would seem to be a final rejection of the theory of implied contract which, although it had been rejected as far back as the 1940s, had surfaced as late as 1990 in the House of Lords in *Guinness plc v Saunders*.²⁰⁷

From this, Lord Browne-Wilkinson argued that the *ultra vires* depositors should have had a personal claim to recover the monies at law based on a total failure of consideration.²⁰⁸ The *total* failure was in the form of the promise to repay. That promise was *ultra vires* and void. Equally, in *Westdeutsche*, although the council had repaid some of the money

²⁰² *Westdeutsche*, *supra* n.16, 688

²⁰³ McCormack, *supra* n.192, 52

²⁰⁴ In *Re Diplock* [1948] Ch 465, 518 Lord Greene stated that the court would be lacking in candour if it did not confess that it found the speeches in *Sinclair* difficult, if not impossible, to follow and reconcile.

²⁰⁵ *Westdeutsche*, *supra* n.16, 713

²⁰⁶ *Ibid.*, 710

²⁰⁷ [1990] 2 WLR 324

²⁰⁸ *Westdeutsche*, *supra* n.16, 710

advanced this could not be argued to be partial consideration, defeating a personal claim in restitution, as the consideration here was a promise to pay in full - a promise which was *ultra vires*, void and the basis of a total failure of consideration.

Lord Browne-Wilkinson then turned to the decision, in *Sinclair*, allowing the depositors' claim *in rem* by ordering the relevant assets to be divided between the depositors and the shareholders *pro rata* according to their respective payments to the building society. The various judgments were dissected and, for similar reasons relating to the presumption of resulting trusts outlined previously in his speech,²⁰⁹ Lord Browne-Wilkinson held that the decision as to rights *in rem* should also be overruled. There should be no equitable proprietary claim giving rights against third parties or priority in insolvency where a claimant has a personal action at law for recovery of monies paid pursuant to an *ultra vires*, and thus, void contract.²¹⁰

As Oakley notes,²¹¹ it had always been difficult to justify the existence of the trust in *Sinclair* as the depositors had made their deposits with the intention of becoming general creditors of the building society. A person who deposits money with a bank must necessarily make the bank the absolute legal and beneficial owner of the money since otherwise the bank would not be able to utilise the funds other than in accordance with the rules governing trust investments. There was therefore no obvious reason for holding that the depositors should have had an equitable proprietary interest and thus potential priority over the building society's general creditors.

Re Diplock and Chase Manhattan

What then of *Re Diplock*, a case which was based on the Court of Appeal's interpretation of *Sinclair*; and Goulding J's decision in *Chase Manhattan*, based on the speech of Viscount Haldane LC in *Sinclair*?

²⁰⁹ *Ibid.*, 707

²¹⁰ *Ibid.*, 713

²¹¹ Oakley, "The availability of proprietary remedies" [1997] 61 *Conv.* 1, 2

Although *Sinclair* was departed from, Lord Browne-Wilkinson did not want this to affect the decision in *Re Diplock*. He thus went out of his way to preserve *Sinclair* to the extent that Lord Parker's decision in the case forms the basis of the Court of Appeal's reasoning in *Re Diplock* in relation to the tracing principles established therein.²¹² The condition that, before a claimant can invoke equitable tracing rules to identify property against which he wishes to assert a claim, he must be able to show that the fiduciary relationship which existed between himself and the party who first acquired the property from him, is still alive. The extent of its application, however, is not made clear, with Jones believing that the condition is becoming increasingly meaningless,²¹³ and Mitchell arguing that the fact that Lord Browne-Wilkinson saw fit to overrule *Sinclair* in all its other aspects:

“...must at least be welcomed as a step down the road towards the eventual abolition of this requirement: as has been widely discussed, the requirement is not soundly based in principle, and its effect has been to encourage the courts to ‘discover’ fiduciary relationships where none can meaningfully be said to have existed”.²¹⁴

Lord Browne-Wilkinson has since indicated that his remark in relation to *Re Diplock* was not to be taken as support for the fiduciary relationship requirement but was only made “...in order to forestall any argument that the entire framework of equitable proprietary claims had been swept away”.²¹⁵ Rather, he regarded the requirement as wholly misconceived.

Cope suggests that it is now open to doubt whether a proprietary claim will be available where monies are received in ignorance of a mistake.²¹⁶ This is because his Lordship then went on to consider the decision of Gouling J in *Chase Manhattan*, a case which Lord Goff did not feel it necessary to review, despite it being long regarded by banking lawyers as anomalous. Although this case was not formally overruled, Lord Browne-Wilkinson was not satisfied with the reasoning behind the decision, but he did state that the outcome could be correct for another reason.

²¹² *Westdeutsche*, *supra* n.16, 714

²¹³ Jones, “Ultra Vires Swaps: The Common Law and Equitable Fall-Out” [1996] *CLJ* 432, 435

²¹⁴ Mitchell, “Case Notes: *Westdeutsche* in the House of Lords” (1996) 10 (3) *TLI* 84, 87 end note 28

²¹⁵ Oakley, “The availability of proprietary remedies” [1997] 61 *Conv.* 1, 4, making note of a seminar given by Lord Browne-Wilkinson at All Souls’ College, Oxford on 27 September 1996.

In *Chase*, Gouling J was concerned with the question as to whether there was a proprietary base on which to base a tracing remedy. He held that, where money was paid under a mistake, the receipt of such money without more, constituted the recipient a trustee, as the payer "...retains an equitable property in it and the conscience of [the recipient] is subjected to a fiduciary duty to respect his property right".²¹⁷ Lord Browne-Wilkinson criticised the decision on two grounds. The first was that he did not agree with the finding that the bank retained an equitable property in the money. The idea of *retaining* a beneficial interest in property was rejected as "meaningless", based on the fundamental principles of trust law. Secondly, Lord Browne-Wilkinson felt that in order for a trust to exist the conscience of the transferee must be affected, and could not see how the defendant bank's conscience could have been affected at the date of the mistake. The outcome of the case might have been correctly decided on the "conscience" basis as, within two days of the receipt of the money, the bank knew of the mistake (a fact dismissed as irrelevant by Gouling J). Lord Browne-Wilkinson argues, however, that at this point the retention of the monies following the realisation of the mistake might have given rise to a constructive trust.²¹⁸

Principles of Trust Law and the Resulting Trust

Lord Browne-Wilkinson gave a very detailed account of the general principles of trust law, with his reasoning being agreed with by Lord Goff.²¹⁹ The bank had submitted that although legal title had been transferred, they retained equitable title in the money, as they only intended to part with beneficial ownership of the money in performance of a valid contract. Following from this it was submitted that where the legal and equitable title were separated, the property would be held on a resulting trust. Lord Browne-Wilkinson rejected this argument stating that not only was it an essential requirement for a trust that there was identifiable trust property, but that because equity is dependant on the conscience of the holder of the legal title being affected, such a person could not be a trustee of the property until he was aware that he was intended to hold the property for the benefit of another. A

²¹⁶ Cope, "Notes: Compound Interest and Restitution" (1996) 112 *LQR* 521, 523

²¹⁷ *Chase Manhattan*, *supra* n.103, 119

²¹⁸ *Westdeutsche*, *supra* n.16, 715

trust could not arise as long as the recipient remains ignorant of the facts which are alleged to affect his conscience. Once the recipient becomes aware, a trust is established and from this date the beneficiary has, in equity, a proprietary interest in the trust property. However, if the recipient dissipates the property before his conscience is affected with this knowledge, no trust can arise. Mitchell questions whether this adds anything to useful to the criteria by which equitable proprietary interests are currently deemed to arise. He believes that its more likely effect will be to "...confuse this muddled area of the law even further, by committing the courts to an enquiry into the state of knowledge of the recipients of property before they can hold that a proprietary claim will lie".²²⁰

The argument that equitable title could be "retained" was, for Lord Browne-Wilkinson, also "fallacious". This is because:

"A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all the rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the bank "retaining" an equitable title is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the local authority. If so, an equitable interest arose for the first time under that trust".²²¹

Birks notes that the clarity of this statement must be welcomed.²²² In the normal course of dealings an owner of property has no equitable interest in their property at all, the property is held at law *pleno iure* with full benefits of ownership. It is only if equity intervenes that a legal title becomes a bare right, a *nudum ius*. Where equity intervenes in a transfer so that only the *nudum ius* is carried across this is because a new equitable interest has sprung up and not because the transfer takes the legal title across leaving the equitable title behind. It was for this reason that the decision in *Chase Manhattan* was questioned.

Worthington, however, sees this argument as simply "...one of semantics, and can easily be taken too far. Moreover, there is something wrong with an argument which supposes it

²¹⁹ *Ibid.*, 689-690

²²⁰ Mitchell, "Case Notes: *Westdeutsche* in the House of Lords" (1996) 10 (3) *TLI* 84, 86

²²¹ *Westdeutsche*, *supra* n.16, 706

to be impossible to *retain* an equitable interest which has no prior existence, but which regards it as unexceptional to *transfer* such an interest”.²²³ For Worthington, whether the property returns to the resulting trust beneficiary after it has been given away or whether it has never left him is not of practical importance. What is important, however, is the reason equity sees this response as appropriate. The outcome is the same whether the property is seen as “retained” or it is seen as immediately resulting back to the transferor.

Rather than dismissing the rejection of the possibility of “retaining” an equitable interest as one of terminology, Ulph argues that it is *excessive* to state that it is never possible to do so.²²⁴ She argues that if it is what the parties intended, the flexibility of the operation of equity will allow for the retention of equitable title, despite the general rule that when property is transferred equitable title will pass along with the legal title. Ulph considers that policy concerns about the injection of equitable principles into the commercial arena may have misguided the House of Lords. She argues that a different conclusion might have been reached on the question of retention of equitable title if their Lordships had considered the position on insolvency of preferences.

Where a company purports to transfer the equitable interest in property back to the original transferor prior to an insolvency, such a transaction may be struck down as a preference. Ulph uses the trust seen to have arisen in *Re Kayford Ltd*,²²⁵ on the consumer prepayment for goods, as an example. Here, Megarry J asserted, in holding that there was a trust in favour of the customers, that either the transferors (the customers) or the transferee (the company) could impress the monies transferred with a trust. Ulph argues that such cases may be distorted if Lord Browne-Wilkinson is followed on his arguments that equitable interest can never be retained. Rather, she prefers Lord Goff’s approach, seeing Lord Browne-Wilkinson’s analysis as simply the *general* rule to which there may be exceptions.

²²² Birks, *supra* n.78, 10

²²³ Worthington, “The Proprietary Consequences of Contract Failure” in Rose (ed.) *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (pub. Hart, 1997) p. 82. Whether this is based on an analysis of Lord Browne-Wilkinson’s position or simply a defence of Worthington’s own analysis, expounded in Worthington, “Proprietary restitution – void, voidable and uncompleted contracts” (1995) 9 (4) TLI 113, is unclear. In this earlier article, the view had been expressed that equitable ownership in property transferred could be either *retained* notwithstanding legal transfer, or *revested*, at the owner’s election.

²²⁴ Ulph, “Proprietary Consequences of Contract Failure – A Comment” in Rose (ed.) *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (pub. Hart, 1997) p. 95

²²⁵ [1975] 1 All ER 604

It is submitted, however, that such trusts are better viewed in the light of a discussion of the *Quistclose* trust²²⁶ rather than as part of the debate on pure presumed resulting trusts and the “retention of title” issue.

Turning more specifically to the resulting trust argument put forward by the bank: if the bank did not have an equitable interest prior to the receipt by the council of the up-front payment, then in order to show that the council became a trustee, the bank would have to demonstrate that a trust was raised following the payment. As their Lordships had held that a resulting trust could not arise under the principles in *Sinclair*, and the council were innocent recipients not subject to a constructive trust, the bank put forward arguments for the extension of the definition of a resulting trust, based on the Birks’s thesis. As has been noted above, Birks has argued that the plaintiff should have a proprietary remedy on the basis of a resulting trust whenever he has transferred value under a mistake or under a contract the consideration for which wholly fails.²²⁷ Both Lords Goff and Browne-Wilkinson felt that this proposition was, however, incompatible with the basic principles of trust law. As Lord Goff noted, Birks’s thesis is “...avowedly experimental, written to test the temperature of the water. I feel bound to respond that the temperature of the water must be regarded as decidedly cold”.²²⁸

Lord Browne-Wilkinson stated that under the present law:

“...a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A’s intention to make an outright transfer... (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest...”²²⁹

²²⁶ See Chapter 7

²²⁷ See above p.28

²²⁸ *Westdeutsche*, *supra* n.16, 689

²²⁹ *Ibid.*, 708

As far as the claim by the bank in *Westdeutsche* was concerned, following from this, its claim could not be substantiated. There was no express trust which failed, and so a resulting trust of type (B) could not arise, and as for type (A), Lord Browne-Wilkinson felt that any presumption would be rebutted since it was demonstrated that the bank paid the up-front payment with the intention that the money should become the absolute property of the council. In approving the writings of Swadling, Lord Browne-Wilkinson held that even though the parties were under a misapprehension that the payment was made pursuant to a valid contract, this did not alter the *actual* intentions of the parties at the date that the money was transferred. The presumption of a resulting trust is rebutted by evidence of *any* intention inconsistent with such a trust and not only by evidence of an intention to make a gift.

That the legal effect on the transferor's intention is not altered by the fact that the parties are both acting under a misapprehension that there is a valid contract is seen by Worthington as a misconception of "...the traditional operation of resulting trusts".²³⁰ Worthington believes that Lord Browne-Wilkinson's suggestion, that evidence of intention to make an outright transfer will suffice to rebut the presumption of a resulting trust, must be treated with caution as, although correct, it is not comprehensive. Although the presumption will be rebutted where there is an underlying voluntary or gratuitous transfer coupled with the intention to transfer as such, Worthington argues that "...what the evidence in rebuttal must really show is *an intention to make an absolute and voluntary (i.e. gratuitous) transfer*".²³¹

Worthington argues that this fits with the conclusions of Swadling which were accepted by the House of Lords. For example, a gift intended as such but based on mistake in the facts will not give rise to a resulting trust as an absolute and voluntary transfer has been demonstrated. In such a case the transferor will only have available common law remedies for the return of the gift. However, this is arguably not the case where the transfer was intended to be absolute but *not* voluntary (i.e. where it is made for consideration, even

²³⁰ Worthington, *supra* n.223, p.83

²³¹ *Ibid.*

when such consideration subsequently fails). This is seen to be of great significance in a commercial context where there may be, for example, payments made pursuant to a void contract. The question as to when contract failure can give rise to proprietary rights, and more specifically, a resulting trust, is identified by Ulph as a “quintessential issue”,²³² although no distinction was allowed by Lord Browne-Wilkinson who believed that equity could not presume that there was no intention to part with the beneficial interest where there was evidence of an intention to transfer absolutely.

