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The Past, Present, and Future of Resulting Trusts

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Abstract: This article considers the nature and future of resulting trusts, and offers a critique of the Birks/Chambers theory of resulting trusts. It argues that the current law cannot be explained, as the Birks/Chambers theory suggests, on the basis of the reversal of unjust enrichment. Instead, the law of resulting trusts is based on an old fiction whereby the owner of property is regarded as holding a beneficial interest which may be retained when the legal ownership has been transferred to another person. Unfortunately, this 'retention' idea does not provide a doctrinally satisfying justification for the current law. A logical response would be to discard those aspects of the law of resulting trusts that depend on the retention idea and, therefore, to dispense with presumed resulting trusts. The article argues that, in fact, in English law the purchase-money resulting trust has already been made irrelevant by the common intention constructive trust. However, the article argues for the continued recognition of gap-filling (i.e. 'automatic') resulting trusts on the basis that an alternative justification can be identified for such trusts.

Introduction

On first inspection, it is not easy to see why the category of resulting trusts exists in the law. If express trusts are those trusts that are created by someone on purpose and constructive trusts are those trusts that have not been deliberately created but are imposed by the courts in the interest of justice, then where do resulting trusts fit in? Trusts created by the settlor and trusts created by the courts seem to exhaust the possibilities. This article addresses this conundrum, attempting to explain where resulting trusts fit into the law and assessing what their future should look like.

The current law recognizes two types of resulting trust. The first are 'presumed' resulting trusts, which can arise when a person makes a voluntary transfer of property[1] or puts up the purchase price of property

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which is conveyed into the name of another person. The second type arises where the claimant transfers property to a trustee on an express trust that fails to exhaust the beneficial interest in the property. The resulting trust arises to fill the 'gap' in the beneficial interest (and, for convenience, such trusts will be referred to in this article as 'gap-filling' resulting trusts).[2] It has also been suggested that, beyond these well-recognized categories, other instances of resulting trusts have been, or should be, recognized by the law. An influential argument has been made in recent years by Professor Peter Birks and Professor Robert Chambers, advocating an expansion of the scope of resulting trusts, so that such a trust would be recognized as the standard response to unjust enrichment and would, eg, arise upon the making of a mistaken payment.[3]

It will be argued in this article that resulting trusts pre-date the modern distinction between express and constructive trusts. As will be explained in detail, in the different historical conditions that prevailed when the doctrine was developed, the normal motive of a transferor was not to vest the beneficial interest in the transferee, but rather to make the latter a trustee. Reflecting these historical conditions, the courts proceeded on the basis that a transferor would 'retain' the beneficial interest in the property unless it could be shown that he intended it to pass. Thus, no express declaration of trust was required in order to make the recipient hold the property on a resulting trust; the transferor's intention was sufficient.

Establishing as a descriptive matter the nature of the current law, and identifying the outdated theoretical justification that underlies it, is of particular assistance when it comes to assessing the Birks/Chambers

[1] ie where the recipient gave no consideration for the transfer.

[2] This label is intended simply to be descriptive. Megarry J suggested the label 'automatic' resulting trusts in *Re Vandervell's Trusts* (*No 2*) [1974] Ch 269 (Ch) 279. This label has, however, been criticized by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 708 (and see also Willliam Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 99–100). The alternative label 'failed trust resulting trust' (employed by Swadling, eg ibid 73) is misleading, in the view of the current author, because it suggests that the settlor's expressed intention to create a trust has simply 'failed'; contrast the justification offered in the section entitled 'The Normative Justification for Gap-Filling Resulting Trusts' below.

[3] See generally Robert Chambers, *Resulting Trusts* (OUP 1997). It is sometimes suggested that the so-called *Quistclose* trust, named after the decision of the House of Lords in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567, provides another example of a resulting trust. Space does not permit a detailed examination of the nature of *Quistclose* trusts in the present article. The current author finds convincing the theoretical explanation, in terms of express trusts, offered by Peter Millett, 'The *Quistclose* Trust – Who Can Enforce It?' (1985) 101 LQR 269 and supported by James Penner, 'Lord Millett's Analysis' in William Swadling (ed), *The Quistclose Trust* (Hart Publishing 2004).

argument in favour of a radical increase in the scope of resulting trusts. This is because the latter is a somewhat unusual type of argument. It does not appear to be normative in nature. The appeal is, rather, essentially to a perceived pattern within the law. The Birks/Chambers argument identifies the basis of resulting trusts as 'absence of intention to benefit the defendant', understanding this to extend beyond cases where the claimant intended to make the defendant a trustee.[4] It then argues that resulting trusts should arise in other situations, which do not currently trigger a resulting trust, on the basis that those other situations fall within the scope of the 'absence of intention to benefit' principle.[5] If, in fact, as is argued in this article, the perceived pattern does not exist, then the Birks/Chambers argument in favour of the expansion in the scope of resulting trusts loses its force. This is not, of course, to suggest that it is impossible to mount a normative argument that the law should develop so as to provide a proprietary response to unjust enrichment (favouring unjust enrichment claimants over the general creditors of the defendant), only that an appeal to the nature of resulting trusts does not advance this argument.

None of the above means that the current author thinks that the past must determine the future of the law. There is much wrong with the current law of resulting trusts and, on the basis of an understanding of its historically determined nature, the article will suggest—making a normative argument—that much of it should be jettisoned. The category of presumed resulting trusts appears to be indefensible in modern times. In fact, it will be suggested, the purchase money resulting trust has already been displaced in English law by the common intention constructive trust, and the law should also dispense with the less commonly discussed 'voluntary transfer' category of presumed resulting trusts. On the other hand, the gap-filling resulting trust makes good sense as one aspect of the package of rules surrounding the express trust and, as will be argued in the final section of the article, can be defended in principle by reference to the fact that the settlor has expressly stipulated, in making the transfer, that the defendant is not to take beneficially. Thus, this article favours

[4] The argument suggests that the claimant's intention to create a trust, where it is present, is relevant only to show that the claimant did not intend the defendant to take the benefit of the property; such an intention is not regarded as being effective to create a trust directly but, because it demonstrates that the defendant has been unjustly enriched, is regarded as triggering the creation of a trust to reverse the unjust enrichment.

[5] cf Fred Wilmot-Smith's criticism of this type of classification-based reasoning in 'Reasons? For *Restitution*?' (2016) 79 MLR 1116, 1121–22.

reducing the scope of resulting trusts but not their complete elimination from the law.

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Resulting Trusts and Retention

This section of the article explains the role of the concept of retention, which originated in the context of resulting uses, in the law of resulting trusts. It will be argued that the retention rationale, although key to understanding the current state of the law, is not defensible in modern times because, in doctrinal terms, the interest under a resulting trust is not truly a 'retained' interest.

The Historical Background to the Development of the Law of Uses

A key aspect of the background to the development of the resulting trust was that it had become 'the practice in late medieval England to make feoffments of freehold land to the uses of a last will, allowing, in effect, a will of such land, otherwise impossible at common law'.[6] The settlor would remain in possession of the land and would continue to enjoy it, exactly as before. Subsequently, often when he was on his deathbed, he would declare who the beneficiaries under the use would be. Such declarations of the settlor's intentions, or 'will', as to who would succeed to his land constituted the earliest wills.[7] Primarily because of their use as a mechanism to facilitate the making of wills, 'uses', as trusts were then known, became extremely common; it was said in 1518 that 'few men be sole seised of their own lands'.[8]

The prevalence of such arrangements at this specific point in history had crucial consequences for the developing law of uses and, ultimately, for the law of trusts. At a time when 'uses waxed general',[9] it was natural for the law to assume that a transfer of land for which the transferee did not pay was intended to create a use. In considering the intention behind a particular

[6] Neil Jones, 'Uses and "Automatic" Resulting Trusts of Freehold' (2013) 72 CLJ 91, 94 (footnotes omitted).

[7] AWB Simpson, *A History of the Land Law* (2nd edn, OUP 1986) 182.

[8] C St Germain, 'Second Dialogue', in TFT Plucknett and JL Barton (eds), *Doctor and Student* (Selden Society 1974) 91, ch 22 [56a]; the spelling here, and in later quotations from this source, has been modernized.

[9] WH Rowe (ed), *The Reading upon the Statute of Uses of Francis Bacon* (W Stratford 1804) 22.

voluntary conveyance of a family's ancestral lands to someone outside the family, it was far more likely that the explanation was a desire to facilitate the making of a will rather than to make a gift to the recipient. This led to the creation of a 'presumption of resulting use' whereby, unless a voluntary conveyance was expressly stated to be for the benefit of the recipient, it would be presumed that the recipient was intended to be a trustee who would ultimately pass on the property to beneficiaries to be nominated by the settlor and who would hold for the settlor in the meantime.