The misconception identified by Worthington arises where the contract entered into is void *ab initio*. She argues that in *Westdeutsche*, the bank paid the monies to the local authority without being contractually obliged to, in circumstances where the local authority need not have satisfied any counter obligations. Worthington argues that to say that a resulting trust cannot arise in such a situation is to argue that the bank intended a voluntary and absolute transfer. This anomaly cannot be resolved by arguing that the bank was mistakenly motivated, believing to be acting pursuant to a valid contract, as this denies the suggestion that the transfer was intended to be voluntary. It is submitted, however, that such an approach is, in itself, misconceived. If there can be no occurrence of a resulting trust where a gratuitous transfer is based on mistake (as mistake does not vitiate intention) and there is no argument that resulting trusts should have any application where there is a dispute in respect of a valid contract, then it does not follow that mistake as to the validity of a contract should afford a proprietary remedy in the form of a resulting trust where it is not available in either of the above two circumstances. That there is now clarification to some extent on this point by the House of Lords must be welcomed in any event. The uncertainty which was prevalent prior to the *Westdeutsche* decision had led McCormack in his paper “Mistaken Payments and Proprietary Claims”²³³ to conclude that there must be a resolution to this policy question, and that any such resolution must take into account the position of unsecured creditors who are too often left out of the equation. Indeed, this was one of the factors which Lord Browne-Wilkinson seemed to have at the front of his mind.

²³² Ulph, *supra* n.224, p.91

²³³ [1996] *Conv.* 86

Lord Browne-Wilkinson was not persuaded by Birks's "tightly reasoned" argument that from restitutionary principles the definition of a resulting trust should be extended to cover situations where it could be said that the actual intentions of the parties were vitiated by mistake or later failure of consideration, as to extend remedies in restitution would involve a distortion of trust principles. Firstly, Birks's thesis ignores the basic principle that there must be identifiable trust property. He transposes rights in defined property into rights in the "value transferred", and it is not consistent with trust principles to argue that a person can be a trustee of property which cannot be defined. Secondly, Birks's thesis assumes that the recipient has been a trustee of the property from the time of its transfer. As Lord Browne-Wilkinson notes, this would mean that a person could be a trustee at a time when he does not, and cannot, know that there is going to be, for example, a total failure of consideration. Lord Browne-Wilkinson, however, believes that as a general principle a trust cannot arise until the trustee is aware of the factors which give rise to the supposed trust. Thus, neither in the case of a total failure of consideration, nor where there is a contract void for mistake, will there be circumstances affecting the conscience of the recipient making him a trustee from that date. Finally, Lord Browne-Wilkinson feels that Birks's arguments relating to the exclusion of the situation where there is simply a failure to perform, rather than a failure of consideration,²³⁴ are arbitrary.²³⁵ This unprincipled modification, whilst designed to preserve the rights of creditors in the insolvency of the recipient, casts doubt on the entire concept.

In rejecting the bank's arguments of the existence of a resulting trust, Lord Browne-Wilkinson also had regard to what he called "reconciling legal principle with commercial common sense".²³⁶ He felt that it would be improper to import into the commercial sphere equitable principles which were inconsistent with the speed and certainty which are essential in business for the conduct of affairs. If the bank's arguments were correct, then upon entering a contract to purchase property one could find that the property contracted for, and apparently belonging to the seller, actually belonged to a third party, not only

²³⁴ Birks, *supra* n.8, p.356

²³⁵ Birks himself describes having to exclude one particular situation which would fall within his wider definition as "artificial". *Ibid.*, p.359

²³⁶ *Westdeutsche*, *supra* n.16, 705

unknown to the purchaser but also unknown to the seller. This would introduce unmanageable risk into commercial dealings.

In a recent article, Millett LJ has criticised a number of the propositions put forward by Lord Browne-Wilkinson. He believes that Lord Browne-Wilkinson proceeded on "...what may without disrespect be described as unorthodox views both of the nature of the resulting trust and of the doctrine that equity acts on the conscience".²³⁷

The first proposition that Millett LJ takes issue with is that he believes, in agreeing with Chambers, that the presumption is that the transferor did not intend to pass the whole beneficial interest to the transferee. "The question is not whether the person who provided the property intended to create a trust in favour of himself, but whether he intended to benefit the recipient. It depends on the absence of the latter intention, not the presence of the former".²³⁸ Millett LJ does, however, then go on to agree with Lord Browne-Wilkinson, and thus with Swadling, that the presumption will be rebutted by "...any explanation which is inconsistent with a trust by demonstrating an intention on the part of the person at whose expense the property was provided to pass the beneficial interest to the recipient".²³⁹ Although seeing this as contrary to the decision in *Westdeutsche*, Oakley is one of a number who find this definition to be "highly convincing".²⁴⁰

The second issue is that of whether a resulting trust can arise where the recipient has no knowledge of the facts. As we have seen, Lord Browne-Wilkinson believes that, as a general principle, a trust cannot arise until the trustee is aware of the factors which give rise to the supposed trust. Millett LJ argues that such a stance is "...with respect, impossible to reconcile with the actual decisions and, if accepted, would have unfortunate practical consequences".²⁴¹ Rather, a resulting trust *can* arise even if the recipient is unaware of the transfer or of the circumstances in which it was made. In fact, Millett LJ sees such a situation as the most commonest case, and as such:

²³⁷ Millett, "Restitution and Constructive Trusts" (1998) 114 *LQR* 399, 410

²³⁸ *Ibid.*, 401

²³⁹ *Ibid.*, 402

²⁴⁰ Oakley, "Restitution and Constructive Trusts: A Commentary" in Cornish et al, *Restitution: Past, Present and Future* (pub. Hart Publishing, 1998), p.224

²⁴¹ Millett, *supra* n.237, 401 at n.12

“The recipient is bound by the trust even if he honestly believes himself to be absolutely and beneficially entitled to the property transferred to him by way of outright gift. His conscience may be clear. The existence of a resulting trust has never been made to depend on unconscionable conduct or notice on the part of the recipient”.²⁴²

Millet LJ relies principally on the work by Chambers to support an argument against the need for the recipient to have knowledge or notice of the facts relating to the existence of a resulting trust. Chambers argues that resulting trustees²⁴³ can be unaware of the existence of the trust or even their receipt of trust property, and Lord Browne-Wilkinson’s suggestion if acted upon “...would not only change the law relating to resulting trusts, but have a drastic effect on the law relating to the creation and enforcement of equitable proprietary interests”.²⁴⁴ In addition, Chambers believes that:

“Introducing the affected conscience of the trustee as an additional requirement for the creation of a trust has alarming consequences. The inquiry would no longer be restricted to the events taking place at the moment of transfer, but could...span the remaining years of the trustee’s life. This is an enormous task, which could well leave the identity of the beneficial owner of the trust property in doubt for a long period of time”.²⁴⁵

The imposition of a resulting trust should not, however, make the resulting trustee liable in the same way that other trustees are, by the imposition of fiduciary obligations.²⁴⁶ Chambers puts forward four possibilities for not imposing such obligations until the recipient becomes aware (or ought to have become aware) of the trust. The first is Lord Browne-Wilkinson’s explanation in *Westdeutsche*, that no obligations can be imposed because there is no trust. The other possibilities are that the recipient; (i) has no personal trust obligations; (ii) is not in breach of his trust obligations; or (iii) is in breach but can be excused for want of knowledge. In order to argue these three possibilities it must first be

²⁴² *Ibid.*

²⁴³ This term is used by Chambers to distinguish the holder of property on a resulting trust from other trustees; however, as Millet LJ notes, the term is not of common usage, it being customary to call such a person a “constructive trustee”, a term which leads to much confusion. See Millet, *supra* n.237, 402

²⁴⁴ Chambers, *supra* n.4, p.159

²⁴⁵ *Ibid.*, p.207

²⁴⁶ *Ibid.*, p.201

assumed that a resulting trust can arise before the recipient has knowledge of the circumstances giving rise to such a trust.

Chambers examines the 'no trust' argument in detail as he believes that it addresses fundamental principles of trust law. He notes that such an explanation "...offers a deceptively simple way of eliminating the dilemma of the innocent trustee, but turns out to produce several more serious problems".²⁴⁷ Although this argument was probably true at more than one stage in the development of the resulting trust,²⁴⁸ it is difficult to reconcile with modern trust law, where most trusts arise because the conditions of their creation are met and not directly because the conscience of the trustee is affected. As an example of cases where a resulting trust has arisen arguable before the resulting trustee is aware of the situation, Chambers quotes *Re Vinogradoff*,²⁴⁹ *Re Muller*,²⁵⁰ *Birch v Blagrave*²⁵¹ and *Childers v Childers*.²⁵² In the first two of these cases the resulting trustees were children under the age of 7 who could not have appreciated the situation, and in the second two cases, the resulting trustees died before they could become aware of the facts giving rise to the trusts. Lord Browne-Wilkinson, in *Westdeutsche*, explains these cases away stating that:

"There are cases where property has been put into the name of X without X's knowledge but in circumstances where no gift to X was intended. ...These cases are explicable on the ground that, by the time action was brought, X or his successors in title have become aware of the facts which give rise to a resulting trust; his conscience was affected as from the time of such discovery and thereafter he held on a resulting trust under which the property was recovered from him. There is, so far as I am aware, no authority which decides that X was a trustee, and therefore accountable for his deeds, at any time before he was aware of the circumstances which gave rise to a resulting trust".²⁵³

Chambers rejects this argument for two reasons. The first is that such an argument is difficult to reconcile with the reasoning in the cases themselves, and the second is based on

²⁴⁷ *Ibid.*, p.203

²⁴⁸ *Ibid.*, p.203-4

²⁴⁹ *Supra* n.56

²⁵⁰ [1953] NZLR 879

²⁵¹ (1755) Amb 264

²⁵² (1857) 1 De G & J 482

the effect that this would have on those matters which depend on a correct definition of the timing of the creation of the resulting trust.²⁵⁴ In *Birch v Blagrave*²⁵⁵ a father conveyed a number of estates to his daughter but continued to receive rents from the properties and to cut timber on them. The facts of the transfer were not revealed until after the deaths of both the father and the daughter. Chambers argues that if the resulting trust, which the court held to be in place in favour of the father, did not arise until after the deaths when the facts came to light, then the estate of the father should have had to account for profits to the estate of the daughter. This, however, was not held to be the case.

Similarly, in *Re Vinogradoff*²⁵⁶ and *Re Muller*²⁵⁷ stock and money was deposited in the names of minors. The infants were unaware of the deposits and in each case the transferors continued to receive interest during their lifetimes. In both cases the transferors' estates were not required to account for that income, which seems to indicate that the cases were decided on the basis that the resulting trusts which operated arose at the date of transfer, the time when the events giving rise to the resulting trusts occurred.

In other cases it is imperative that there is a clear definition of when the trust arises. One such case relates to liability for taxation. In *Vandervell v IRC*,²⁵⁸ in an attempt to make a gift to the Royal College of Surgeons without paying tax on the scheme, Mr Vandervell transferred shares to the College, with an option to purchase those same shares granted to a trust company. The House of Lords held that the benefit of the option was not intended to be that of the trust company, who therefore held it on a resulting trust for Mr Vandervell from the date of receipt. Chambers notes that no one involved in the transaction anticipated this, Mr Vandervell had tried to rid himself of any beneficial interest, and it cannot be said that the conscience of the trust company had been affected in any way. However, a tax liability arose from the date of transfer due to the imposition of the resulting trust. This

²⁵³ *Westdeutsche*, *supra* n.16, 705-6

²⁵⁴ See Birks, *supra* n.8, pp19-20. Birks notes that it is very important to know exactly when a proprietary interest arises, especially where there is to be an adjustment of property rights (see *Rawluk v Rawluk* [1990] 1 SCR 70; 65 DLR (4th) 161) or in the field of taxation (see *Vandervell v IRC* [1967] 2 AC 291).

²⁵⁵ (1755) Amb 264

²⁵⁶ [1934] WN 68

²⁵⁷ [1953] NZLR 879

²⁵⁸ [1967] 2 AC 291

surely "...demonstrates convincingly that resulting trusts arise without regard to the conscience of the resulting trustee".²⁵⁹

Finally, Chambers points to an apparent inconsistency in the reasoning on Lord Browne-Wilkinson in *Westdeutsche* where he stated that:

"Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice".²⁶⁰

Chambers argues that this is difficult to reconcile with the idea that enforcement of trusts depends on the holder's conscience being affected. He asks what the difference is between the innocent *subsequent* recipient and the innocent *original* recipient, such that equity would ignore the original recipient until his conscience is affected, but would enforce against the subsequent recipient who is equally innocent and may even have given some value for the property. Chambers concludes that to link the creation of equitable property interests directly to the affected conscience of the legal title holder would be a difficult and dangerous departure from existing law, with little to be gained and much to be lost.²⁶¹

In rejecting this proposition, Chambers is joined by Worthington who believes that the fallacy of Lord Browne-Wilkinson's reasoning arises because of "...the tendency to equate the *existence* of a trust with the *imposition* of the full gamut of fiduciary obligations traditionally imposed on trustees of express trusts".²⁶² She believes that equity is not examining the bona fides of the recipient in obtaining the property, but is simply addressing itself to the question as to whether the recipient should be entitled to keep it. To reinterpret the cases would be to impose on them an analysis and justification not evident in the primary decisions.²⁶³ The answer to this problem seems to lie with one of the

²⁵⁹ Chambers, *supra* n.4, p.207

²⁶⁰ *Westdeutsche*, *supra* n.16, 705

²⁶¹ Chambers, *supra* n.4, p.208

²⁶² Worthington, *supra* n.173, p.xiv. See also Worthington, *supra* n.223, p.86

²⁶³ Worthington, *supra* n.173, p.xv

alternative positions put forward by Chambers, rather than with the imposition of strict fiduciary obligations on an unknowing resulting trustee.