The near universality of such arrangements also meant that the need was not felt to spell them out expressly. Thus, John Baker notes that 'most uses created prior to 1536 [were] tacit resulting uses arising from feoffments made without a consideration moving from the feoffees'.[10] This helps to explain why the nature of the presumption of resulting use that developed was not that an express declaration of trust had been made by the settlor but rather that the intention behind the transfer, which may or may not have been expressed in a declaration but which would have been understood on all sides in any case, was that the trustee would hold it to the uses of the settlor's will and, in the meantime, passively allow the settlor to continue to enjoy the land on the basis of a resulting use. Similarly, the modern presumption of resulting trust, which developed by analogy with the presumption of resulting use, is a presumption as to the intention of the settlor, not a presumption that the settlor made an express declaration of trust in his own favour.[11]

A final consequence of the prevalence of uses is that the owner of land who created a passive use would not have thought of himself as having given away his ownership of the land to the trustee. The transfer of legal title to the trustee was simply a technicality that was necessary in order to facilitate the acquisition of a power (to dispose of the land by will) that would become useful in the future. The fact that the trustee's role was essentially passive, with the settlor remaining in occupation of the land as before, made it plausible for the law to think, as the parties surely did, in terms of the settlor having 'retained' his pre-existing ownership of the

[10] JH Baker, *The Oxford History of the Laws of England: Vol VI 1483–1558* (OUP 2003) 675.

[11] Swadling argues that the presumption of resulting trust is a presumption that the settlor expressly declared a trust for himself: see Swadling (n 2) 79–85. However, the case law conclusively shows that the modern presumption is a presumption as to the *intention* of the settlor: John Mee 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73 CLJ 86, 90–94.

land.[12] As will now be discussed, this idea of 'retention' was at the heart of the doctrine of resulting uses and, although it cannot be defended in doctrinal terms, it remains the foundation of the modern doctrine of resulting trusts.

Retention and Resulting Uses

Consistent with the assumption that the resulting use in favour of the settlor represented a continuation of his pre-existing ownership, the law developed the idea that the ownership of land—even when it was not subject to any trust arrangement—had a dual quality. This was explained by Christopher St Germain in the following terms:

> [E]very man that has lands has thereby two things in him, that is to say, the possession of the land, which … is called the … freehold, and the other is authority to take thereby the profits of the land.[13]

The beneficiary under a use was also referred to as the 'pernor of profits', that is, the taker of the profits. Thus, the law's conception of ownership of land came to reflect the idea that an outright owner was, in a sense, holding the land to his own use. The word 'use' was, therefore, used in two ways. In the terminology of Francis Bacon, the law distinguished between the 'divided use', where a trustee held land to the use of a beneficiary, and the 'conjoined use', which was simply an aspect of the unfettered ownership of land (being 'conjoined', or attached, to the legal ownership).[14]

When a resulting use arose, this conjoined use (referred to in this context as the 'old' or 'ancient' use) was regarded as being retained by the transferor. As Sir Edward Coke explained:[15]

> [W]hosoever is seized of land, hath not only the estate of the land in him, but the right to take profits, which is in the nature of the use, and therefore

[12] Note that, under the modern law also, resulting trusts have been found to exist in cases where the trustee was intended to be merely a passive nominee, who would not even be aware of the fact that legal ownership had been transferred to him or her. See eg *Standing v Bowring* (1881) 31 Ch D 282 (CA) 289; *Re Vinogradoff* [1935] WN 68 (Ch). cf Mee (n 11) 99–100.

[13] St Germain (n 2), ch 22 [54b].

[14] Rowe (ed) (n 9) 45. See further Jones (n 6) 94ff. See also Neil Jones, 'Uses, Trusts and a Path to Privity' (1997) 56 CLJ 175, 178–82; Neil Jones, 'Trusts in England after the Statute of Uses: A View from the 16th Century' in Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Duncker & Humblot 1998) 190–92.

[15] *The First Part of the Institutes of the Lawes of England; or, a Commentary upon Littleton* (4th edn, M Flesher and others 1639) 23a.

when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use . . ..

The result was that '[a] use of land . . . is no new thing, but part of that which the owner of the land had'.[16]

The above comments of Sir Edward Coke were made in the context of the type of resulting use that corresponds to the modern 'gap-filling' resulting trust. However, the retention idea was crucial to all resulting uses.[17] The presumption of resulting use that arose upon a voluntary transfer of land was seen as a presumption that the transferor intended to retain his 'old use'. Thus, as with other resulting uses, the law did not think of the settlor as having created, by exercising a power to achieve this result, a new use in his own favour. The notion of retention involves looking at the matter in the opposite way. In cases of a resulting use, the 'old use' was simply staying where it was (with the settlor); it was only if the use was to move away from the settlor that something positive was required to be demonstrated that 'draws the use out of the [settlor]'.[18] If the use was to remain in the transferor, then a mere intention was sufficient. As was explained in St Germain's dialogue between *Doctor and Student*:

> [H]e that has land, and intends to give only the possession and freehold thereof to another and keep the profits to himself ought in reason and conscience to have the profits.[19]

The retention idea also came to govern uses expressly created by a settlor in his own favour. If one accepts that the outright owner of land already held a (conjoined) use in the land, the implication is that, if a settlor transferred his land to a trustee on the express basis that the trustee was to hold on trust for the settlor, no new use was created. The settlor merely retained his pre-existing use, just as in the case of a resulting use arising upon a voluntary conveyance: 'in both cases the fee remains in the donor, and was never drawn out of him'.[20]

[16] *Samme's Case* (1609) 13 Co Rep 54, 56; 77 ER 1464, 1466.
[17] cf Jones (n 6) 98–99 (see his fn 56).
[18] *Shortridge v Lamplough* (1700) 7 Mod 71, 72 quoted by Jones (n 6) 99.
[19] St Germain (n 2), ch 22 [54b].
[20] *Godbold v Freestone* (1694) 3 Lev 406, 407. See also *Abbot v Burton* (1708) 11 Mod 181, 182 (Trevor CJ), discussed by Jones (n 6) 100. In the modern law also, there is no essential difference between a resulting trust and a bare express trust in favour of the settlor, a point which is relevant to understanding the modern case of *Hodgson v Marks* [1971] Ch 892; see the discussion in Mee (n 11) 104–05.

Retention and Resulting Trusts

Following the Statute of Uses 1535, the legal concept of the trust was developed and the new trust shared many, but not all, of the features of the use. Crucially for present purposes, the idea of retention was applied in the same way in relation to trusts. In *Burgess v Wheate*,[21] Lord Keeper Henley stated the position as follows:

> Uses at common law, and trusts now, must ensue [ie follow] the nature of the land …. In the case of a resulting use, the true reason is, that 'tis never out of the grantor. In the case of trust, 'tis the same – 'tis the old trust …[22]

Setting out the same rule in the 19th century, Preston explained that it 'depends altogether on the rules applied by courts of equity, anterior to the statute of uses'.[23] The emphasis placed by the law of trusts on the concept of retention had important practical implications, into the 20th century. For example, as the current author has discussed in detail elsewhere, it made a crucial difference in the law of intestate succession.[24] The interest under a resulting trust descended on the basis that it was something that the settlor had previously held and now 'retained', rather than something created for the first time as a result of the transfer that triggered the resulting trust.

The courts have continued to formulate the rules on resulting trusts in terms of the retention by the settlor of a pre-existing beneficial interest. In *Vandervell v IRC*,[25] Lord Upjohn stated that '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'.[26] In the same case, Lord Wilberforce argued that 'the equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settlor'.[27] There are many other examples.[28]

[21] (1759) 1 Black W 123.
[22] ibid 185. See also *Northen v Carnegie* (1859) 4 Drew 587, 593; 62 ER 225, 227 (Kindersley VC).
[23] Richard Preston, *An Essay in a Course of Lectures on Abstracts of Title* Vol 2 (W Clarke & Sons 1818) 436.
[24] See John Mee, '"Automatic" Resulting Trusts: Retention, Restitution, or Reposing Trust' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 215–18. Note also *Re Robb's Contract* [1941] Ch 463 where, in the context of a dispute over stamp duty, it was held that a conveyance leading to a resulting trust is one 'under which no beneficial interest passes in the property conveyed or transferred' for the purposes of the Finance (1909–10) Act, 1910, s 74(6).
[25] [1967] 2 AC 291 (HL).
[26] ibid 313.
[27] ibid 329. See also ibid 307–08 (Lord Reid).
[28] Note eg *Shephard v Cartwright* [1955] AC 431, 454 (Lord Reid); *Tribe v Tribe* [1996] 1 Ch 107, 129, 134, 135 (Millett LJ); *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (PC)

A Problem: Retention is not a Doctrinally Satisfying Explanation

The discussion so far has pointed out that the courts' explanation of the basis for resulting trusts has centred on the concept of retention. To some commentators, this judicial rationalization has seemed self-evidently valid, being simply a matter of 'proprietary arithmetic' and the application of the principle that 'what I once had and have not granted away, I keep'.[29] However, this overlooks the fact that the interest which the claimant holds under a resulting trust is not, strictly speaking, something that he or she previously held. Before the creation of the resulting trust, he or she held the legal title to the property, giving him or her *inter alia* the right to sue anyone who interferes with the property and to transfer the property to whomever he or she chooses. After the creation of the resulting trust, he or she lost these rights but gained instead *inter alia* the right to insist that the trustee should sue anyone who interferes with the property and to compel the trustee to transfer the property to whomever the claimant chooses. Notwithstanding the rhetoric of retention, the rights that the claimant holds under the resulting trust are of a different nature to, and not 'part of', the legal title that he or she held before.[30]

This point was made by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[31] who dismissed as 'fallacious' an argument that the claimant bank had 'retained' its equitable ownership in monies that had been paid pursuant to a void contract.[32] According to Lord Browne-Wilkinson:

> A person solely entitled to the full beneficial ownership of . . . property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights.[33]

Lord Browne-Wilkinson does not appear to have appreciated that the traditional explanation of the resulting trust had been based on a fiction to the contrary and, in *Westdeutsche*, he supported the orthodox approach to resulting trusts that has been identified in this article. In fact, *Westdeutsche*

1412 (Lord Millett); *Lavelle v Lavelle* [2004] EWCA 223, [2004] 2 FCR 418 [13] (Lord Phillips MR).