The first is that there is a scale of the fiduciary obligations applicable to resulting trustees, depending on the circumstances in which the resulting trust arises, with the innocent resulting trustee at the lower end of this scale.²⁶⁴ As such, actions which would normally be seen as a breach of trust by an express trustee would not be wrongful for the innocent resulting trustee. The innocent trustee will to a certain extent, however, be under a personal obligation with regard to the trust property, even if this is only an obligation to restore the property on demand, if still in possession.²⁶⁵ Thus, the minimum duty of a resulting trustee would be to convey the trust property on the request of the trust beneficiary. Once this request has been made, the innocent resulting trustee gains the requisite knowledge for imposing further fiduciary duties, such as the duty to preserve the trust property, and possibly others depending on the circumstances.

This argument finds favour with Worthington who equates the position with that of constructive trustees.²⁶⁶ Where the defendant is a “knowing recipient” of trust property the full force of fiduciary duties are imposed on him. These include the obligation to act in the best interests of the beneficiary and to not make a personal profit from the trust, with any generated profits being held equally on trust for the beneficiaries. However, where the constructive trustee is an innocent volunteer then the rigours of this approach are substantially modified: “...evidential difficulties are resolved by balancing the parties’ respective interests, profits are retained, and compensation orders are not grounded in an obligation to maximise the beneficiary’s interests”.²⁶⁷ Oakley also takes this view, arguing that a holder of property should be “...liable to account as a trustee only if, once he has acquired the necessary knowledge that he is holding the property which has been disposed of in breach of trust, he deals with the property in his hands in a manner inconsistent with the trust...”.²⁶⁸ Taking this view, the trust will arise at the time of the transfer. The holder

²⁶⁴ Chambers, *supra* n.4, p.209

²⁶⁵ Hackney, *Understanding Equity and Trusts* (pub. Sweet & Maxwell, 1987) p. 167

²⁶⁶ Worthington, *supra* n.173, p.xvi

²⁶⁷ *Ibid.*

²⁶⁸ Oakley, *supra* n.240, p.224

of the property will, however, only be liable to account once he has the knowledge that he is holding trust property.

Chambers's second argument is that if the same duties are applied to innocent and to knowing recipients, then one could decide that there can be no breach of trust unless the recipient was aware of the situation. This argument is then rejected on the basis that it is difficult to apply because an honest and well-meaning express trustee can be liable for an unintended breach.²⁶⁹ Liability in equity does not depend on a guilty mind.

The final alternative is based on Elias's suggestion that s.61 of the Trustee Act 1925 "...offers a viable but as yet unexplored base for a change of position defence which is general to trustees".²⁷⁰ This section allows the court to relieve a trustee of personal liability where there has been a breach of trust, but where the trustee has acted honestly and reasonably. However, Chambers argues that an innocent recipient ought to be able to deal with property he believes to be his own however he wishes.²⁷¹ There is a significant difference between someone who has agreed to take on the burden of becoming a trustee and one who has not, and the innocent recipient should not have to rely on the courts' discretion to obtain forgiveness for breaching unknown duties. Section 61 should remain simply for those who have accepted and are aware of their obligations, but who have been unwittingly in breach.

An alternative view is put forward by Ulph who suggests that the recipient of property which is made subject to a resulting trust could be held personally liable to account if the property is dissipated. However, she believes that in such a situation the recipient should

²⁶⁹ *Keech v Sandford* (1726) Sel Cas T King 61

²⁷⁰ Elias, *Explaining Constructive Trusts* (pub. Clarendon, 1990) p.20 cf Law Commission Report No. 236 *Fiduciary Duties and Regulatory Rules* § 15.7 (December 1995) where the point is mooted that it is unclear as to how far s.61 can be relied on by constructive trustees, and indeed, it is difficult to see how there can be a "breach" of a constructive trust bringing s.61 into play.

²⁷¹ See Chambers, *supra* n.4, p.201. The Law Commission has also concluded that "...in principle, a person ought to be able to spend money to which he appears entitled as he chooses". See Law Commission Report No. 227 *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* § 2.23 (November 1994)

have the defence of change of position²⁷² open to him, with deliberation on the question of fault being made at this point.²⁷³

In *Westdeutsche*, Lord Browne-Wilkinson rejected the reasoning of Gouling J in *Chase Manhattan* as he could not see how the recipient's conscience was affected where he was not aware of, in this case, a mistake. This proposition is, however, not accepted by Millett LJ who, although for alternative reasons, also believes that the basis of the decision was incorrect. For Millett LJ, this is not because of a lack of notice, but because the plaintiff had no proprietary interest for the defendant to have notice of. In parallel with the finding of the facts in *Westdeutsche*, the transferor in *Chase* also intended to part with the beneficial interest, and it is this intention which is inconsistent with the imposition of a resulting trust. Millett LJ also disagrees with Lord Browne-Wilkinson's finding that once the recipient learnt of the mistake, this may have given rise to a constructive trust. As he points out:

“The fact that the money was paid by mistake afforded a ground for restitution. By itself notice of the existence of a ground of restitution is obviously insufficient to found a proprietary remedy; it is merely notice of a personal right to an account and payment. It cannot constitute notice of an adverse proprietary interest if there is none”.²⁷⁴

Millet LJ also criticises the House of Lords for not considering the true ground for which restitution should have been sought.²⁷⁵ The true ground was not the “absence of consideration” relied on by Hobhouse J and Leggatt LJ, or as Lord Browne-Wilkinson preferred to see the case, one of “total failure of consideration”, with the consideration being the promise to repay. As Chambers points out, this would be inconsistent with the decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* where it was held that:

“In the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration...it is,

²⁷² See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

²⁷³ Ulph, *supra* n.224, p.94

²⁷⁴ Millett, *supra* n.237, 413

²⁷⁵ *Ibid.*, 413-414

generally speaking, not the promise which is referred to as the consideration, but the performance of the promise".²⁷⁶

Thus, Millett LJ sees these cases as being based on *partial* failure of consideration. The Court of Appeal could not say this, however, as they wished to find for the plaintiff. Such a decision would have been barred by the rule that failure of consideration does not give rise to a right of recovery unless it is total. Millett LJ believes that it was unfortunate that the House of Lords did not have the opportunity to sweep away this rule in order to concentrate on the true ground of recovery. He argues that following from Lord Goff's observations in *Goss v Chilcott*²⁷⁷ the House will take this opportunity as soon as it presents itself. As to whether the bank would have had a proprietary restitutionary claim, he concludes that "[t]here is no proprietary claim where there is a total failure of consideration; *a fortiori* there is none where there is only a partial failure".²⁷⁸

²⁷⁶ [1943] AC 32, 48

²⁷⁷ [1996] AC 788, 798

²⁷⁸ Millett, *supra* n.237, 414

Chapter 5

Automatic Resulting Trusts

The second type of resulting trust, as identified by Megarry J in *Re Vandervell's Trusts (No. 2)*,²⁷⁹ is the “automatic” resulting trust. This trust arises where an express trust fails to dispose of all or any part of the property or beneficial interest in the property conveyed to the trustees. Megarry J was the first to set out what has been regarded, until recently, as a definitive explanation of the differences, suggesting that the “...distinction between the two categories of resulting trusts is important because they operate in different ways”.²⁸⁰ Whereas, with presumed resulting trusts, the matter is one of intention, with a rebuttable presumption applying where intention is not made manifest, with an automatic resulting trust intention has been said to be irrelevant, with the trust taking effect by way of law, and thus seen to be automatic. That which is indisposed of remains automatically vested in the settlor. In order to analyse the academic and judicial debate which has arisen with regard to the automatic resulting trust it is necessary to briefly summarise the instances where such trusts have been held to have arisen.

1. Trusts which fail

There are a number of reasons why trusts can fail, for example for lack of due formality,²⁸¹ lapse,²⁸² perpetuity,²⁸³ or uncertainty.²⁸⁴ In such situations resulting trusts are an essential part of the trust concept as, apart from where the subject matter of a trust is, on rare occasions, held to pass to the Crown as *bona vacantia* (ownerless property), resulting trusts provide the last practical means of disposing of trust property where the original scheme of the trust envisaged by the settlor fails. Where an express trust fails the entire equitable interest, or such part as has not been effectively disposed of, remains vested in, or results

²⁷⁹ [1974] 1 Ch 269

²⁸⁰ *Vandervell (No. 2)*, *supra* n.24, 289

²⁸¹ *Hodgson v Marks*, *supra* n.25, 892

²⁸² *Ackroyd v Smithson* (1780) 1 Bro CC 503

²⁸³ *Thurupp v Collett* (1858) 26 Beav 125

²⁸⁴ *Morice v Bishop of Durham* (1804) 9 Ves 399; on appeal (1805) 10 Ves 522; *Re Osmund* [1944] Ch 66; *Re Pugh's Will Trusts* [1967] 3 All ER 337

back to, the settlor.²⁸⁵ The resulting trust can be seen as a consequence of the maxim that equity “abhors a beneficial vacuum”.²⁸⁶ No new trust is established, the beneficial interest is simply redirected. The trustees, appointed by the settlor, hold the trust property on a resulting trust for him.

2. Trusts which do not exhaust the beneficial interest

Where an express trust is valid but does not exhaust the beneficial interest, for example where there is a gap in the trust which cannot be filled by construction, there will be a resulting trust of the remaining property for such period as the gap continues.²⁸⁷ This may be due to defective drafting,²⁸⁸ or the failure to foresee and provide for future contingencies.²⁸⁹

The creation of a resulting trust will also be the case where an express trust is only partially expressed. An example is where a testator bequeaths the residue of his property to T upon trust to pay the income to B for life without saying what is to be done with the property on B’s death. When B dies T holds as trustee for the persons entitled as on an intestacy of the testator.²⁹⁰

3. Surplus funds

A similar situation arises where a trust is set up for a particular purpose and there remains trust property on the fulfilment of the purpose, the direction of which has not been provided for in the trust. In *Re Abbott Fund Trusts*²⁹¹ a fund had been raised for the maintenance and support of two deaf and dumb ladies. On the death of the survivor of the two there was a portion of the fund which remained unapplied in the hands of the trustees.

²⁸⁵ Or his estate if he is dead.

²⁸⁶ Pettit, *Equity and the Law of Trusts* (pub. Butterworths, 1997), p.152

²⁸⁷ Unless the terms of the trust expressly exclude the possibility of a resulting trust (*Davis v Richards and Wallington Industries Ltd* [1991] 2 All ER 563) or where the trust is charitable and the doctrine of cy-près applies, directing the property to be applied for other charitable purposes as near as possible to the original intentions of the settlor (*Re Hillier* [1954] 2 All ER 59).

²⁸⁸ *John v George* [1995] 1 EGLR 9

²⁸⁹ *Re Cochrane* [1955] Ch 309

²⁹⁰ Baker & Langan, *Snell’s Equity* (pub. Sweet & Maxwell, 1990) p.176

Stirling J held that, as the ladies had no interest in the capital sum in the trusts, there must be a resulting trust in favour of the subscribers to it.

It is accepted that there are inherent problems in the application of the resulting trust to surpluses on the attainment of a purpose, especially where there are a number of sometimes small and unascertainable subscribers (the “collection box problem”). In *Re Gillingham Bus Disaster Fund*²⁹² a trust fund was set up into which more money was contributed than was required for the primary object. A problem arose as the secondary object failed because it had not been confined to charitable purpose. Despite the difficulties with the approach and the inconvenience, Harman J concluded that a resulting trust arose in favour of the subscribers. It was held that whether large or small, contributors intended that their donations should be used for a specific purpose and, on that purpose being attained, or becoming unattainable, each had an interest in the surplus by way of resulting trust. Harman J rejected the suggestion of the property being *bona vacantia* holding that:

“...the settlor or donor did not part with his money out and out but only sub modo to the intent that his wishes as declared by the declaration of trust should be carried into effect. When, therefore this has been done any surplus still belongs to him. This doctrine does not, in my judgment, rest on any evidence of the state of mind of the settlor for in the vast majority of cases no doubt that he does not expect to see his money back: he has created a trust which so far as he can see will absorb the whole of it. The resulting trust arises where that expectation is for some unforeseen reason cheated of fruition and is an inference of law based on after-knowledge of the event”.²⁹³

It is apparent that the resulting trust in such cases of small unascertainable donors may not be the most appropriate solution. It was Harman J’s judgment, that as the small giver has the same intention as the large giver who can be named, his portion of the surplus must also be held on a resulting trust. Unlike the situation where there is a large donor who can be named, allowing the resulting trust to be executed in his favour, where there are unknown donors the property cannot change direction to become *bona vacantia* but remains on resulting trusts for which no beneficiaries can be found. The money on such

²⁹¹ [1900] 2 Ch 326

²⁹² [1958] Ch 300

²⁹³ *Ibid.*, 310

trusts must then be paid into court in the same manner as any other trustee who cannot find his beneficiary.²⁹⁴

4. Unincorporated Associations

This problem of surpluses has arisen in a number of cases where the courts have attempted to interpret the circumstances in a manner such that a resulting trust was not held to apply. Where there is a dissolution of an unincorporated association it is now clear that resulting trusts have no application, despite that fact that often the funds of such an association will be held on express trusts.²⁹⁵ This is because membership of such a club or society is primarily a matter of contract. Members pay their subscription fees and in return become entitled to the benefits available under the rules of the society. The subscription fees become the property of the society, with the subscriber ceasing to retain any individual beneficial interest in those monies but acquiring an interest in the totality of the property belonging to the society. Once a person ceases to be a member, by leaving the society, by death or by any other means, he ceases to be a part owner of any of the society's property. Thus, on the dissolution of such a society there is a distribution of the property of the society, not pro rata those who contributed to the fund, but to those who are currently members, to the exclusion of former members, equally per capita, subject of course to anything in the rules of the society.²⁹⁶

5. Pension fund surpluses

Special mention must be made of the line of cases dealing with the application of the resulting trust to surpluses in trusts set up to facilitate pension schemes, where such a scheme is subsequently wound up.²⁹⁷ Generally the pension fund trust deed will provide for

²⁹⁴ *Ibid.*, 314

²⁹⁵ See *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trust* [1971] Ch 1 and *Re Bucks Constabulary Widows and Orphans' Fund Friendly Society (No 2)* [1979] 1 All ER 623

²⁹⁶ *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51; *Re St Andrews Allotment Association Trusts* [1969] 1 All ER 147; *Re GKN Bolts and Nuts Ltd (Automotive Division) Birmingham Works, Sports and Social Club* [1982] 2 All ER 855

²⁹⁷ The main reason that pension schemes are founded on trusts is the special exemption from tax afforded to such schemes. The down side, of course, is that the schemes are then subject to the full onslaught of trust law principles.

the allocation of such a surplus.²⁹⁸ On rare occasions, however, where the scheme is silent, the general law applies. To whom does the surplus belong – to the employer under contractual principles or to the present and future pensioners? The difficulty is that the authorities on this point are not wholly consistent.