[29] Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana 1987) 153, quoted by Chambers *Resulting Trusts* (n 3) 51–52.

[30] See eg Chambers (n 3) 53; Swadling (n 2) 100; Mee (n 24) 219–21.

[31] [1996] AC 669.

[32] ibid 706.

[33] ibid.

holds explicitly that a resulting trust cannot arise in the absence of an intention on the part of the claimant to create a trust,[34] thus copper-fastening the position established over many centuries of case law. Nonetheless, the logic of Lord Browne-Wilkinson's observations on the question of retention creates a major challenge for the law of resulting trusts.

In the view of the current author, the appropriate response is to acknowledge that the retention analysis is no longer viable (and the implications of this will be explored shortly). However, a different approach has been advocated by Professor James Penner. He argues that the objections to the 'retention' model are 'very *theoretical*',[35] and that the explanation can be defended if one is willing 'to maintain a distinction between form and substance'.[36] It is certainly the case that, as Professor Penner argues, one could decide to look past the strict legal position and assert that, in substance, the settlor who benefits from a resulting trust is retaining something that he or she held before. The question is, however, what would be the normative justification for ignoring the strict legal position? The 'retention' argument appeals to a normative basis outside of itself: the point of emphasizing that the settlor is retaining something that he or she previously owned is that it leads to the conclusion that the settlor's continued ownership is simply an expression of his or her pre-existing property rights and, therefore, justified on the same basis as the law's initial recognition of those rights. Beyond that, the retention argument appears to be normatively inert. Thus, if one has to concede that the settlor is actually obtaining new rights, different to those which he previously held (and has given away), the retention idea loses its essential point and it does not seem that the argument can be rescued by rhetoric about substance and form. The retention idea might be a convenient metaphor to assist in the exposition of the relevant legal rules, assuming that some other normative justification could be found for them, but that is a different matter.

Consequences of the Insufficiency of the Retention Explanation

Although the deficiency, in doctrinal terms, of the retention explanation has been said to leave the 'gap-filling' resulting trust as 'a rule in search of a

[34] ibid 708–09 (Lord Browne-Wilkinson). See also ibid 689–90 (Lord Goff); 718 (Lord Slynn); 720 (Lord Woolf); 738 (Lord Lloyd).

[35] 'Resulting Trusts and Unjust Enrichment: Three Controversies' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) n(24) 262 (original emphasis).

[36] ibid 263.

rationale',[37] it also has implications for presumed resulting trusts. These forms of resulting trust, the voluntary transfer and purchase money resulting trusts, involve an intention on the part of the claimant to make the defendant a trustee for the claimant[38] and it is tempting to see this trust-creating intention as providing a rationale for such trusts, independent of the concept of retention. However, the concept of retention is at the heart of equity's traditional response to a key question (emphasized by commentators such as Professor Chambers[39] and Professor Swadling[40]): why should the mere fact that the claimant *intended* to create a trust be sufficient to do so when the exercise of a settlor's power to create a trust requires a *declaration* of trust?

The immediate answer to this question lies in the fact that, as reflected in the old equitable doctrine of 'consideration'[41] and its translation into the modern law of resulting trusts, the courts developed a rule of substantive law which dictates that the effect of a (direct or indirect) voluntary transfer depends on the intention of the transferor.[42] However, this rule itself requires explanation and the explanation, no longer satisfactory in modern times, is clearly supplied by the idea of retention and the historical circumstances that gave plausibility to that idea. In an era when a very large proportion of voluntary transfers were motivated by an intention, often taken for granted and so not declared expressly, that the recipient would hold as trustee, it made sense to take as the starting point that the transferor would 'retain' his ownership and to put the onus on the person arguing that the recipient was intended to take beneficially. Thus, the historical context does not simply explain the *existence* of a presumption of resulting trust in favour of the transferor but also the *nature* of that presumption, ie why it is a presumption of an intention to create a trust, rather than a declaration of trust. It is common for commentators to recognize that the presumption of resulting trust is outdated but to fail to see that the doctrine itself—turning on a mere intention to

[37] Jones (n 6) 114.

[38] As noted in Mee (n 11) 97, the presumption of resulting trust encompasses also an intention that the trustee would hold according to the claimant's instructions, which has always been regarded as equivalent to an intention that the trustee should hold on trust for the claimant.

[39] *Resulting Trusts* (n 3) 34.

[40] Swadling (n 2) 80.

[41] In this context, 'consideration' was understood in its older sense of the reason or motive explaining a transaction. See AWB Simpson, *A History of the Common Law of Contract* (Clarendon Press 1975) 329–32.

[42] Mee (n 11) 106–109.

create a trust—was also decisively influenced by the same unusual historical circumstances.

What is the appropriate response to the conclusion that the rationale for a doctrine is based on social conditions which no longer prevail? The logical answer appears to be that the doctrine should be discarded unless some alternative, and more satisfactory, rationale can be identified. It will be argued in this article that the voluntary transfer and purchase money resulting trusts cannot be defended in modern times and should not form part of the law. In England and Wales, the purchase money resulting trust has, of course, already been impacted upon by the development of the common intention constructive trust. It is widely accepted that this newer doctrine has taken over much of the territory formerly occupied by the purchase money resulting trust. However, it will be pointed out that, if one looks past the misleading use of terminology in the case law, the process has gone further than is generally appreciated and, in fact, the purchase money resulting trust has essentially been deprived of any independent significance. It will also be suggested (although it will not be possible to explore the relevant arguments fully in the current article) that the voluntary transfer resulting trust should be discarded; in English law, the argument in favour of this is strengthened by the fact that it would be consistent with the demise of the purchase money resulting trust. The gap-filling resulting trust, however, stands in a different position. The fact that the claimant has expressly stipulated that the relevant transfer to the defendant is 'on trust' distinguishes the situation from one where the claimant merely intended to create a trust but did not expressly provide that this was to be the case. It will be argued that the gap-filling resulting trust doctrine is perfectly defensible in modern conditions and should remain part of the law of trusts. First, however, it is necessary to discuss an influential academic theory which identifies an alternative basis for resulting trusts and suggests that the scope of resulting trusts should be expanded rather than restricted.

The Birks/Chambers Theory

In his *An Introduction to the Law of Restitution*,[43] Professor Peter Birks argued that resulting trusts operate to reverse unjust enrichment. In a 1992 book chapter, he elaborated the more ambitious argument that this understanding of resulting trusts justified a radical increase in their

[43] Revd edn (OUP 1989) esp 57–73.

scope of application.[44] The argument has since been developed in detail by Professor Chambers, in his monograph on *Resulting Trusts* and in a series of later publications.[45] The relevant theory suggests that '[a]ll resulting trusts come into being because the provider of property did not intend to benefit the recipient.'[46] This 'absence of intention to benefit' formulation does not appear to derive from any judicial authority but rather to represent Professor Chambers' preferred phrasing of the applicable principle. Absence of intention to benefit is understood under this theory to include not merely cases where the claimant intended to pass the legal interest to the defendant but not the beneficial interest, ie intended to make the defendant a trustee (which the orthodox doctrine regards as covering the entire field), but also cases where the claimant lacked an intention to pass legal title to the defendant or had a vitiated intention to do so.

Overlooking the Role of Retention

The Birks/Chambers argument was, unfortunately, formulated without an appreciation of the central role of the concept of retention in the law of resulting trusts. Professor Birks noted that, while on his argument the resulting trust was 'an interest newly created with 'restitutionary' purpose and effect',[47] it would also be possible in principle to regard it as an interest retained by the claimant. However, he regarded his view as 'truer to history' because:

> In the days of institutional separation between law and equity, the courts of equity had nothing to say at all about the holding of property until some event occurred which attracted their jurisdiction. The notion of a legal owner as having, even before such an event, concurrent legal and equitable title would have been nonsense.[48]

In *Resulting Trusts,* Professor Chambers regarded his theory as 'consistent with the historical development of equitable interests'[49] and suggested that, in contrast, the idea of explaining resulting trusts on the basis of the

[44] 'Restitution and Resulting Trusts' in Stephen R Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University Jerusalem 1992).
[45] Chambers (n 3) and, for example, 'Resulting Trusts in Canada' (2000) 38 Alta L Rev 378; 'Resulting Trusts' in Andrew Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); 'Is There a Presumption of Resulting Trust?' in Charles Mitchell (ed), *Constructive and Resulting Trusts* n(24) (Hart Publishing 2010).
[46] Chambers (n 3) 2.
[47] Birks (n 43) 71.
[48] ibid.
[49] Chambers (n 3) 103.

retention of a pre-existing beneficial interest 'requires a view of equitable ownership which is contrary to history and precedent'.[50] As demonstrated by the discussion thus far in this article, these assertions about the history of the matter turn out to be mistaken. Inevitably, the credibility of an argument that seeks to change the law on the basis of a particular understanding of the 'true' nature of resulting trusts, invoking history and precedent, is seriously damaged by this mistake.

The Birks/Chambers argument is founded on the proposition that the creation of resulting trusts is a response simply to unjust enrichment. This proposition prompts the question of why the mere existence of unjust enrichment dictates a proprietary remedy rather than a personal remedy.[51] Crucially, the Birks/Chambers argument is not concerned to offer a justification for the fact that a trust arises in the traditional resulting trust scenarios but not in other situations; instead, it focuses upon the fact that a trust currently arises in the traditional resulting trust scenarios and extrapolates from this that a trust should also arise in other cases involving an absence of intention to benefit. The result would be that a proprietary remedy, in the form of a resulting trust, would be available in the case of mistaken payments and all other cases of unjust enrichment, provided only that 'the recipient has not obtained the unfettered beneficial ownership of the property before the right to restitution arises'.[52] Whether this amounts to changing the law is described as 'depend[ing] on what we mean by "change"':

> If it turns out that more events give rise to resulting trusts than previously suspected, the resulting trust is not moving, but getting an addition to its existing home. Complaints about imperialism should be directed, if anywhere, to Chancery.[53]

The suggestion appears to be that a radical change in the law is dictated by the existing law; this argument, already difficult to make, is undercut by the misunderstanding of the current basis of resulting trusts which lies at the heart of the Birks/Chambers' theory.

Misreading Retention as Restitution: 'Absence of Intention to Pass the Beneficial Interest'

A key point of distinction between the Birks/Chambers theory and the orthodox view identified in this article is that, under the orthodox view,

[50] ibid 104.
[51] A point made by Swadling (n 2) 101.
[52] Chambers (n 3) 151.
[53] ibid 244.

resulting trusts arise only in the context of an intention on the part of the claimant to create a trust. Of their nature, gap-filling resulting trusts arise only where the settlor intended to create a trust (ie to make the defendant a trustee). Therefore, it is only in the context of presumed resulting trusts that there is room for debate as to whether an intention other than an intention to create a trust could trigger a resulting trust. The courts have sometimes stated the presumption of resulting trusts in terms that directly refer to a trust-creating intention on the part of the claimant (or a positive intention to retain the beneficial interest): 'It is presumed that the intention of the person paying the purchase price is that the property should be held by the person having the legal title in trust for him.'[54] On other occasions, however, courts and commentators have stated the presumption in terms of an absence of intention to pass the beneficial interest to the defendant. This alternative phrasing of the same test reflects the influence of the retention paradigm, ie the idea that the claimant should 'retain' the beneficial interest unless he or she intended to pass it to the defendant along with the legal title. However, Professor Chambers suggests that such formulations are supportive of his position and damaging to the orthodox view. He sees a conflict in the case law between 'two main views on the intention being presumed':

> The first, and seemingly most popular, is that the provider of the property intended to create a trust for himself or herself. The second and, it is respectfully suggested, better view is that the provider did not intend to give the benefit of that property to the recipient.[55]

This argument of Professor Chambers' has gained a degree of traction, with some leading commentators seeming to accept the existence of an association between his position and statements of the presumption of resulting trust in terms of an absence of intention to pass the beneficial

[54] *Dullow v Dullow* (1985) 3 NSWLR 531 (NSW CA) 535 (Hope JA; Kirby P and McHugh JA concurring). See also *Benger v Drew* (1721) 1 P Wms 781, 781 (Lord Macclesfield); *Murless v Franklin* (1818) 1 Swan 13, 18 (Lord Eldon); *Sidmouth v Sidmouth* (1840) 2 Beav 447, 454–57 (Lord Langdale MR); *Standing v Bowring* (1885) 31 Ch D 282, 289 (Lindley LJ); *Re Kerrigan* (1946) 47 SR (NSW) 76, 81 (Jordan CJ). See also the further authorities cited in Mee (n 11) 101 fn 97. Note that gap-filling resulting trusts do *not* arise through the operation of the presumption of resulting trust: see Swadling (n 2) 94–99; Mee (n 24) 210 fn 13. It is obviously true that, as Lord Millett's observed in *Air Jamaica v Charlton* [1999] 1 WLR 1399, 1412, a gap-filling resulting trust 'may arise even when the transferor positively wished to part with the beneficial interest, as in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291'. This, however, does not cast any light on the nature of the presumption of resulting trust.

[55] Chambers (n 3) 19.

interest.[56] In fact, such statements clearly reflect the orthodox view, conveying the fact that, while intending to pass the legal interest, the claimant did not intend to pass the (previously 'conjoined') beneficial interest which, according to the retention model, the claimant held along his legal title.

In contrast, it requires some verbal gymnastics to reconcile the relevant formulation with the Birks/Chambers theory. This is because the Birks/Chambers view suggests that resulting trusts can arise (i) where the claimant intended to give the defendant the legal title but not the beneficial interest (as under the orthodox view) and also (ii) where the claimant lacked the intention that the defendant would take the legal title. 'Absence of intention to pass *the beneficial interest*' does not, at first sight, seem apt to cover the second set of cases. Professor Chambers suggests that 'the phrase, "beneficial interest", … can describe both legal and equitable ownership'.[57] However, he has not appreciated the influence of the retention analysis on the language used by equity to explain the doctrine of resulting trusts. It would be very confusing if, in the unqualified way required by Professor Chambers' argument, the phrase 'beneficial interest' meant both 'equitable ownership' and 'legal ownership'. Although Professor Chambers postulates the concept of 'beneficial ownership at law',[58] what is at issue (under the dominant retention analysis) is not legal ownership but rather that part of ownership which is *not* the legal title, ie the beneficial interest which is regarded as being conjoined to the legal title of an outright owner. Therefore, references to an absence of intention to pass the claimant's beneficial interest suggest an intention to pass the bare legal title but not equitable ownership. Such references do not, on a natural reading, include an absence of intention to pass the conjoined package of legal title and pre-existing beneficial interest.

It has just been suggested that it is more natural to read the relevant formulation as a statement of the orthodox position rather than of the Birks/Chambers position. However, what matters is what was meant by those judges and commentators who have used the relevant formulation. On this point, it is submitted that the fact that the negative formulation is often used interchangeably, in the same source, with a positive formulation shows clearly that they are both being used to state the orthodox

[56] See eg Charles Mitchell, Paul Mitchell, Stephen Watterson (eds), *Goff and Jones The Law of Restitution* (9th edn, OUP 2016) 955–56; Jamie Glister and James Lee (eds), *Hanbury and Martin: Modern Equity* (20th edn, Sweet and Maxwell 2015) 230.
[57] Chambers (n 3) 52.
[58] ibid 55

position. Thus, for example, in the leading case of *Lavelle v Lavelle*,[59] Lord Phillips MR described the presumption of resulting trust in negative terms as 'a presumption that [the claimant] does not intend to part with the beneficial interest in the property'.[60] However, just prior to this in his judgment, Lord Phillips MR had stated that the effect of a voluntary transfer by A depends on the intention of A, so that:

> If he intends to transfer the beneficial interest in the property to B, the transaction will take effect as a gift and A will lose all interest in the property. If *he intends to retain the beneficial interest for himself*, [B][61] will take the legal interest but will hold the property in trust for A.[62]

Clearly, Lord Phillips MR meant the same thing by the positive and negative formulations.