Millet J in *Re Courage Group's Pension Schemes*²⁹⁹ held that the surplus arising from past over-funding belongs to the employer to the full extent of its contributions in whatever form, and only then to the employees, rather than being attributed *pro rata* the contributions of each.³⁰⁰ The alternative approach, favoured by Scott J,³⁰¹ was that there would be a resulting trust for each of the contributors *pro rata* their contributions provided that there was no intention to exclude the operation of a resulting trust. He rejected the argument that a pension scheme was a species of unincorporated association made by employers and employees under contract with one another and so, as has been noted above, the possibility of the application of a resulting trust being excluded. In referring to the case of *Palmer v Abney Park Cemetery Co Ltd*,³⁰² Scott J saw the fact that the origin of rights under such a scheme were contractual as not conclusive. In that case, Blackett-Ord V-C had held that the nature of a pension scheme was primarily a matter of contract, and not trust, and that there had been full consideration as the company was entitled to no more than the benefit of goodwill with its employees, and the employees were entitled to only what they had contracted for, being in fact what they had obtained, thus rendering any surplus *bona vacantia*.

A similar proposition was put forward by Lord Browne-Wilkinson in an address to the National Superannuation Conference in Melbourne³⁰³ where he expressed doubt as to whether the resulting trust has any application to superannuation schemes on the ground that contributions are made pursuant to contractual obligations, an area to which the resulting trust has never been applied. Vinelott J, however, suggests that the answer to this

²⁹⁸ See Pension Schemes Office, *Notes on Approval of Occupational Pension Schemes*, IR 12 (1997) (as amended) (pub. Inland Revenue)

²⁹⁹ [1987] 1 All ER 528

³⁰⁰ This approach has received support from Vinelott J. See Vinelott J, "Pensions law and the role of the courts" (1994) 8 Tr LI 35

³⁰¹ *Davis v Richards and Wallington Industries Ltd* [1991] 2 All ER 563

³⁰² Unreported, 4 July 1985

question lies in that such schemes contain elements of both contract and trust. The rights of members are founded on a duty analogous to a fiduciary duty which is imported by reference to the employer's duty of good faith and the reasonable expectations of employees and former employees.³⁰⁴

In *Jones v Williams*³⁰⁵ Knox J held that "... it is only where it is absolutely clear that in no circumstances is a resulting trust to arise that it will be excluded". In agreeing with this approach, Scott J made one qualification, stating that in his opinion, the provision excluding a resulting trust did not need to be express, although where there was no express provision it would be very difficult to imply such a term. He concluded this line of reasoning by stating that the fact that payment had been made to a fund under contract, and that the payer had obtained all that he had bargained for, was not necessarily a decisive argument against the resulting trust.

Scott J held that as it was the employees' contributions which formed the base of the fund, with employer contributions required in order to produce sufficient assets to cover all the benefits under the scheme, the surplus should be regarded as derived from the employer's contributions.

A resulting trust in favour of the employees was held to be excluded as each employee had paid his contributions in return for specific benefits, the value being different for each employee. To find that a resulting trust operated in such a situation would lead to an unworkable result,³⁰⁶ and so Scott J concluded that the part of the fund surplus derived from employees' contributions must be *bona vacantia*.

In the recent case of *Air Jamaica Limited & Others v Charlton & Others*³⁰⁷ the Privy Council, led by Lord Millett, reviewed the general law in relation to pension scheme

³⁰³ 27 February 1992, Melbourne, Australia. See (1992) 6 *TLI* 19

³⁰⁴ Vinelott J, *supra* n.300

³⁰⁵ Unreported, 15 March 1988

³⁰⁶ This conclusion is rejected by Vinelott J who believes that: "No doubt grave practical difficulties would arise in ascertaining those proportions, but the courts have met and overcome similar difficulties in cases where monies have been provided for the purpose of investment by a company which failed to invest the monies in accordance with the mandate". See Vinelott J, *supra* n.300, 37

³⁰⁷ [1999] 1 *WLR* 1399

surpluses. The Court held that, prima facie, any surplus in a fund is held on a resulting trust for those who provided it. In this case, the fund was contributed to equally by the employees and the employer. The Court rejected the Attorney-General's argument that neither the company nor the employees could receive any part of the surplus as it was *bona vacantia*, also rejecting the argument that the trust deed precluded a claim by the company whilst members could not claim as they had received all that they were entitled to. Although there was authority for both propositions, the Court considered that those arguments could not be supported by principle or as a matter of construction.

Their Lordships also considered the case of *Re A.B.C. Television Limited Pension Scheme*³⁰⁸ where it had been held that, where there is a clause in the trust deed stating that monies paid by the company could not be repaid, the possibility of employing a resulting trust was negated. Their Lordships held that:

“Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest - he almost always does not - since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest...”³⁰⁹

Their Lordships therefore considered that such a clause stopped repayment of contributions under the terms of the scheme, but could not rebut a resulting trust which arises “dehors” the scheme. They also held that employees' contributions stood on a similar footing. Agreeing with Scott J they held that the fact that an employee had received all which he bargained for did not necessarily exclude a resulting trust. Scott J's conclusion that where a distribution under a resulting trust seems unworkable the resulting trust is excluded was, however, rejected.

With regard to the argument that the employees had received all that they have bargained for, Lord Millett held that one of the benefits an employee bargained for was that the

³⁰⁸ Unreported, 22 May 1973

trustee should be obliged to pay them additional benefits in the event of the scheme's discontinuance. Their Lordships concluded that it would be more accurate to say that the employees could claim such part of the surplus as was attributable to their contributions because they had *not* received all that they had bargained for. Lord Millett made reference to Scott J's observation that it is often difficult to arrive at a workable scheme for apportioning the surplus amongst employees and executives of deceased employees, as he thought it necessary to value the benefit that each member had received in order to ascertain his share in the surplus. Under the present scheme, however, their Lordships adopted the view that no such process was required. Their view was that the surplus should be divided pro rata amongst employees in proportion to their contributions rather than to the benefits they had received.

From this case, we can see that so much of the surplus as is attributable to contributions made by the company should be repaid, via a resulting trust, to the company, and that so much of the surplus as is attributable to employees' contributions is divisible pro rata amongst them and the estates of the deceased employees, again via a resulting trust, in proportion to their respective contributions without regard to the value of the benefits they have received, and irrespective of the dates of their contributions.

³⁰⁹ *Supra* n.307, 1412. This statement, however, seems contradictory as on one hand the resulting trust is to give effect to intention, but on the other it is said to arise whether or not the transferor intended to retain a beneficial interest.

evinced intention that the shares should be held on trust for the children, the resulting trust was rendered extinct.

Megarry J's decision stems from that of Plowman J in *Vandervell v IRC*³¹⁵ where it was held that as VT, the defendant company, held the option on a resulting trust for V, he had not divested himself of the shares absolutely.³¹⁶ This decision was upheld in both the Court of Appeal and in the House of Lords for substantially the same reasons, although in the House of Lords only by the majority, with Lords Reid and Donovan dissenting.³¹⁷ Megarry J accepted that he was bound by the principles of law set down by the higher courts but then set about to "amplify" (rather than to "explain") the speeches in the House of Lords so that they were not liable to misunderstanding.

Focusing mainly on the speech of Lord Upjohn, Megarry J noted that two different categories of the doctrine of resulting trusts were being referred to. Having first dealt with the type of resulting trust labelled by Megarry J as the "presumed resulting trust", Lord Upjohn noted that:

"...the doctrine of resulting trusts plays another very important part in our law and, in my opinion is decisive in this case. If A intends to give away all his beneficial interest in a piece of property and thinks he has done so but, by some mistake or accident or failure to comply with the requirements of the law, he has failed to do so, either wholly or partially, there will, by operation of law, be a resulting trust for him of the beneficial interest of which he had failed effectually to dispose. If the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him. Early references to Equity, like Nature, abhorring a vacuum, are delightful but unnecessary...As Plowman J said [1966] Ch 261, 275: 'As I see it, a man does not cease to own property simply by saying "I don't want it." If he tries to give it away the question must always be, has he succeeded in doing so or not?'"³¹⁸

For Megarry J this second category of resulting trust takes effect by operation of law as "what a man fails effectually to dispose of remains automatically vested in him, and no

³¹⁵ [1966] Ch 261 (also known as *Vandervell (No. 1)*)

³¹⁶ Within s.415(1)(d) of the *Income Tax Act 1952*

³¹⁷ [1966] Ch 261, CA; [1967] 2 AC 291, HL

question of any mere presumption can arise”.³¹⁹ He then set about distinguishing between the two categories of resulting trust and how they arise, rejecting the suggested propositions that: (i) the categories concern the disposition of a *legal* estate on one hand and transactions with the *beneficial* interest on the other; and (ii) the distinction is between the *dynamic* of a transfer and the *static* of an ineffective transfer. Rather, the distinction is that “...although the second category contains no mention of any transfer of any interest, it must have been founded on an assumption of some transfer. Furthermore...the implicit transfer is a transfer on trust”.³²⁰ Into Lord Upjohn’s dicta, he therefore inserts wording so that the first sentence reads:

“If A intends to give away all his beneficial interest, and transfers the legal title estate or bare ownership to trustees, but by some mistake or accident or failure to comply with the requirements of the law...”

Megarry J’s argument is that one may properly speak of a resulting trust whether the entire interest is regarded as having notionally left the transferor, becoming vested in the trustees with some or all of the beneficial interest promptly returning to the transferor, or whether one regards only part of the entire interest as notionally being transferred with the remainder remaining vested in the transferor throughout. The beneficial interest has been separated from bare ownership in each case, with the results being substantially the same.

In further support of his propositions Megarry J then turns to the speech of Lord Wilberforce where he states:

“The transaction has been investigated on the evidence of the settlor and his agent and the facts have been found. There is no need, or room, as I see it, to invoke a presumption. The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time... But the equitable, or beneficial interest, cannot remain in the air: the consequence of the law must be that it remains in the settlor.”³²¹

³¹⁸ [1967] 2 AC 291,313

³¹⁹ *Vandervell (No. 2)*, *supra* n.24, 289

³²⁰ *Ibid.*, 291

³²¹ *Ibid.*, 329

Megarry J reads this as Lord Wilberforce rejecting the “presumed” resulting trust and accepting that in these circumstances an “automatic” resulting trust would apply. As the transfer had been made on trust there was no need to invoke a presumption as the intention of the settlor was clear. Whether or not this “automatic” resulting trust is fundamentally different in its form to the “presumed” resulting trust is what is being debated. It is possible that such a trust is based on the same principles but that where there is clear evidence of the settlor’s intention, i.e. to create a trust, there is no need for the court to make a presumption and the circumstances indicate that, as there is no other possible beneficiary, the interest remains, or results, seemingly automatically to the settlor. Megarry made note that “I think that the evidence before me points strongly to the defendant company having been intended to take in trust and not beneficially”.³²² Where the settlor has not effectively disposed of the beneficial interest being held by the trustee, the trustee must hold it for the settlor on a resulting trust, until such time as an effective trust is declared.

Chambers’s Arguments

As has already been noted, Chambers rejects the “fairly well-established set of principles for determining whom, if anyone, has beneficial ownership of property which has been placed on a void express trust or on trust subject to a void condition”³²³ in favour of his view that the categories of “presumed” and “automatic” resulting trusts should be abandoned as there is no real distinction between them. In addressing the position of the automatic resulting trust, Chambers argues that Megarry J’s interpretation of the speeches in *Vandervell v IRC* is based on “two common misconceptions”.³²⁴ The first, he argues, is the belief that a resulting trust of an apparent gift is based on the presumption that the provider intended to create a trust. As has been noted in Chapter 4 of this paper, Chambers argues that the true basis of a resulting trust in such a situation is the absence of intention to benefit the recipient. It seems clear to him that Mr Vandervell did not have an intention to benefit himself, but that his intention was that the trust company should hold the options on trust for beneficiaries to be chosen at some later date.

³²² *Ibid.*, 296

³²³ Law Commission Consultation Paper No. 154, “Illegal Transactions: The Effects of Illegality on Contracts and Trusts” §3.36 (pub. Law Commission, 21 January 1999)

³²⁴ Chambers, *supra* n.4, p.43

The second misconception which Chambers identifies is the confusion of the presumption of resulting trust and the trust itself. He points out that in deciding the point on the option to purchase, Lord Upjohn doubted whether the presumption applied but found it unnecessary to decide the point as there was sufficient evidence of the actual intention of the parties. Lord Upjohn stated:

“As I think the facts and circumstances are sufficient for this purpose without resort to this long stop presumption, it is unnecessary finally to decide whether the doctrine of resulting trust does apply to an option”.³²⁵

Megarry J recognised that Lord Upjohn was using the terms “presumption” and “doctrine” of resulting trust interchangeably, but Chambers argues that he did not consider that Lord Upjohn may have been distinguishing between the presumption which gives rise to a resulting trust and the trust itself where it was noted that:

“...the actual decision seems to be that Mr. Vandervell was entitled under a resulting trust...I do not then see how the application of the doctrine or presumption of resulting trusts to options can have been left undecided if it was decided that it was that doctrine or presumption that carried the beneficial interest in the option to Mr. Vandervell”.³²⁶

This lead Megarry J to conclude that Lord Upjohn must have been distinguishing between two types of resulting trust and rejecting one in favour of another. Chambers argues, however, that if resulting trusts are based on the provider’s lack of intention to benefit, where the provider’s intention is proved there is no need to resort to a presumption. This argument does hold force in rejecting a distinction between automatic and presumed resulting trusts, although it could be argued that Megarry J rejected the presumed resulting trust for precisely the same reason – that there was clear intention that a trust was intended and so there was no requirement to resort to the presumption.