A second example is provided by the leading American text, *Scott and Ascher on Trusts*, which explains that resulting trusts arise when 'the circumstances indicate the absence of an intention to give the beneficial interest to the person in whom legal title is vested'.[63] Citing a similar passage from an earlier edition of this textbook, Professor Chambers implied in *Resulting Trusts* that it showed that his theory of resulting trusts was reflected in US law.[64] However, this is not the case. *Scott and Ascher*, in fact, sharply distinguishes constructive trusts (which are seen in US law as responding to unjust enrichment) from resulting trusts, which are explained on the orthodox basis discussed in this article. In the context of explaining the distinction, the textbook states that 'a resulting trust arises in favour of the person who transfers property or causes it to be transferred under circumstances that raise the inference that he or she intended to transfer to the other bare legal title, but not the beneficial interest'.[65] This refers to a positive intention 'to transfer to the other bare legal title' (so that there would be a trust, involving the creation of a separate beneficial interest) combined with an absence of intention that the defendant should take the beneficial interest under that trust. To take a third and final example, Maitland stated that the presumption of resulting trust is a presumption that 'I [the claimant] do not intend to

[59] *Lavelle v Lavelle* [2004] EWCA Civ 223; [2004] 2 FCR 418.
[60] ibid [14].
[61] In the judgment, the reference is to 'A' but it seems clear that this should read 'B'.
[62] [2004] EWCA Civ 223 [13] (emphasis added).
[63] AW Scott, WF Fratcher, Mark L Ascher, *Scott and Ascher on Trusts* (5th edn, Aspen Publishers 2006) §40.1.1.
[64] Chambers (n 3) 3, referring to WF Fratcher and AW Scott, *Scott on Trusts* (4th edn, Little Brown & Co 1989) § 404.1.
[65] Scott, Fratcher and Ascher (n 63) §40.1.2.

benefit him [the defendant]'. This is a negative formulation of the test but its equivalence to the positive formulation is demonstrated by the remaining words in the relevant sentence: '. . . but intend that he shall hold as a trustee for me'.[66] Thus, 'it is not the case . . . that the courts have been confused, alternating between inconsistent formulations of basic doctrine and failing to notice the serious practical consequences of this confusion, while frequently stating that the law is well settled and free from doubt'.[67] The equivalence of the positive and negative formulations of the presumption of resulting trust, as they have been understood in equity's longstanding discourse on resulting trusts,[68] means that Professor Chambers was mistaken to discern a conflict in the case law.

By way of conclusion to this section, it may be pointed out that the fact that the presumption of resulting trust is a presumption that the claimant intended to make the defendant a trustee means that it does not encompass cases of 'lack of authority/want of consent'.[69] Examples of this scenario are cases where a trustee improperly uses his or her beneficiaries' money to purchase property, or a company director misdirects company funds into the purchase of assets in his or her own name. The argument that such scenarios do not fall within the presumption does not imply (as Professor Chambers suggested in *Resulting Trusts*) that 'a host of cases . . . are wrongly decided',[70] only that these cases do not involve resulting trusts.[71] In fact, it is very difficult to relate the lack of authority/want

[66] FW Maitland, *Equity: A Course of Lectures* (revd edn by J Brunyate, CUP 1936) 79.
[67] Mee (n 11) 103.
[68] It is not being suggested here that there is no difference between the positive and negative formulations *as interpreted by Professor Chambers*; the point is that, in order for there to be a conflict in the case law, the courts would have to have shared Professor Chambers' interpretation.
[69] On this issue, see generally Mitchell, Mitchell and Watterson (n 56) ch 8.
[70] Chambers (n 3) 227.
[71] In terms of authority, Professor Chambers makes much of *Ryall v Ryall* (1739) 1 Atk 59, where an executor used trust funds to purchase land in his own name and Lord Hardwicke referred to resulting trusts (although the remedy in the case appears to have been the imposition of a charge or lien over the land in question). In fact, the case law of three centuries ago is full of false starts and dead ends. The drawing of an analogy with resulting trusts in *Ryall* is explained by the existence of a line of authority suggesting that s 7 of the Statute of Frauds had the effect, *inter alia*, of preventing the tracing of money into land: see Mee (n 11) 106. Resulting trusts fell within the exemption in s 8 of the Statute of Frauds (equivalent to s 53(2) of the LPA 1925). In tracing cases not involving land, where no 'peculiar rules or habits of Courts of Equity in respect to the charging of land' stood in the way (*Taylor v Plumer* (1815) 3 M & S 562, 579 (Lord Ellenborough CJ)), there was no discussion of the resulting trust. In the event, the concern about the effect of the Statute of Frauds receded and the reference to resulting trusts in *Ryall* appears to have influenced only the tentative observations of Spragge C in the old Ontario case of *Goodfellow v Robertson* (discussed in n 83). Professor Chambers also relies (*Resulting Trusts* (n 3) 22) on *Lane v Dighton* (1762) Amb 409, where the defendants cited *Ryall v Ryall*. However, the sentence

of consent cases to the 'absence of intention to benefit' model. This is because the trigger for restitution in these cases is the defendant's want of authority and not the state of mind of the claimant. As Professor Chambers himself has observed, in a jointly authored article, 'the very idea of the claimant's intentions fits ill here . . . the claimant's knowledge or notice is irrelevant to the legal consequences of what the third party does'.[72] A proprietary remedy will not be excluded even if the claimant, knowing and silently approving of an unauthorized purchase by the trustee or other fiduciary, had in this sense an intention to benefit the person in whose name the property is being purchased. Conversely, if the defendant's actions are authorized, eg by the terms of the trust, then no resulting trust will arise irrespective of whether the beneficiary knew or approved of the purchase.[73] Since the availability or otherwise of a remedy in this scenario does not turn on the claimant's state of mind, it cannot sensibly be governed by a presumption as to the claimant's mental state. This point may help to explain Professor Chambers' move to the position that there is, after all, no presumption of resulting trust (which will be discussed shortly).[74]

Some Difficulties with the Birks/Chambers Theory

Space does not permit a full exploration of the Birks/Chambers theory but a number of specific difficulties with it may be highlighted. The first relates to the path from the existence of an 'absence of intention to benefit' to the creation of a resulting trust based on unjust enrichment. Professor Chambers has described as 'a very difficult issue' the question of 'how to relate the resulting trust to the recognised list of factors that make enrichment unjust', conceding that it is 'not an easy fit'.[75] He went on to suggest that perhaps his attempt in *Resulting Trusts* to identify an unjust factor was a 'struggl[e] in vain' because '[i]n hindsight, it might have been better to explain the law of unjust enrichment in terms of absence of basis rather than trying to explain the resulting trust in terms of unjust factors.'[76] However, English law proceeds on the basis of the unjust factor

from the judgment of Clarke MR that Professor Chambers quotes as the basis for the decision comes from the judge's summary of the argument of the unsuccessful plaintiffs and it does not seem that the decision actually supports his position.

[72] Robert Chambers and James Penner, 'Ignorance' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Company 2008) 256.

[73] ibid 273: 'The claimant's ignorance of the enrichment is not an element of the cause of action to recover it, being neither sufficient nor necessary for that purpose.'

[74] See text to nn 84–99.

[75] Chambers (n 45) 287.

[76] ibid.

approach, and not the failure of basis approach.[77] It follows from this that the unjust enrichment principle cannot be seen as explaining the creation of a resulting trust unless an unjust factor or factors can be identified, which (as Professor Chambers comes close to admitting) does not seem to be possible in all the situations regarded by Professor Chambers as falling within his central concept of 'absence of intention to benefit'.

Consider one of the scenarios identified by Professor Chambers as leading to the creation of a resulting trust, the situation where the claimant 'simply failed to address [his or her] mind to the issue of beneficial ownership'.[78] This is neither a recognized unjust factor in the law of unjust enrichment nor an established vitiating ground in the law of equity or the law of contract. It is simply a category invented by Professor Chambers himself—on the strength of his interpretation of one Australian case.[79] Although the task of analysis is not helped by the fact that the category's parameters have not been explored in detail by Professor Chambers, it seems to cover some situations where the creation of a resulting trust would be the wrong result in principle. One example is the situation where a person enters into a voluntary transaction proposed by her advisors, and chooses not to read the relevant documentation (so that she does not appreciate the nature of the transaction) because she correctly believes that her advisors have her best interests at heart and can be trusted in this matter. Also relevant is a variation on this scenario, in which the person fails to address her mind to the consequences of the transaction because she is lazy and is reckless as to what the transaction in question might involve. In both those situations, although the claimant 'failed to address her mind to the question of beneficial ownership' it seems contrary to principle to suggest that the claimant should be able to rely on the principle of unjust enrichment. The fact that one cannot identify any unjust factor in these scenarios is not a mere technicality; it is indicative of the fact that this is not a case where the defendant has been unjustly enriched.[80]

A second point is that it seems incorrect to suggest the existence of a pattern in the existing law whereby an 'absence of intention to benefit the defendant' generally leads to the creation of a resulting trust. In fact, the

[77] See eg *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32 [22] (Lord Sumption).

[78] 'Resulting Trusts in Canada' (2000) 38 Alta L Rev 378, 391.