³²⁵ *Vandervell (No. 1)*, *supra* n.315, 315

³²⁶ *Vandervell (No. 2)*, *supra* n.24, 293

Lord Wilberforce did not see any reason to invoke the presumption of a resulting trust preferring to see that where there was an absence of a beneficiary, the ownership of property cannot remain “in the air”³²⁷ and so the consequence in law is that the beneficial interest must remain in the settlor. Although the Court of Appeal had applied the doctrine of resulting trusts, and Lord Wilberforce agreed with their judgments, Chambers notes that Lord Wilberforce preferred to apply the same principles to the settlor’s actual rather than presumed intention.

Chambers’s arguments must, however, be treated with caution as similar propositions have been rejected by the House of Lords in *Westdeutsche*. In addition, it has been submitted that such arguments have not been as clearly supported by case law as he suggests.

Chambers continues to discuss the distinction between presumed and automatic trusts stating that Megarry J based his reasoning on whether the transfer had been made on trust or not. This is identified as the essential fact distinguishing the two, leading Chambers to a discussion as to why this is not an adequate basis.³²⁸ He identifies three reasons for rejecting the distinction which will be discussed below.

1. No clear distinction between the two situations

By way of illustration of his argument that it can be difficult to ascertain whether a transfer has been made on trust or not, Chambers uses *Vandervell v IRC*. He argues that there was no declaration of trust in respect of the granted option and nothing in the transaction that indicated a trust. Only the evidence of Mr Vandervell’s financial advisors revealed that the trust company was intended to take on trust. Chambers sees this intention as not being sufficient to create a trust due to lack of certainty of beneficiaries. In such a case “...there was no express trust, but merely proof that the trust company was not intended to receive the benefit of the option”.³²⁹ This is argued to be exactly the same basis as for other resulting trusts.

³²⁷ *Vandervell (No. 1)*, *supra* n.315, 329

³²⁸ Chambers, *supra* n.4, p.44

It seems strange that Chambers does not accept that a trust was created due to the evidenced intention being insufficient to create the trust. This is especially so as the transfer was not made to an individual but to a trust company, whose primary object is to administer trusts and hold property which is not on its own account. It could be argued that where there is evidence that a transfer has been made and the transferor intends a trust to be created then at that stage the trust comes into existence. The argument that the trust cannot be created where there is a lack of certainty of beneficiaries is also fallacious. These arguments run along the same lines as those advanced in respect of the *Hodgson* trust.³³⁰ If it is shown that there is an irregularity in the trust, it then becomes void, and consequences flow from that. This could, of course, all happen within a *scintilla temporis* so as to seem as if the trust had never existed, the trust immediately failing, giving rise to the resulting trust, rather than it never having existed at all.

*Hodgson v Marks*³³¹ is also used as illustration by Chambers in an attempt to support his arguments. He believes that to accept the distinction places the law in one of two untenable positions. The first is that a presumed resulting trust arises where there is a presumed intention to create a trust, but if the presumed intention is shown to actually exist then a different set of principles apply to create an automatic resulting trust. The second position is that a resulting trust where there is an ineffective intention to create a trust for oneself (as in *Hodgson v Marks*) would operate on different principles to one which arose as a result of an ineffective intention to create a trust for someone else (as in *Vandervell v IRC*). For Chambers however, the law operates in the same way as there is only one resulting trust based on the transferor's lack of intention to benefit the recipient.

In respect of these "untenable" positions, it has already been suggested that the true interpretation of these situations is that an express trust is created where there is intention, which can be shown either as express wording or by evidence of a positive intention to create a trust, and following this, the trust will either be valid in which case it is enforceable, or it will be invalid for some reason in which case an "automatic" resulting

³²⁹ *Ibid.*

³³⁰ See above, p.24

³³¹ [1971] 1 Ch 892

trust arises.³³² Whether or not this is a correct categorisation of the trust, or whether there are other arguments to suggest that the trust arises for other reasons, will be considered later. Suffice it to say in respect of Chambers's arguments, alternative explanations can be found without having to accept the "no intention to benefit" argument.

2. No express trust exists

Chambers further argues that in *Vandervell*, Mr Vandervell's intention was insufficient to create an express trust, and so Megarry J was wrong to state that the automatic resulting trust "...does not establish the trust but merely carries back ... the beneficial interest that has not been disposed of". He argues that as no express trust was created it is impossible to merely redirect the trust which was established. As support for his argument, Chambers cites the following passage from *Maitland on Equity*³³³:

"I convey land unto and to the use of A and his heirs upon trust but I declare no trust. Here the use does not result, for a use is declared in favour of A and therefore A gets the legal estate. But I have by the words 'upon trust' declared my intention that A is not to enjoy the land for his own behoof – on the other hand I have not saddled him with any particular trust. Here a trust results for me."

Chambers argues that the words "upon trust" do not create a trust, but that the obligation to hold the property for the benefit of the settlor is imposed by equity because those words make it clear that the settlor did not intend for the recipient to benefit.³³⁴ Chambers relies for this proposition on *Lewin on Trusts*. It is stated in *Lewin on Trusts* that:

"A trust results, by operation of law, where the intention not to benefit the grantee, devisee or legatee is expressed upon the instrument itself, is if the conveyance, devise or bequest is to a person "upon trust," and no trust is declared..."³³⁵

³³² In relation to *Hodgson v Marks* it has been argued that the resulting trust which arose in this case was not a presumed resulting trust but an automatic resulting trust arising as a result of the failure of the express trust of land due to non-compliance with statutory requirements as to writing. This interpretation seems to be supported by Pettit and Hayton. See Pettit, *Equity and the Law of Trusts* (pub. Butterworths, 1997), p.152 and Underhill and Hayton, *Law of Trusts and Trustees* (pub. Butterworths, 1995), p.303.

³³³ Maitland, *Equity* (revised edition: Cambridge, 1936), p76

³³⁴ Chambers, *supra* n.4, p.45

³³⁵ Mowbray, *Lewin on Trusts* (pub. Sweet & Maxwell, 16th ed., 1964), p. 121

In interpreting this, Chambers sees this as an argument that even though the words “upon trust” are used, until the trust is set up there is no trust, but only an indication of intention, and so it is incorrect to say that a resulting trust redirects property already in trust. It is further noted in *Lewin on Trusts*, however, that where the words “upon trust” are used “...the whole property has been impressed with a trust”,³³⁶ and so it is not open for the trustee to try to adduce evidence that he should be beneficially entitled. Whether this means that there is a trust established at the time that the words are used or whether Chambers’s interpretation is correct is unclear. One interpretation may be that where Lewin states that “and no trust is declared” what is really being referred to is that a resulting trust arises where property is bequeathed “upon trust” but “*where no beneficiaries are identified*”.

3. Presumption of resulting trust

Chambers argues that where a trust does not exhaust the beneficial interest there is not necessarily a resulting trust, but only a presumption that the settlor did not wish the recipient trustees to take the property beneficially. This rule applies in all cases and does not rest on whether there is an express trust or not, although he does accept that where there is an express trust the presumption of the resulting trust is much stronger. As illustration, Chambers cites *Re West*³³⁷ where a testatrix appointed four trustees to administer certain trusts, with the property to be sold and the proceeds used to pay funeral expenses, debts, trustee administration costs and then certain specific legacies. Following the execution of the trusts there remained a surplus. The question which faced the court was whether the donees in trust took the surplus beneficially or whether there was a resulting trust in favour of the co-heirs-at-law and next of kin of the testatrix. Kekewich J described the question of whether the donees in trust were trustees in respect of the whole property given, or only in respect of the part which is given to others as “the pith and marrow of the whole matter”.³³⁸ He took the view that:

³³⁶ *Ibid.*

³³⁷ *Sub nom George v Grose* [1900] 1 Ch 84

“...it is impossible to say that because property is given to persons as trustees they therefore take no beneficial interest ... Nevertheless, there is a presumption that a gift in trust is not a beneficial gift. It is, however, not uncommon to find a gift of a fund charged with certain payments, or coupled with a condition that a certain amount be paid to a third person. Whether the charge takes effect by way of trust or condition, it is not intended to do more than give a certain amount out of the fund to another person.”³³⁹

Chambers reads this as supporting his argument that although there was a transfer on trust this did not settle the question as to whether the trustees could take beneficially if there was any surplus. He does not, however, go on to discuss the case more fully or the interpretation of the various dicta in *Croome v Croome*³⁴⁰ and *King v Denison*.³⁴¹ The question seems to be whether the testator set up a trust of the whole of his property to be used for a specific purpose or whether he made a gift of his whole property with such part of it as was needed to be used for a specific purpose. In the latter case the recipient takes beneficially subject only to the amount required to fulfil the stated purpose. In the former there is a trust of all the property and any surplus after the fulfilment of the purpose cannot be the recipient's as he took as trustee. At no other stage in his judgment than within the passage quoted by Chambers does Kekewich J refer to the possibility of presumptions. Rather he seems to indicate that where the recipient under a will receives property which is stated to be used for a single purpose (ie that the donor contemplated a complete trust) the surplus automatically goes to the heir at law. In fact, the presumption that Kekewich J refers to seems to be a presumption that where a testator leaves money to be used for a purpose then he intends a complete trust.

Chambers argues that where there is no evidence of intention beyond the granting of property on trust, the court will assume that the trustee was not intended to enjoy the benefit of the remainder, but that slight indications, and here Chambers quotes *Croome v Croome*, of an intention to give can be sufficient to prove the contrary. As indicated above, whether this is a correct interpretation of the cases is at least debatable. An alternative reading being that where a testator gifts property subject to paying debts and expenses then the beneficial interest in any surplus is to the donee, but where there is a trust of the whole

³³⁸ [1900] 1 Ch 84, 89

³³⁹ [1900] 1 Ch 84, 87

³⁴⁰ (1888) 59 LT 582

of the property transferred to pay expenses and debts, then the surplus results to the heirs either under the will if this construction can be taken, or under the intestacy rules.

The role of intention

As Chambers notes, Megarry J stated that the automatic resulting trust “does not depend on any intentions or presumptions, but is the automatic consequence of [the transferor’s] failure to dispose of what is vested in him”.³⁴² It is this to which Chambers raises most objections.

The general rule as stated in *Lewin on Trusts* is that:

“...wherever, upon a conveyance, devise, or bequest, it appears to have been the intention of a donor that the grantee, devisee, or legatee was not to take beneficially, the equitable interest, or so much of it as is left indisposed of, will result to the donor or his representatives [and that the] settlor’s intention of excluding the person invested with the legal estate from the usufructuary enjoyment may either be presumed by the court or actually expressed upon the instrument.”³⁴³

It would seem clear from this passage that resulting trusts are based firstly on intention and, secondly, on either a presumption or an express indication that surplus property in a trust is to be returned to the settlor, and Chambers argues that “...the resulting trust arises precisely because the settlor did not intend to benefit the trustee with that surplus”.³⁴⁴ There is clearly a conflict between the views of different writers and judges, and so further discussion was inevitable. In assessing the position of intention, Chambers looks firstly at its role and then at how he believes it has become obscured. It does not follow, however, that Chambers should quote *Lewin on Trusts* as there is clearly a difference between an intention not to benefit and no intention to benefit. Indeed, it is this difference on which Chambers bases his arguments on the basis of the imposition of a resulting trust.

³⁴¹ 1 V & B 260; 12 RR 227

³⁴² *Vandervell (No. 2)*, *supra* n.24, 294

³⁴³ Mowbray, *Lewin on Trusts* (16th ed., pub. Sweet & Maxwell, 1964) p. 115

³⁴⁴ Chambers, *supra* n.4, p.47

1. The importance of intention

Chambers argues that even in *Vandervell v IRC* the role of intention was a central issue, with the House having difficulties in assessing whether or not the trust company was intended to take beneficially or not,³⁴⁵ and considers that Megarry J treated the question as a matter of categorisation rather than rather than looking at the intention of the settlor. For Chambers:

“[w]here there is an express trust which fails to exhaust the trust property, the resulting trust is not the automatic consequence of that failure, but is dependent on the intention of the settlor. Where it can be proven by admissible evidence that the trustee was intended to enjoy the benefit of the remainder, there will be no resulting trust. This has been established by a long line of authority which has come to be forgotten in the wake of *Vandervell (No. 2)*.”³⁴⁶

This contention is slightly out of line with the reasoning of the Privy Council in the *Air Jamaica* case where Lord Millett held that:

“[I]ike a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass the beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest...”³⁴⁷

Lord Millett accepts that intention has a role to play in the area of resulting trusts but does not see that the possibility of a resulting trust arising is excluded where there is evidence that the transferor intended to part with the beneficial interest and pass it to the transferee.

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ *Air Jamaica Limited & Others v Charlton & Others*, *supra* n.307, 1412

Chambers uses a number of cases in support of his proposition³⁴⁸ and goes some way to illustrate the problems in Megarry J's classification of resulting trusts. As was noted above,³⁴⁹ however, these cases indicate that the difference is between intending to create a trust of the whole property or creating a trust of such amount as was required for a particular purpose.³⁵⁰ In addition it seems that the courts in these cases may have considered "...the relation between the parties..."³⁵¹ and as such may have taken into account the presumption of advancement.