[79] *Brown v Brown* (1993) 31 NSWLR 582. Neither *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 WLR 2695 nor *Lattimer v Lattimer* (1978) 82 DLR (3d) 587 (Ont) (both cited by Chambers in this general context in 'Is There a Presumption of Resulting Trust?' (n 45) 283) appears to provide any support for the proposition that a failure on the claimant's part to address her mind to the issue of beneficial ownership triggers a resulting trust.

[80] Note also the discussion at the end of n 132.

legal consequences of this are varied. In the classic resulting trust scenarios, where the claimant's 'absence of intention to benefit the defendant' is attributable to his or her intention to create a trust, the response is indeed a resulting trust. However, in other situations, the consequence of 'an absence of intention to benefit', which Professor Chambers has interpreted broadly so as to include cases of vitiated intention to benefit,[81] is that the claimant obtains a 'mere equity', as for example in the case of undue influence. Such a claimant has a power to rescind the transaction but does not hold the beneficial interest under a resulting trust.[82] In another set of situations, the consequence of an 'absence of intention to benefit' is instead the voidness of the transaction in question. This occurs, for example, in cases of *non est factum* and in cases of gifts where the donor lacked mental capacity.[83] Finally, where the defendant has applied the claimant's money in the purchase of property, again a situation which Professor Chambers regards as involving 'absence of intention to benefit', the claimant can elect between a proprietary remedy (which Professor Chambers would classify as a resulting trust) and the right to recover his or her money, secured by a lien on the purchased property. This is not the same as the law's simply imposing a resulting trust, as would be the case if the claimant had, himself or herself, advanced the purchase price of the property. In light of this complex set of legal responses to what Professor Chambers terms 'an absence of intention to benefit', there seems to be no plausibility to the suggestion that, as the law stands, the resulting trust is the natural or default response in the relevant situations.

[81] See his discussion in Chambers (n 3), ch 5.

[82] It appears that Professor Chambers now accepts this as a statement of the current law. See Robert Chambers *An Introduction to Property Law in Australia* (3rd edn, Lawbook Co 2013) 376, adopting the analysis in Birke Häcker 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324. Note also Sarah Worthington 'The Proprietary Consequences of Rescission' [2002] RLR 28.

[83] *Re Beaney* [1978] 1 WLR 770 (Ch); *Kicks v Leigh* [2014] EWHC 3926 (Ch). Professor Chambers' argument that incapacity can trigger a resulting trust rests on the authority of one Ontario case, *Goodfellow v Robertson* (1871) 18 Gr 572 (see eg Chambers (n 3) 23). However, *Goodfellow* actually provides no support for this argument. In the case, R paid money to A and, consistently with *Re Beaney*, this voluntary transfer was void on the supposition that R had lacked capacity at the time. The consequence was that, in subsequently purchasing land from a third-party vendor, A was using R's money without authorization, since R lacked the capacity to assent to A's use of it. It was this subsequent transaction that, on Spragge C's analysis, was possibly (note Spragge C's very tentative language: ibid 578) capable of triggering a resulting trust. The incapacity of R was merely the background to the issue of lack of consent/want of authority, discussed in text to nn 69–74.

Finally, it is instructive to note the difficulties Professor Chambers' argument encounters in explaining the nature of the presumption of resulting trust and the manner in which his position has changed in this respect. Initially, he argued that '[t]he presumption of resulting trust is that the provider of property to another did not intend to benefit the recipient'.[84] However, he has more recently retreated from this explanation, while insisting that he need not modify his argument in other respects[85] (although readers may be more familiar with his original position than with the rather less attractive position to which he has now moved). The occasion for Professor's Chambers' change of mind was a critique by Professor Swadling.[86] A key part of this critique was the argument that Professor Chambers had misunderstood the way in which presumptions of law operate, viz that, in the absence of rebutting evidence, 'proof by evidence of one fact, the "basic" or "primary" fact, gives [one] party to the litigation the benefit of another fact, the "secondary" fact, without any need to adduce evidence in proof'.[87] According to Professor Swadling, in relation to the presumption of resulting trust, the secondary fact presumed cannot be—as Professor Chambers' argument requires—that the claimant had 'no intention to benefit' the defendant because this is 'a legal inference from facts proved by evidence, not the proof of an additional fact through the operation of a presumption'.[88]

In response to this criticism, Professor Chambers has altered his explanation of the presumption of resulting trust. He now argues that the presumption of resulting trust is 'not a true presumption'[89] but is 'simply a situation in which there is no apparent reason (or consideration or basis) for the transfer of assets to the recipient at the expense of another'.[90] Thus, instead of arising in a particular situation, the presumption is now somehow to be regarded *as* 'a situation'. Professor Chambers reasons as follows:

> The presumption of resulting trust arises when one person acquires an asset at the expense of another and there is no apparent reason for the transaction. However, those are exactly the same facts that give rise to the resulting trust itself when proved by evidence. In other words, there is no 'secondary fact' being presumed.[91]

[84] Chambers (n 3) 38.
[85] See Chambers (n 45) 276–87.
[86] Swadling (n 2).
[87] ibid 74.
[88] ibid 90.
[89] Chambers (n 45) 284.
[90] ibid 285–86.
[91] ibid 284–85.

It is not possible to offer a full critique of Professor Chambers' modified argument here but it may be pointed out that his suggestion that the presumption of resulting trust is not a 'true' presumption is not persuasive. As Professor Swadling has explained, there are certain other, less precise, senses in which the word presumption has been used[92] but Professor Chambers makes no attempt to fit the presumption of resulting trust within one of those other categories. Therefore, the reader is left unclear as to what meaning, if any, Professor Chambers wishes to attach to the term 'presumption' in this context. He also makes no attempt to engage with explicit statements in the case law to the effect that the presumption of resulting trusts is indeed a conventional presumption. For example, in *Stack v Dowden*,[93] Lord Neuberger stated that the resulting trust is 'no more than a presumption',[94] explaining that this term is 'descriptive of a shift in the evidential onus on a question of fact'.[95] Although it is not easy to pin down Professor Chambers' modified position, it appears that his statement that the presumption of resulting trust is triggered by 'exactly the same facts that give rise to the resulting trust itself' implies that the presumption (whatever that term might mean) cannot be rebutted once it is triggered. However, it was already regarded as 'established doctrine' in the seminal case of *Dyer v Dyer*[96] that the presumption of a resulting trust 'may be rebutted by circumstances in evidence',[97] and this position clearly still prevails.[98]

Thus, Professor Chambers' argument does not allow him to provide a convincing explanation of the presumption of resulting trust, a central feature of the law of resulting trusts.[99]

[92] Swadling (n 2) 75–77.
[93] [2007] 2 AC 432.
[94] ibid [123].
[95] ibid, referring to the discussion by Lord Nicholls in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 [16]. Note also eg *Drake v Whipp* [1996] 1 FLR 826 (CA) 827 (Peter Gibson LJ): 'The resulting trust . . . operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention'; *O'Kelly v Davies* [2014] EWCA Civ 1606; [2015] 1 WLR 2725 [19] (Pitchford LJ): 'a judicially created evidential presumption as to the parties' intention'.
[96] (1788) 2 Cox Eq Cas 92.
[97] ibid 93.
[98] See eg *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415 [49] (Lord Sumption).
[99] Note also that in a comparatively brief discussion in a more recent case note, 'The Presumption of Resulting Trust: *Nishi v Rascal Trucking Ltd*' (2013–14) 51 Alta L Rev 667, Professor Chambers made no mention of his previous suggestion that the presumption of resulting trust is not a 'true' presumption. The discussion there appears to treat the presumption of resulting trust as sharing the normal features of presumptions; note eg the

The Demise of the Purchase Money Resulting Trust?

This section of the article briefly traces the development of the purchase money resulting trust and explains how, despite misleading references in the recent case law to a continued role for 'the presumption of resulting trust', the purchase money resulting trust appears to have been completely displaced in English law by the common intention constructive trust.[100] The disappearance of the purchase money resulting trust resonates with the suggestion made previously in this article that this type of resulting trust is no longer defensible in modern times and should be discarded. The development in question, however, sits less easily with the view of the Birks/Chambers theory that resulting trusts reflect the modern principle against unjust enrichment and that their scope of operation should be increased.

The Purchase Money Resulting Trust

The purchase money resulting trust doctrine[101] was initially developed by analogy with the resulting use that arose upon a voluntary conveyance of land.[102] The idea was that a person who put up all the money for a purchase in the name of another could be seen as the 'real' purchaser; it was as if he had acquired the ownership of the land from the vendor and then voluntarily conveyed it himself to the nominal purchaser, so as to trigger the same principle as in the case of a voluntary conveyance of the land directly from the real purchaser to the nominee. Some further adjustment was required to deal with a situation where more than one person had contributed to the purchase price, but ultimately,[103] in this

statement (ibid 672) that 'there is no room for a presumption once the relevant facts are known'. It is possible that this signals a further refinement in Professor Chambers' position.