The most convincing of the cases which Chambers uses as illustration of his point is *Re Foord*³⁵² where the issue was not whether the testator had created a trust, but whether the transferee was entitled to and intended to retain the benefit of the surplus. The testator's will in this case stated: "I leave absolutely to my sister Margaret Juliet on trust to pay my wife per annum (three hundred pounds)...". The bequest was more than sufficient to satisfy the annuity and so the question which arose was whether, upon the true construction of the will, the gift was merely for a specific purpose in which case the surplus was held by the sister on a resulting trust for the next of kin, or whether the gift was to the sister for her own benefit subject to the annuity, not being merely for that purpose.

Sargant J held that there was a difference between a devise for the purpose of giving the devisee a beneficial interest, subject to a specific purpose, and a devise for a particular purpose with no intention to give the devisee any beneficial interest. Accordingly, whether or not the legatee takes the surplus for his own benefit depends on which of these views is adopted on the construction of each particular bequest. In this case, the court held that the sister could take beneficially as there were a number of "slight expressions and indications of intention".³⁵³ Chambers argues that this approach shows that it is not enough to define the extent of the express trust, arguing that anything remaining must be held on a resulting

³⁴⁸ *Cook v Hutchinson* (1836) 1 Keen 42; *King v Denison* (1813) 1 V & B 260; *Hill v Bishop of London* (1738) 1 Atk 618

³⁴⁹ See above p.84

³⁵⁰ Which, of course, itself raises questions as to certainty of subject matter (see *Sprange v Barnard* (1789) 2 Bro CC 585; *Re Golay* [1965] 1 WLR 1969), although the courts have tried to circumvent this rule by assessing what is a reasonable amount to fulfil obligations under the trust.

³⁵¹ *Cook v Hutchinson* (1836) 1 Keen 42, as quoted by Chambers, *supra* n.4, p.47

³⁵² [1922] 2 Ch 519

³⁵³ *Ibid.*, 521-522

trust, but that the intention behind the gift, and indications of what should happen to the surplus must be taken into account.³⁵⁴ Here, however, Chambers seems to stray from his original concept that it is the lack of intention to benefit which gives rise to the resulting trust. Rather it seems that the resulting trust will arise where it is intended that that is what should happen to the surplus.

2. The role of intention obscured

A number of issues arise in the assessment of how the role of intention in “automatic” resulting trusts has become obscured. Chambers argues that often it is the case that there is a confusion between the issue as to whether the settlor intended for the trustee to retain the surplus and the issue as to whether the settlor intended to create a trust at all. An example is the judgment of Evershed MR in *Re Rees*,³⁵⁵ in his interpretation of the judgment in *Re Foord*. Rather than seeing the judgment as an intention to create a trust with the surplus going to the sister as trustee, Evershed MR interprets the intention of the settlor as “...not to create a trust estate in the devisee but to give him a conditional gift”.³⁵⁶ It is of course possible for the settlor to make a beneficial gift in favour of his trustee, including a gift of the surplus in a trust and, although there may be problems with conflicts of interest which could lead to an interpretation that the gift is conditional rather than on trust, this does not preclude the making of such a gift.

Chambers argues that where there is clear evidence of the settlor’s intention, and the trust fails, causing a resulting trust to arise, the fact that the resulting trust arises is not the automatic consequence of the failure. Chambers sees the fact that this is seen to be the case as another example of the obscuring of the nature of the resulting trust, especially where the resulting trust seems to be in direct conflict with the settlor’s intention.³⁵⁷ The true construction of such a situation is that where a trust is ineffective, the resulting trust does not strip the beneficial ownership from the intended beneficiaries. In the absence of a valid trust there is a contest between the trustee and the settlor. It is the intention of the settlor

³⁵⁴ Chambers, *supra* n.4, p.49

³⁵⁵ [1950] Ch 204

³⁵⁶ *Ibid.*, 208

³⁵⁷ See *Re Boyes* (1884) 26 Ch D 531

not to benefit the trustee, evidenced by his intention to benefit another, which Chambers sees as giving rise to the resulting trust by operation of law.³⁵⁸

An alternative way of looking at such a situation is to see that the settlor intended to create a trust, a trust which itself failed. Where this is the case the imposition of a trust is the only option as it is presumed that in such a case the settlor would not have intended that the trustee should become entitled to the property, and so a resulting trust is created by operation of law. Taking the idea of the presumed resulting trust a step further may lead to the conclusion that the settlor's secondary intention, where his primary intention was to create a valid express trust, was that if his intended beneficiary could not take, then he should get his property back.

A further reason that Chambers sees for the obscuring of the nature of resulting trusts is that as a matter of admissibility of evidence often the intention of the settlor is obscured, if not ignored. By virtue of the parole evidence rule, the trust, when comprised in a written document, is construed according to the words written without taking into account any extrinsic factors or evidence which may contradict the document. This of course is not the case where the trust is created without a trust document where extrinsic evidence will be valid. Where the intention of the settlor is taken directly from the trust document then only where it is absolutely clear that the trustee should take beneficially will a resulting trust not arise.

Chambers's conclusion is that there is no real distinction between "presumed" and "automatic" resulting trusts, but that in both situations the resulting trust arises from the settlor's lack of intention to benefit the recipient. There is always a presumption that the trustee was not intended to take beneficially, but this presumption may be rebutted where admissible evidence points to an intention of the settlor to benefit the trustee. Equitable ownership of property indisposed of by express trust is not retained by the settlor, nor is the beneficial interest created by the express trust merely redirected. Rather, the resulting trust is a new interest created in favour of the settlor based on his lack of intention to benefit the holder of the property.

³⁵⁸ Chambers, *supra* n.4, p.50

As indicated above, an alternative interpretation of the situation could be that indeed there is no real distinction between “presumed” and “automatic” resulting trusts, but that in both situations the resulting trust arises as a result of the settlor’s presumed intention to create a trust in favour of himself. Such a presumption can be rebutted by evidence that the settlor did not intend for property to be held on a trust for himself, by, for example, indicating that if the intended trust failed for any reason the property would be transferred absolutely to another, although in the case of an “automatic resulting trust” such evidence would be very difficult to sustain giving the impression that the resulting trust in such a case is in fact automatic and unable to be rebutted.

Birks, in his differentiation between trusts which are “resulting in pattern” and those which are “resulting in origin”, argues that it is important to be careful in the use of the term “resulting trust” as both meanings could be attached, but with very different consequences. For Birks, the true resulting trust is that which is resulting in origin, i.e. presumed, which arise “...on two sets of facts: express trusts which fail to distribute the whole beneficial interest; and apparent gifts...”.³⁵⁹ However, he continues that the position has become more complicated due to the developments in *Vandervell (No.2)* where the view was taken that the situation where an express trust fails does not arise by presumption at all. Clearly though, Birks indicates that before *Vandervell (No.2)*, the view was that resulting trusts arose as a result of the settlor’s intention, whether that was express or presumed. This is echoed in his paper on *Westdeutsche* where he states that “[w]hen a trust failed to distribute the entire beneficial cake, it used to be said that there was a presumption that the undisposed-of slice resulted to the settlor”.³⁶⁰ Without wishing to cover old ground, the question which then arises is to how the distinction between presumed and automatic resulting trusts came about. The answer must lie in the *Vandervell* litigation.

³⁵⁹ Birks, *An Introduction to the Law of Restitution* (pub. Clarendon Press, 1985), p. 61

³⁶⁰ Birks, *supra* n.78, 11

“Automatic” resulting trusts

Despite Megarry J’s interpretation of the House of Lords’s decision in *Vandervell v IRC*, at first instance and in the Court of Appeal the courts found for the Inland Revenue holding that a resulting trust would operate as the trustee company had taken as a “volunteer”, i.e. the resulting trust which operated was what is now seen to be the “presumed” resulting trust.³⁶¹ Until either Mr Vandervell or his advisers had decided upon what trusts, if any, the option was to be held on, it was held “in cold storage” and, as such, a resulting trust operated in favour of Mr Vandervell absolutely. As Plowman J saw it, this was the result whether Mr Vandervell wanted it or not. This seems to indicate that Plowman J saw the resulting trust operating outside the scope of the settlor’s intention, and so such a presumption would be irrebuttable. However, in the Court of Appeal Willmer LJ argued:

“The presumption of a resulting trust could have been rebutted by showing an intention on the part of the taxpayer that the trustee company should take beneficially. It could have been rebutted by showing an intention that the trustee company should hold the benefit of the option on some specific trust, for instance, the trusts of the children’s settlement”.³⁶²

The reasoning for the imposition of a resulting trust was that the trustee company was taking as a volunteer and therefore in the absence of an intention of a gift by Mr Vandervell there was no passing of the beneficial interest. On the facts it was clear that neither Mr Vandervell nor his advisers ever intended any such gift and so the trustee company could not take beneficially and must have taken on some trust or other. It followed that Mr Vandervell remained the beneficial owner and so the option was held on a resulting trust. The interpretation of the situation by the lower courts is rather superficial. Their decision is based on the interpretation that the settlor remained Mr Vandervell despite the College being the holder of the shares and so the *de facto* grantor of the option.

Megarry J’s interpretation is based on the rejection of the need to invoke a presumption in the House of Lords, especially by Lord Wilberforce who preferred the simpler approach of concluding that as it was clear that the option was vested upon trust, and as the

³⁶¹ [1966] 1 Ch 261, 286

beneficiaries were not defined, and as the beneficial interest could not remain in the air, the consequence must be that it remained in the settlor, again being Mr Vandervell. Megarry interprets this as an acceptance of the doctrine of “automatic” resulting trusts over the “presumed” resulting trust. It could, however, be argued that Lord Wilberforce was not rejecting the fact that the resulting trust arose on the basis of the presumed resulting trust, but that there was no need for the court to make the presumption on behalf of the settlor as there was clear evidence that a trust was what he intended. This is not the same as the irrebuttable automatic resulting trust, but is applying the principles of the presumed resulting trust and using evidence to support it.

Notwithstanding the above discussion, where the situation arises of an express trust, or an attempted express trust, failing completely or partially, then a resulting trust will arise as a consequence. Whether the trust arises automatically by operation of law, or whether it arises on the principles of the presumed resulting trust (whatever they may be), in the absence of any clear and compelling evidence to the contrary it is difficult to envisage a situation where the outcome would be different. This is because, if it is possible to rebut such a trust, the evidence which would be required would almost certainly not be available and, as such, debate on the point becomes purely academic, rather than of practical concern.

³⁶² *Ibid.*, 292

Chapter 7

The *Quistclose* Resulting Trust

A third, and much debated, type of resulting trust, which most notably does not fit comfortably into the mould of either of the traditional categories, is the *Quistclose* trust. This trust does not arise as a result of an apparent gift and there is no failed express trust. Further, although the English Courts have traditionally been reluctant to import into commercial transactions the principles of equity,³⁶³ the *Quistclose* trust is one notable exception.

A contract entered into in respect of a loan is generally a simple arm's length commercial transaction, inapt to import any fiduciary obligation in respect of the monies loaned. The debtor's obligations are provided for in the terms of the agreement and no equitable proprietary relationship or parallel obligations can be inferred. However, case law identifies a carve-out from this position for those loans (and other transfers) where the terms stipulate a specific purpose for which the monies must be used. In such cases it is seen as proper to infer an intention to create both personal and fiduciary obligations on the recipient. A limited role for trusts is thus seen as being acceptable where they are viewed as "...merely short-term expediencies..."³⁶⁴ driven by policy.

The *Quistclose* trust takes its name from *Barclays Bank Limited v Quistclose Investments Limited*.³⁶⁵ In this case, Rolls Razor Ltd, who were in debt to Barclays Bank, declared a dividend on their shares which they were unable to meet. The sum required was then borrowed from Quistclose Investments under an arrangement whereby the money was only to be used for that purpose. The money was then transferred into a separate bank account at Barclays, opened specially to receive this money, with the bank having notice of the terms of the agreement. Prior to the dividend payment being made, Rolls Razor went into voluntary liquidation and Barclays made an attempt to use the Quistclose money to set off

³⁶³ *Manchester Trust v Furness* [1895] 2 QB 539; *Re Wait* [1927] 1 Ch 606; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74

³⁶⁴ Ulph, *supra* n.224, p.93

³⁶⁵ [1970] AC 567

against Rolls Razor's overdraft. The question arose as to whether the bank was entitled to do this. If the money was regarded as having been loaned to Rolls Razor then Quistclose would rank along side all other creditors. If, on the other hand, it could be argued that the money was held on trust to pay the dividend and that, the trust having failed, it was now held on a resulting trust for Quistclose, then Quistclose would be able to "jump the queue"³⁶⁶ and claim the money back from Barclays who would now be holding it as constructive trustees.

The House of Lords held that the essence of the transaction was that the money advanced should not become part of the assets of Rolls Razor but that it should be used exclusively for the payment of the dividend. Lord Wilberforce approved a long line of bankruptcy cases³⁶⁷ holding that:

"...arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondly, if the primary trust fails, of the third person...There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose...: when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for the recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not".³⁶⁸

The basis of this decision and those preceding it was that where it becomes impossible to fulfil the primary designated purpose of the loan then, where a secondary purpose (i.e. the repayment to the lender) has been agreed, a resulting trust will arise in favour of the lender.

³⁶⁶ See Belcher and Beglan, "Jumping the Queue" [1997] *JBL* 1

³⁶⁷ *Toovey v Milne* (1819) 2 B & A 683; *Edwards v Glyn* (1859) 2 El & El 29; *In re Rogers, Ex parte Holland and Hannen* (1891) 8 Morr 243; *In re Drucker (No. 1)* [1902] 2 KB 237; *In re Hooley, Ex parte Trustee* [1915] HBR 181

Although Lord Wilberforce treated the secondary trust in *Quistclose* as arising “expressly or by implication” at the time the advance was made, the purpose expressly being treated as demonstrating clear intention to create such a secondary trust, the preponderance of academic opinion supports the view that this secondary trust is in fact a resulting trust. In the later case of *Re EVTR*³⁶⁹ where loan monies were advanced for the purpose of the purchase of video equipment, it was held that “...since a resulting or constructive trust normally arises by implication of law when circumstances happen to which the parties have not addressed their minds...”³⁷⁰ it was not essential that the parties expressly or impliedly address their minds to the possibility of failure of the original special purpose specified. Here the Court held that a resulting trust arose in the failure of the specified purpose, in favour of the lender.