[100] The focus here is on the position under English law. It is not suggested that other jurisdictions have taken the same approach. In Canadian law, for example, the common intention trust analysis has been rejected by the Supreme Court of Canada: *Kerr v Baranow* [2011] 1 SCR 269, 2011 SCC 10 [21]-[29] (Cromwell J). Orthodox resulting trust principles were reaffirmed in *Nishi v Rascal Trucking Ltd* 2013 SCC 33; [2013] 2 SCR 438, where the Supreme Court rejected an argument that the purchase money resulting trust should be abandoned in favour of an unjust enrichment analysis.

[101] This paragraph is adapted from John Mee, '*Pettitt v Pettitt* (1970) and *Gissing v Gissing* (1971)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2014) 630–31.

[102] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 93; 30 ER 42, 44 (Eyre CB). See the discussion in John Mee, 'Resulting Trusts and Voluntary Conveyances of Land 1674–1925' (2011) 32 JLH 215, 223–24.

[103] See *Wray v Steele* (1814) 2 V & B 388 and contrast *Crop v Norton* (1740) 2 Atk 74.

situation, each contributor was seen as the real purchaser of a fraction of the beneficial ownership of the property reflecting the proportion of the total purchase money that he or she had provided. By analogy with the treatment of the sole contributor scenario, each contributor was presumed to intend to retain the proportion of the beneficial interest of which he or she was the 'real' purchaser.

It is hard to reconcile with modern sensibilities this emphasis on the separate intentions of the individual contributors and the assumption that each person's intention is determinative in respect of the proportion of the ownership that she has bought with her contribution to the purchase price. If, from a modern perspective and with a blank slate, one were developing a doctrine to deal with situations where a claimant has contributed to the purchase of property that is legally held in the name of another, the idea of focusing on the existence of an understanding between the parties would have attractions. Instead of regarding each contributor's intention as sovereign in relation to the fraction of the ownership that he or she has purchased, one could instead concentrate on the injustice of the owning party's seeking to go back on what was understood between the parties. The next section examines the common intention constructive trust doctrine, which represents a development along these lines.

The Common Intention Constructive Trust

In *Gissing v Gissing*,[104] Lord Diplock offered a new analysis which, although this was not made explicit in his speech (and may not have been appreciated by Lord Diplock himself), represented a radical departure from the orthodox understanding of the purchase money resulting trust. In a well-known passage, Lord Diplock stated that:

> A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held to have so conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.[105]

[104] [1971] AC 886.
[105] ibid 905.

These comments are directly at odds with the orthodox understanding of the resulting trust. On the orthodox understanding, the basis of the resulting trust is *not*, as Lord Diplock suggested at the end of the above passage, that the defendant has induced the claimant to believe 'that by . . . acting [to his detriment] he was acquiring a beneficial interest in the land'. It is not even, to focus on Lord Diplock's earlier and more general statement, that 'the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired'. As has been discussed in detail above, the orthodox explanation for the resulting trust does not focus at all on the trustee's conduct but rather on the claimant and the fact that he or she intended the recipient of the property to be a trustee; in fact, the case law shows that resulting trusts can arise even where the trustee was, at the time, unaware of the transaction whereby he or she acquired the legal ownership of the relevant property.[106]

Under the orthodox purchase money resulting trust analysis, the claimant's contribution to the purchase price triggers a presumption that the claimant intended that the legal owner should hold the purchased property on trust. Under Lord Diplock's common intention analysis, however, the contribution allows the court to infer the existence of a common intention between the parties. This involves the court's concluding that the claimant's conduct in making the contribution must, as a matter of fact, have been undertaken on the basis of a prior or contemporaneous common intention that the beneficial interests would differ from the legal title. In such cases, the claimant's conduct in making the contribution to the purchase price also constitutes the detrimental reliance which makes it inequitable for the defendant to deny that the claimant has a beneficial interest in the disputed property. Therefore, the court will find that the claimant is entitled to the share that was commonly intended. The rationale for the creation of this form of trust clearly bears no relationship to the rationale for the creation of a resulting trust and it has now been accepted that the common intention trust is a constructive, rather than a resulting trust.[107]

[106] See Mee (n 11) 110–11, referring to *Duke of Norfolk v Browne* (1697) Pr Ch 80; *Sidmouth v Sidmouth* (1840) 2 Beav 447; *Re Vinogradoff* [1935] WN 68; *Shephard v Cartwright* [1955] AC 431.

[107] See eg *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776 [17] (Lord Walker and Lady Hale).

A Continued Role for the (Presumption of) Resulting Trust?

There has been some debate in the case law as to whether the resulting trust continues to exist despite the advent of the common intention constructive trust. The question has arisen in the context of the situation where a common intention has been inferred from conduct and does not extend to the question of the extent of the respective shares in the beneficial ownership. This issue was the major point of disagreement between the Law Lords in *Stack v Dowden*.[108] According to the majority in *Stack*, in such cases 'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property'.[109] However, Lord Neuberger took a different view, stating that '[w]here the only additional relevant evidence to the fact that the property has been acquired in joint names is the extent of each party's contribution to the purchase price, the beneficial ownership at the time of acquisition will be held . . . in the same proportions as the contributions to the purchase price'.[110]

According to Lord Neuberger, that 'solution' is 'no more than a presumption',[111] which is capable of being rebutted. He noted that in many cases there would be evidence available that 'would often enable the court to deduce an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held'.[112] He explained that '[i]t would be in this way that the resulting trust would become rebutted and replaced, or (conceivably) supplemented, by a constructive trust'.[113] Thus, Lord Neuberger's approach means that the fact that the claimant has made a financial contribution to the purchase price raises a presumption of resulting trust and this will lead to the creation of a resulting trust in the proportions of the parties' contributions unless the presumption is rebutted by evidence that shows that the parties had a common intention in favour of a specific alternative division of the beneficial interests, which would lead to a constructive trust instead.

While Lord Neuberger dissented in *Stack*, the majority seemed to limit their approach to 'the domestic consumer context',[114] leaving open the possibility that it might be appropriate to apply Lord Neuberger's

[108] [2007] 2 AC 432.
[109] *Oxley v Hiscock* [2005] Fam 211 [69] (Chadwick LJ), quoted in *Stack v Dowden* [61] by Baroness Hale.
[110] *Stack* [110].
[111] ibid [123].
[112] ibid [124].
[113] ibid.
[114] ibid [58] (Baroness Hale).

approach outside this context.[115] The recent Privy Council decision of *Marr v Collie*[116] suggests that the majority approach in *Stack* is not limited to the 'purely domestic setting',[117] encompassing also commercial investments made by a couple in an intimate personal relationship (what might be described as an example of the 'domestic non-consumer context'). Nonetheless, it is still possible that the majority approach does not apply where there is no 'domestic' aspect to the case at all, ie when the parties are not in an intimate cohabitation or other close family relationship.[118] The key question for present purposes is whether the possible survival of 'the presumption of resulting trust', in at least some factual situations, is an indication of the survival of the purchase money resulting trust. The answer suggested in this article will be that it is not such an indication, and that the terminology used in *Stack v Dowden* has been misleading.

In the view of the current author, Lord Neuberger's view that his approach involves the application of 'the presumption of resulting trust' involves a misunderstanding of the nature of presumptions. In the words of Lord Nicholls in *Royal Bank of Scotland v Etridge (No 2)*,[119] as quoted by Lord Neuberger in *Stack*, the 'use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact'.[120] The presumption of resulting trust, when it is not rebutted by contrary evidence, operates as a method of proof of a particular fact. The scope for operation of the presumption of resulting trust lies in situations where there is no available evidence as to intention (as, for example, if the relevant parties are dead by the time the matter is litigated), or where the available evidence is unreliable or difficult to interpret. The presumption cannot be of assistance in a case where there is no gap in the evidence. In response to the question 'what happens if the evidence proves that the

[115] Note the judgment of Lord Neuberger in *Laskar v Laskar* [2008] EWCA Civ 347.
[116] [2017] UKPC 17.
[117] ibid [39] (Lord Kerr).
[118] In *Marr v Collie* [53], Lord Kerr suggested that it would be 'simplistic' to conclude that a presumption of equal ownership applies in the domestic context and a presumption of resulting trust applies in the (wholly) non-domestic context. He went on to argue ([54]) that what is really important is the common intention of the parties and that 'save perhaps where there is no evidence from which the parties' intentions can be identified, the answer is not to be provided by the triumph of one presumption over another'. It is somewhat difficult to interpret this, however, because it appears to assume that the purpose of a presumption is to 'provide the answer' rather than merely to represent a starting point which ceases to be relevant if there is evidence of the parties' actual intentions. See also n 123.
[119] [2002] 2 AC 773, [16].
[120] *Stack* [123] (Lord Neuberger).

parties had a common intention as to ownership but that common intention did not extend to the issue of the size of the parties' shares?', it is not coherent to answer that if these facts are proven by the evidence, we will rely on the presumption of resulting trust to prove that the facts are otherwise and that the parties actually did have a common intention that extended to the size of the shares. As was famously pointed out by Lamm J in *Mackowik v Kansas City*[121] 'presumptions may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts'.[122]

The function of the presumption of resulting trust, as with other presumptions, is to fill an *evidential* gap. It is not possible to use a presumption to fill a *doctrinal* gap, eg to solve the problem of determining the appropriate remedy where the claimant has relied upon a proven common intention that the beneficial interests should differ from the legal interest where (the evidence shows) the common intention did not extend to the question of the quantification of each party's share.[123] This is not to deny that it is possible to argue for the quantification rule under discussion. The important point is that this doctrinal solution would not represent the application of the 'presumption of resulting trust' leading to the creation of a 'resulting trust'. Instead, the argument would merely be that, under the common intention constructive trust analysis, the appropriate default solution where there is a common intention which does not extend to the quantification of the parties' shares is a quantification based on the respective financial contributions to the purchase price. This would lead to the creation of a constructive trust.