This reasoning was not, however, followed in *Re Northern Development (Holdings) Ltd*³⁷¹ or in *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* where Peter Gibson J stated:

“In my judgment the principle in all these cases is that equity fastens on the conscience of the person who receives from another property which is transferred for a specific purpose only and not therefore for the recipient’s own purposes, so that each person will not be permitted to treat the property as his own or to use it for other than the stated purpose...if the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for some reason that purpose cannot be fulfilled.”³⁷²

The Courts plainly took the view in these cases that the primary purpose trust must be clearly intended and expressed with an apparent common intention of the parties being required. Indeed, in *Re Goldcorp Exchange Ltd*, Lord Mustill held that “...a mutual intention that the moneys should not fall within the general fund of the [recipient’s/borrower’s] assets but should be applied for a special designated purpose...”

³⁶⁸ *Quistclose*, *supra* n.17, 580-582

³⁶⁹ [1987] BCLC 646; [1987] BCC 389

³⁷⁰ Per Dillon LJ, *ibid.*, 650

³⁷¹ Unreported, 6 October 1978

³⁷² [1985] 1 Ch 207, 222

was required.³⁷³ A mere declaration of specific purpose will not suffice. There must be an additional indication that the borrower must not receive full beneficial interest in the monies. Such an indication can usually be drawn from the terms of the agreement – generally through the obligation to segregate the funds from those owned by the borrower absolutely.

Millett points out that what is regarded as being the primary purpose is extremely important. If, in *Quistclose*, the primary purpose was the making of the dividend payment to the shareholders, then this purpose was capable of being fulfilled notwithstanding the insolvency of the company.³⁷⁴ As Millett points out, "...a trust, unlike a power, does not fail simply because the trustee refuses to perform it, but only if it becomes impossible or unlawful to carry it out".³⁷⁵ Either the loan arrangements created a power but not a trust for the payment of the shareholders, or the true purpose was saving the company from insolvency, the benefit to the shareholders simply being incidental to it.

This is a strong argument and fits well with the earlier cases. For example, in *Edwards v Glyn*,³⁷⁶ bankers who were short of funds and expecting a run on their bank were advanced a sum of money supported by a guarantee. It was expressly understood that if the bankers were unable to meet the run the money should be repaid. It became impossible to meet the run and the money was repaid. The bankers then became bankrupt and the trustee in bankruptcy sued to recover the repaid loan. The claim failed as the court held that the specific purpose for which the money was advanced had been expressly stated and was "clothed with a specific trust". In this case, the primary purpose was not to repay creditors but to meet the run, and avoid bankruptcy. In meeting the run, however, a side consequence would be that creditors were repaid.

³⁷³ [1995] 1 AC 74, 100

³⁷⁴ Millett rejects the suggestion of Megarry VC in *Re Northern Developments Holdings Limited* (unreported, 6th October 1978) that once a winding-up had begun section 212(1)(g) of the Companies Act 1948 prevented the payment of the dividend on this basis that shareholders could not take precedent over general creditors. Millett argues that as the money was trust money, it did not form part of the assets of the company and as such the liquidator could not interfere with its application.

³⁷⁵ Millett, "The Quistclose Trust: Who Can Enforce It?" (1985) 101 *LQR* 269, 271

³⁷⁶ (1859) 2 El & El 29

Once it has been established that the primary trust is not in favour of the creditors, the question as to in whom the beneficial interest lies must be addressed, as it is this person who has the ability to enforce any trust. The answer, according to Millett, depends on the intention of the settlor, whether this is expressly stated or implied from the facts. It does not involve a new type of enforceable purpose trust,³⁷⁷ but is based on the “well-settled principles of trust law”.³⁷⁸ If the settlor’s intention is to benefit the third party (rather than the recipient), then an irrevocable trust arises in favour of the third party, and the beneficial interest is in him. Where the settlor’s intention was to benefit the recipient as an aside (but not to vest a beneficial interest in him) or to benefit himself by furthering some interest of his own and not (except incidentally) to benefit the third party, then the recipient will hold the property on trust for the benefit of the settlor. The beneficial interest will remain in the settlor and he, not the third party, will be able to enforce the trust.

Where the settlor’s intention is to benefit the recipient (for example, by saving him from bankruptcy) and an incidental to this is the benefit of a third party, and where the settlor has an interest separate from that of the recipient, then the recipient is under a positive obligation to use the property for the stated purpose. Where the settlor has no such interest, then the recipient has a power, but is under no duty, to apply the property for the purpose and the settlor’s remedy is confined to the prevention of misapplication. In addition, the settlor’s directions will be revocable, unless prior to this the third party is notified of the arrangements in which case an assignment of the settlor’s interest to the third party will be effected converting the settlor’s revocable mandate into a trust in favour of the third party.³⁷⁹

This reading of the position seems to be rejected by Swadling who prefers to see the *Quistclose* trust as arising as a result of the courts’ peculiar dislike of assignees in

³⁷⁷ It had been suggested by Megarry VC in *Re Northern Developments Holdings Limited* (unreported, 6th October 1978) that the trust arrangement was a purpose trust of the type recognised in *Re Denley’s Trust Deed* [1969] 1 Ch 373. On this basis, the beneficial interest would be in suspense until the payment was made. This interpretation was later applied by Peter Gibson J in *Carreras Rothmans Limited v Freeman Matthews Treasure Limited* [1985] 1 Ch 207. In addition, Matthews seems to suggest that the *Quistclose* trust is a “...modern development in the law of purpose trusts...” (see Matthews, “The New Trust: Obligations without Rights?” in Oakley (ed.), *Trends in Contemporary Trust Law* (pub. Clarendon, 1996) p.16).

³⁷⁸ Millett, *supra* n.375, 290

bankruptcy. He does not see the “trust” as arising through general principles, although he bases his rejection on his difficulty in understanding how a primary trust in favour of the shareholders could arise where there seems to be no express intention to do so.³⁸⁰ As a result of this, Swadling does not believe that the *Quistclose* trust has any application outside the sphere of bankruptcy.³⁸¹ In addition, and aside from authority, he argues that the trusts which arose were express trusts, the second arising on the failure of the first because that was the intention of the parties, which seems rather to indicate “...an express trust with two limbs rather than an express trust in favour of the shareholders and a resulting trust in favour of Quistclose...”.³⁸² The purpose for which the monies were advanced is seen by Swadling as the payment of dividends. In such a case there is a restriction on the use and it is this restriction which seems to create an express trust, the subsequent failure of which gives rise to the resulting trust in favour of the lender.³⁸³

For different reasons to those of Swadling, Millett’s analysis is also rejected by Chambers, who argues that although an important contribution to the understanding of the *Quistclose* trust, it does not adequately explain the interests of the lender, borrower and creditors. In Chambers’s analysis, the loan does not create a trust in favour of the intended recipients of the money and neither does the lender retain the beneficial ownership. Rather, the borrower receives the beneficial interest, subject to the lender’s right to prevent its use for alternate purposes based on an express or implied right in the contract entered into between them. Secondly, the failure of the purpose brings about a resulting trust in favour of the lender based on the fact that the lender did not intend for the borrower to keep the beneficial ownership for any other purpose.

Chambers sees the lender’s right to prevent misuse of the loan monies as the backbone of the *Quistclose* trust. The money is never free to be used, as the lender can obtain injunctive relief to prevent its use for any other purpose. It is this restriction on the borrower’s freedom to deal with the property which leads Chambers to conclude that what is in place is a “quasi-trust”: a contract between the lender and the borrower which, like a trust,

³⁷⁹ *Ibid.*, 290-291

³⁸⁰ A trust in favour of the shareholders is rejected in Millett’s analysis.

³⁸¹ Swadling, *supra* n.12, 124

³⁸² Per Gummow J in *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681, 691

³⁸³ Swadling, *supra* n.168, 84

prevents a trustee in bankruptcy from distributing the loan monies amongst the general creditors.³⁸⁴ Unlike a conventional trust the interests of the parties involved (lender, borrower and creditors) do not correspond with those of a settlor, trustee and beneficiary.³⁸⁵

As far as the lender is concerned, Chambers argues against a trust in his favour, as he does not retain full beneficial ownership. The lender is unable to revoke the loan so long as the purpose is capable of fulfilment, with his sole interest being the right to restrain the borrower from misapplying it. Secondly, unlike the settlor of a trust, the lender cannot compel the borrower to use the money for the stated purpose. The borrower is under no contractual duty to apply the money, only that if he chooses to do so, it must be applied solely for the stated purpose. Although Lord Wilberforce argues that "...the lender acquires an equitable right to see that [the money] is applied for the designated purpose", Chambers points out that this statement was based on *Re Rogers*³⁸⁶ where the court held that, once money was advanced, the lender can prevent misuse of the money, not that he could have compelled payment. As such, Chambers argues that Lord Wilberforce's statement should not be read as a new principle, but as keeping with the previous decisions.

Of the borrower's interest in the money, Chambers draws on dicta from a number of cases³⁸⁷ and concludes that subject to the fiduciary obligation not to misuse the money, he is the full beneficial owner at common law. This is because whilst the purpose is capable of fulfilment, the borrower has full benefit of the proceeds of the loan. If the loan had been made without a restrictive purpose equity would not come into play; the borrower does not receive equitable ownership and neither is the beneficial interest "in suspense",³⁸⁸ he has full benefit at common law and equity does not interfere. Chambers sees the only difference as the restriction on use (the element of "trust"), but it does not follow to say that the entire beneficial interest is held in trust.

³⁸⁴ See *Re Drucker* [1902] 2 KB 55, 57, per Wright J (affirmed [1902] 2 KB 237, CA); *Re Watson* (1912) 107 LT 96, 98, per Phillimore J (affirmed (1912) 107 LT 783, CA)

³⁸⁵ Chambers, *supra* n.4, p.73

³⁸⁶ (1891) 8 Morr 243

³⁸⁷ *Re Rogers*, *supra* n.367; *Quistclose*, *supra* n.17; *Gibert v Gonard* (1884) 54 LJ Ch 439; *Carreras Rothmans*, *supra* n. 377

This analysis has received recent judicial attention in the Court of Appeal. In his judgment in *Twinsectra Ltd v Yardley and others*,³⁸⁹ Potter LJ contrasted the “in suspense” doctrine with the broad jurisdiction of equity thesis under which the borrower receives the full benefit of the monies advanced with equity intervening where there is a special purpose, preventing the use of the monies for any other purpose. He concludes his analysis by adopting the approach taken by Peter Gibson J in *Carreras Rothmans*, although it is unclear from the judgment as to how far he rejects the approach favoured by Chambers. Potter LJ does, however, accept that the *Quistclose* trust is in truth a “quasi-trust” which arises from the restriction of the borrower’s right to use the monies rather than from the existence of a conventional express trust, and as such he feels that it is not the case that the requirements for a valid trust (such as “certainty of object”) must be met. The degree of certainty need be no more than is necessary to enable the restriction on the borrower’s use to be identified and enforced. There must be, however, an element present, being more than simply the declaration of purpose, which indicates the presence of fiduciary obligations. Potter LJ suggests that the requirement to deposit monies received into a separate bank account would suffice in this respect.

Returning to Chambers’s analysis, as far as the creditors are concerned, he does not see that in the first instance they have any beneficial interest in the fund. Any duty which the borrower is under, or any right of the lender to enforce, does not give the creditor an interest. The lender may in normal circumstances waive the obligation of the borrower, but a trust in favour of the creditors would mean that this power is lost. The creditors have not given consideration for the loan and cannot enforce any contract between the lender and borrower. As a result, Chambers argues that the courts should presume that there is no trust for the creditors. In agreeing with Millett, Chambers believes that only as a result of subsequent conduct might the creditors have an interest in the fund. For example, where they are told of the position and rely on this in their subsequent conduct it would seem unconscionable that no right to enforce payment should arise. Such was the position in *Re*

³⁸⁸ Chambers rejects Peter Gibson J’s conclusion in *Carreras Rothmans* that “...the beneficial interest is in suspense until the payment is made” in a *Quistclose* situation.

³⁸⁹ Unreported, 28 April 1999, Transcript: Smith Bernal

*Northern Developments*³⁹⁰ where pressing creditors were told of the fund in order to obtain their forbearance. Only in the *type* of interest does Chambers disagree with Millett. Whereas Millett sees a transfer of the lender's equitable interest on the communication, Chambers argues that the creditor's interest is different from that of the lender and as such it is a new interest which is created. The lender retains those rights over the fund which he previously had, but new rights are created.

As can be seen from above, Chambers does not believe that initially a trust is in operation. On the failure of the purpose, however, the borrower becomes a bare trustee of the money for the lender. For Chambers this is not a second limb express trust, but is a resulting trust based on the fact that the lender did not intend for the borrower to become the beneficial owner of the loan monies, rather than because that is what the lender intended.³⁹¹ This he sees as the connection between the traditional categories of resulting trust and the *Quistclose* trust. It follows that such a trust is not a subset of either of the two recognised categories, but stands on its own.

Millett LJ indicates, in his review of Chambers's book, that it is the section relating to the *Quistclose* trust which he finds "...the most disappointing and the least persuasive...".³⁹² Although accepting that his own views are now "unfashionable", he believes that his argument, that there is a resulting trust for the transferor with a superadded mandate to the transferee for the application of the transferred monies for the stated purpose, would sit within Chambers's analysis of the resulting trust. To say that the transferee receives full beneficial ownership is, for Millett LJ, a misunderstanding which is unnecessary for the purposes of Chambers's core thesis.

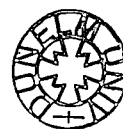
What the status of the property is pre-failure of purpose does not impact on the trust which arises at that stage. Whether or not a trust is created by the initial loan,³⁹³ the consequence

³⁹⁰ Unreported

³⁹¹ Chambers relies on *Re EVTR* [1987] BCLC 646, CA where Dillon and Bingham LJJ found that the trust in favour of the lender was a resulting trust.

³⁹² Millett, "Review Article: Resulting Trusts" [1998] *RLR* 283, 284

³⁹³ Millett LJ argues that it is not necessary that the payment should have been made by way of loan. He believes that Lord Wilberforce clearly envisaged the possibility of such a trust being superimposed on an outright payment. By way of illustration, he refers to the payment of a mortgage advance by a prospective



of the failure of purpose is that a resulting trust arises. It is arguable that such a trust arises because, and contrary to the arguments of Chambers, it is what the parties intended. Once established that the true purpose of the loan is to save the recipient from bankruptcy, it seems clear that at the time of transfer the lender did intend some benefit to the recipient if the purpose was fulfilled. Rather than the resulting trust then arising due to the lender's lack of intention to benefit the recipient if the purpose could not be fulfilled, it could be argued that it is open for the court to presume (unless of course there is clear evidence either way) that the secondary intention of the transferor, where the primary intention is of saving the transferee from bankruptcy, is that on a failure, the recipient should return the money to him. At this stage the obligation to return the money has the effect of removing any beneficial rights of the recipient and returning them to the lender on a resulting trust. It is this positive intention to create such a trust which the courts should be able to presume in the same way as any other resulting trust, and it is this aspect which is the connection with the other forms of resulting trust, each being a subset of the presumed resulting trust. A consequence of accepting this interpretation is that the *Quistclose* trust becomes rebuttable where there is clear evidence that the lender intended the borrower to take beneficially, although this will rarely, if ever, be the case in such a situation.

One final point to mention is the debate between Swadling and Chambers as to the factors which must be prevalent for a *Quistclose* trust to arise. For Swadling, only in a bankruptcy situation will there be the opportunity to invoke the trust, the development of the *Quistclose* trust being a result of the antipathy of the courts to trustees in bankruptcy. For the most part this will doubtless be the case. The motive for the development of the *Quistclose* trust is the ability of the transferor to take priority over other creditors in certain situations. However, in following his thesis that resulting trusts arise wherever there is a transfer of property where the transferor has no intention for the transferee to take beneficially, Chambers concludes, rejecting Swadling's position, that the *Quistclose* trust is not restricted to loans to pay creditors and avoid bankruptcy but applies wherever money is paid to another for a specific purpose. Whether or not Chambers's core principles are accepted, there seems to be no policy reason that the *Quistclose* trust should be limited to

mortgagee to his solicitor. The money is trust money, being held on a resulting trust, in the solicitor's client account. Further, the trust is of the *Quistclose* variety as the transfer was made for a specified purpose. See Millett, *ibid.*, 284.

bankruptcy, although the occasions where the need to invoke equitable principles over the common law outside such a situation will be minimal. Potter LJ notes that although the *Quistclose* trust cases principally concern loans to pay creditors this is not exclusively the case, leaving open the use of such a trust outside the bankruptcy situation.³⁹⁴

A recent example of an ingenious attempt to make use of a *Quistclose* trust outside a bankruptcy situation is *R v Common Professional Examination Board ex parte McLeod*.³⁹⁵ The applicant in this case had brought a number of actions, on a number of separate occasions, against the respondent, following two of which the Court had made orders for costs against the applicant which remained unpaid. This case, however, concerned the sum of £6,000 which had been paid into court following the grant of leave to appeal. Prior to the hearing of this action, new evidence emerged and the appeal was withdrawn by consent. No order as to costs was made in respect of this matter. As a result, the applicant applied for payment out of the £6,000 held by the Court. The respondent also made an application that the money held should be used as a set off against the outstanding costs orders.

The applicant had, however, borrowed the money paid into court from Lloyds Bank plc and argued that the loan had been made under agreement that the money would be used solely for the purpose of security for the respondent's costs *on the appeal*. As there had been no such costs awarded, the applicant argued that the purpose had failed and that the money was now held on a resulting trust for the bank. The applicant relied on *Quistclose* and *Carreras Rothmans*.

This argument did not, however, hold weight with Hidden J who held that, on the construction of the terms of the loan agreement, the only purpose for which the money had been advanced was "deposit to Court Funds". Evidence adduced by the applicant that this was simply the wording which had been agreed with the bank, but that there had been further agreement that the use of the money was to be specifically limited to use in respect of the appeal, was rejected. Hidden J also seemed to attach weight to the respondent's

³⁹⁴ *Twinsectra Ltd v Yardley and others*, Unreported, 28 April 1999

³⁹⁵ Unreported, 19 April 1999, Transcript: Smith Bernal CO/2588/97

submissions that the effect of imposing a resulting trust would be to make the Court a constructive trustee of the money, in theory liable to an action for breach of trust, even though the Court had no knowledge of the bank's interest in the "so-called trust" when the money was paid in.

Although the Court noted that the *Quistclose* principles "...involved an entirely different situation",³⁹⁶ the case in hand was decided on the lack of evidence to support the applicant's submissions rather than a rejection of the idea that a *Quistclose* trust could arise outside of a bankruptcy situation. As a consequence, the Court found itself free to rely on O.50 r.9A RSC³⁹⁷ to make an order for payment out, of money held to the account of a debtor, in favour of a judgment creditor. It would seem that the courts are not adverse to the suggestion that the *Quistclose* principles can operate outside the bankruptcy situation, contrary to the arguments of Swadling.

³⁹⁶ *Ibid.*, p.6

³⁹⁷ See note 9A/33 RSC.

Chapter 8

Conclusion

One thing that can be said about the field of resulting trusts following the decision in *Westdeutsche* and its subsequent academic considerations, together with the much praised monograph of Dr Chambers on the subject, is that the area which was once considered to be not in doubt - to be settled law - is now in a position of being more confused than it has been for centuries. What has become apparent from recent cases where the resulting trust argument has been used is that, amongst the judiciary as well as amongst academics, there is no consensus as to how resulting trusts arise or how far they apply.

It may have been thought that a House of Lords decision on the issues should lay any disputes to rest. This has not, however, been the case. Lord Browne-Wilkinson clearly rejected the Birks thesis on which Chambers builds, in favour of the traditional view that resulting trusts arise as a result of the intentions of the transferor (it is submitted that the references to common intention of the parties is misconstrued). It has been suggested by certain writers that this conclusion may have been different had their Lordships had the benefit of Chambers's thesis which was published only following the submissions in *Westdeutsche*. However, as has been noted from discussion in this paper, Chambers's thesis is not so tightly reasoned that it is impenetrable by criticism. Indeed, there have been identified a number of fundamental flaws in his reasoning.

The Court of Appeal has, however, recently been seen to somewhat endorse the propositions put forward by Chambers, holding that:

“Express trusts are fundamentally dependent upon the intention of the parties, whereas the role of intention in resulting trusts is a negative one, the evidential question being whether or not the provider intended to benefit the recipient and not whether he or she intended to create a trust. The latter question is relevant to the whether the provider succeeded in creating an express trust, but its relevance to the resulting trust is only as an indication of lack of intention to benefit the recipient”.³⁹⁸

³⁹⁸ Per Potter LJ in *Twinsectra*, *supra* n.394

This statement taken as a whole is clearly contrary to the views expressed in the House of Lords. However, in itself, the statement is confused. In the first instance, Potter LJ states that the role of intention is a *negative* one, but then goes on to say that the evidential question is whether the transferor intended to benefit the transferee or not. The intention not to benefit the transferee is a *positive* intention, and it is this statement which accords with the House of Lords' decision in *Westdeutsche*.

That a resulting trust arises because it is presumed that the transferor intended to create a trust does not mean that a trust *per se* must have been in the mind of the transferor at the time of the transfer of the property in question. This is a common mistake made when turning one's mind to the consideration of the resulting trust. The transferor does not have to *actually* intend the trust – as is correctly stated by Potter LJ, this would give rise to an express trust. Rather, the resulting trust is the response of law to a set of particular circumstances which require the law to presume from the facts the intention of the transferor.

This judicial confusion is shown by the contrary decision in *Allen and another v Rochdale Borough Council*³⁹⁹ where Morritt LJ, giving judgment again for the Court of Appeal, relied on the traditional view of resulting trusts expounded by Megarry J in *Vandervell No.2* in reaching his conclusions.

The question must therefore be asked as to whether it matters if the response of the law is to impose a resulting trust due to the transferor's intention that the property should not be for the benefit of the transferee, or whether it is due to the lack of intention to make a beneficial transfer. The answer, in practical terms, is that it does not, where the resulting trust arises in the traditional situations. Only where the accepted principles lead to the suggestion that the resulting trust may have a much wider application, for example within the area of the law of restitution, that problems arise. It is in his attempted clarification of the principles that Chambers attempts to enable consistent application of the rules in situations which are "apparently" different to the traditional instances. Where such an

approach leads to the exposure of distinctions, then, and only then, will divergence as to outcome result.

Chambers has suggested that at the heart of the resulting trust is subtractive unjust enrichment, and that every resulting trust effects restitution of that enrichment to its provider. From this he believes that resulting trusts should arise in a much wider set of circumstances. That the resulting trust should be seen as arising in circumstances outside its traditional use is not, for Chambers, a method of law reform, but is a more consistent and logical application of the principles giving a better understanding of what is there already.

With regard to the “automatic” resulting trust, it has been suggested that Lord Browne-Wilkinson in *Westdeutsche* rejects any application of such a trust preferring to see the Crown as taking, in such cases, as a result of the equitable interest vesting *bona vacantia*. To accept such a view, it is submitted, is to take the dicta too far. Rather, it is suggested that Lord Browne-Wilkinson is rejecting the distinction between what has traditionally been seen as two separate types of resulting trust, in favour of a doctrine of resulting trusts based on the same propositions. This is, however, as far as the similarities with the thesis put forward by Chambers go. Rather than seeing resulting trusts arising as a result of the lack of the transferor’s intention to benefit the recipient, the resulting trust is confirmed by the House of Lords to arise as a result of the intentions of the parties, to be presumed by the courts where necessary.

Where a resulting trust arises as a consequence of the failure, or partial failure, to dispose of the beneficial interest through an express trust (what has been traditionally called an “automatic resulting trust”), then it is suggested in this paper that this is due to the intention of the transferor, in the same way as the “presumed” resulting trust. However, this resulting trust is not based on a presumption of the transferor’s *primary* intention – that was to dispose of the property in question by way of an express trust – but is based on his *secondary* intention, i.e. that he would have intended that any non-disposed of property would be returned to him. The mechanism for this return is the resulting trust, which arises

³⁹⁹ [1999] 3 All ER 443

as the law presumes that the transferor intended to create a trust in favour of himself, in the same way as on a gratuitous transfer, where his initial wishes cannot be fulfilled. As with resulting trust based on the presumption of *primary* intention, this will be open to the transferee to attempt to rebut, which it is argued would be extremely difficult in such a situation. This thesis is, of course, in direct conflict with Chambers's views. It may, following this view be more consistent to refer to resulting trusts as either primary intention resulting trusts or secondary intention resulting trusts.

Further in support of this rejection of those who suggest that Lord Browne-Wilkinson has focused on the automatic resulting trust is that in *Westdeutsche* Lord Browne-Wilkinson classified the *Quistclose* trust as falling within the automatic resulting trust category. However, there has been no suggestion that property held on a *Quistclose* trust should vest in the Crown as *bona vacantia* – this would fly in the face of public policy.

Since the *Quistclose* decision there has been much debate with regard to such trusts and again, as noted through the discussion in this paper, there is no consensus here either. Being a form of “automatic” resulting trust, it is submitted that the *Quistclose* trust arises as a result of the transferor's *secondary* intention being that, on the failure of the purpose for which the property was advanced (the *primary* intention), such property should be returned to its provider.

Chambers concludes his thesis⁴⁰⁰ with the statement that the doubts cast by Swadling on the proper role of the resulting trust, which were shared by the House of Lords in *Westdeutsche*, are based on the view that resulting trusts arise only in the traditionally recognised categories in response to the presumed intention to create a trust. Chambers sees this view as able to explain the origins of the resulting trust but not its application to the modern law, and that to accept such a view would be to reject, as wrongly decided, a whole line of case law.

Before the publication of Dr Chambers's book there was a notable absence, amongst the plethora of textbooks relating to the law of equity and trusts, of a work dedicated to the

examination of the principles of the “special” trusts which lie at the very heart of equity. Chambers explores in depth the core concepts of the trust and attempts to “...cut back the tangled undergrowth of the constructive trust and let in light to allow the resulting trust to grow”.⁴⁰¹ This is important in itself as the resulting trust has recently begun to raise its head more and more in the commercial arena.

Any such text must be welcomed as a platform for debate in the same way as the writings of Birks on the subject have done. However, a definitive guide to the present law the book is not. This is because despite the rejection by the House of Lords of the Birks thesis, Chambers continues in his belief that these principles reflect current legal thinking. As Oakley points out: “...anyone writing about this subject...is likely subconsciously to start out with some conception of the conclusion which he or she wishes to reach and therefore necessarily arrive there”.⁴⁰² For Chambers, his starting point, and unsurprisingly his conclusion, is that there is a single form resulting trust which arises where property is transferred in the absence of intention to benefit the recipient.

In this paper the case law and academic arguments have been examined. The difficulty arises in drawing any conclusions other than to say that there are none. As the law stands at present, it would seem that the traditional doctrine of resulting trusts as expounded in *Vandervell (No.2)* remains intact, subject to some minor tweaking. There has, however, been a shadow cast over the “automatic” resulting trust such that it may be said that rather than arising automatically as a consequence of trust failure, the courts should apply the presumption to such situations, the consequences being the same save for the negligible possibility of rebuttal.

Resulting trusts arise by operation of law. They arise in certain situations where the law presumes that the transferor intended to create a trust in his own favour. It will then be open to the transferee to rebut this presumption through evidence that a beneficial transfer was intended, save for in certain personal relationships where the presumption of advancement applies, reversing the outcome.

⁴⁰⁰ Chambers, *supra* n.4, p.227

⁴⁰¹ Millett, *supra* n.392

⁴⁰² Oakley, *supra* n.240, 229

If the rationale behind Chambers's thesis was the consolidation and clarification of the true nature of the resulting trust, then it must be said that its aim has not been achieved. If, on the other hand, its experimental propositions were designed to raise further questions and academic and judicial debate on the subject, then Dr Chambers must be congratulated on a resounding success.

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