It might be protested that the preceding argument assumes what it seeks to prove, ie that the resulting trust has been absorbed into the common intention analysis. This counter-argument would insist that no common intention constructive trust can arise unless there was a common intention as to the parties' precise shares. Therefore, the counter-argument would run, what is happening in the situation under discussion is that a resulting trust has arisen on the basis of well-established

[121] (1906) 94 SW 256.
[122] ibid 262–63.
[123] The fact that Lord Kerr felt obliged to point out in *Marr v Collie* [2017] UKPC 17 ([54] that there should be no resulting trust when it is 'the unambiguous mutual wish of the parties' that 'joint beneficial ownership should reflect their joint legal ownership' may indicate the existence of a tendency in the cases and commentary to see 'the presumption of resulting trust' as a solution to the problem of quantifying the parties' interests, unrelated to the actual intentions of the parties, that might be imposed in certain situations. See also ibid [49] and n 118.

principles and that no common intention constructive trust has arisen to displace that resulting trust. If this counter-argument were correct, then a purchase money resulting trust could arise in favour of a claimant who unilaterally intended to gain a greater share for himself or herself, in circumstances where the absence of any *common* intention to this effect would preclude a common intention constructive trust. Significantly, however, there is appellate court authority to the contrary. In *Fowler v Barron*,[124] the Court of Appeal rejected the claim of a cohabitant who had provided all the purchase money for a property that was conveyed into the joint names of the parties. Arden LJ emphasized that '[t]he emphasis is on the parties' shared intentions,'[125] so that it was not possible to take account of 'any secret intention of Mr Barron, that Miss Fowler should only benefit in the event of his death and on the basis that they were then still living together'.[126] She went to insist that 'for the same reason, the fact that Mr Barron was mistaken as to the effect of putting the property into joint names, and did not appreciate that that would give Miss Fowler an immediate and absolute entitlement to a beneficial interest is of no materiality'.[127] This case shows a determination by the court to keep the focus on the common intentions of the parties; it was not enough that the claimant had an intention that would have been consistent with a purchase money resulting trust in his favour.

It is true that this case arose in the context of a dispute between cohabitants, so that it might be argued that the demise of the purchase money resulting trust is limited to the domestic context. However, there is no indication in the leading authorities of *Stack* and *Jones v Kernott*[128] that different *substantive* rules of law apply to disputes in the domestic context as compared to those applicable in other contexts. Baroness Hale suggested in *Stack* that 'the presumption of resulting trust is not a rule of law'.[129] Considering this dictum, Briggs LJ, writing extra-judicially, has recently commented that: 'the doctrine [of resulting trusts] is not really a rule of law at all, but an aspect of the evidential rules about burden of proof'.[130] Therefore, in suggesting in *Stack* that the presumption of resulting trust was not the appropriate 'starting point'[131] in certain situations, it seems clear that Baroness Hale was

[124] [2008] EWCA Civ 377.
[125] ibid [36].
[126] ibid [37].
[127] ibid.
[128] [2011] UKSC 53; [2012] 1 AC 776.
[129] [2007] 2 AC 432 [60].
[130] 'Resulting Trusts after Prest' (2014) 181 ACTAP Newsletter 4, 5.
[131] *Stack* [59].

making a point about the location of the burden of proof, rather than suggesting that a different set of legal rules applied in one context as opposed to another.[132]

It seems, therefore, that in English law—as a descriptive matter—the advent of the common intention constructive trust has effectively killed off the purchase money resulting trust. The fact that *Stack* and *Jones* contemplate the possible survival of the 'presumption of resulting trust' outside the domestic context does not mean that the outcome would be a resulting trust. Instead, the operation of a presumption in favour of a quantification of the beneficial interests in proportion to the parties' contributions would lead to a constructive trust dependent on the existence of a common intention between the parties, with the so-called 'presumption' operating, in fact, as a default method of quantifying the beneficial interests under that constructive trust when the common intention did not extend to the precise shares of the parties.

[132] Lord Kerr's judgment in *Marr v Collie* [2017] UKPC 17 gives contradictory signals in relation to the survival of the purchase money resulting trust as an independent doctrine. On one hand, the judgment focuses strongly on 'the common intention of the parties': ibid [56]. The claimant had contributed all of the purchase price for each of a number of investment properties that the couple in dispute had taken in joint names. Under the orthodox resulting trust, the only intention that would have been relevant was that of the claimant but the decision of the Privy Council was that the issues raised in the judgment, 'particularly the intention *of the parties* at the time of the purchase', should be remitted to a lower court for decision. The way that the decision in the case is framed does not seem to be consistent with the view that the claimant could succeed on the basis of a unilateral intention to obtain all the beneficial interest and the implication seems to be that a common intention would have to be demonstrated. On the other hand, Lord Kerr commented at one point (ibid [54]) that it 'may' be appropriate to apply the 'resulting trust solution' where the parties 'have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that' (and where, therefore, there would be no common intention that the beneficial interests should differ from the legal interests, seeming to rule out a common intention constructive trust). This latter comment might seem to support Professor Chambers' view that a resulting trust can arise where the claimant 'gave no thought to the question of the beneficial interest' (see the discussion in text to nn 78–80). However, in the relevant paragraph, Lord Kerr focused on the parties' common intention, or lack of it, rather than on the separate intention of the claimant as required by Professor Chambers' analysis. It seems, in any case, that Lord Kerr mischaracterized the problem that arises where a couple accepted advice that the property be taken in joint names. The issue is not that they formed no intention 'as to beneficial ownership'; unless they specifically thought about some divergence between the two, they would have believed that joint legal ownership meant joint beneficial ownership. What they might well have failed to consider is the possibility that their relationship would end in disharmony, so that important practical consequences would attach to the way in which, without dwelling on the matter, they had agreed to share ownership. Other jurisdictions have invented new doctrines, not explicable on the basis of the orthodox law of unjust enrichment, to address this issue: see n 134.

It may be that the only situation where the purchase money resulting trust could have independent significance is where counsel has failed to plead the common intention constructive trust (or where, not recognizing the purchase money resulting trust's lack of independent significance, a judge gives permission to appeal on the basis of the purchase money resulting trust claim but not the common intention constructive trust claim).[133] It does not make sense to allow a doctrine to make occasional random appearances like this. If, indeed, the purchase money resulting trust no longer has independent significance, then it would provide one element of clarity, in an area greatly in need of clarification, if the courts could explicitly recognize this. The difficult task facing judges and commentators would then be made plain: to try to bring some coherence to the common intention constructive trust.[134]

While space does not permit a detailed analysis of this point, it seems that it would be a logical development if, consistent with the apparent elimination of the purchase money resulting trust, the voluntary transfer resulting trust were to be discarded also, since it depends on the same outdated rationale.[135] It is true that, in both the case of a contribution to the purchase price and of a voluntary transfer, the fact that the claimant intended the creation of a trust will probably indicate the existence of a mistake or other basis for an unjust enrichment remedy (even if the Court of Appeal in *Fowler v Barron* did not appear to see any room for such a remedy). However, the situation should be dealt with on the basis of ordinary unjust enrichment principles, and there should be no special doctrine, applicable only to such situations, which would lead to the creation of a trust in favour of the claimant. Once the outdated retention principle is discarded, having been recognized as the reason why in the past a resulting trust was recognized in such situations, there is no reason

[133] *Curley v Parkes* [2004] EWCA Civ 1515.

[134] This doctrine is highly unsatisfactory in doctrinal terms, partly because of the manner in which it evolved from the purchase money resulting trust and partly because the courts have distorted it in order to provide remedies in disputes arising in family situations. See the critique in John Mee, *The Property Rights of Cohabitees* (Hart Publishing 1999), ch 5. The courts in other Commonwealth jurisdictions have developed alternative doctrines which, although seeming to lack doctrinal legitimacy, are better adapted to provide such remedies. See ibid, chs 7–9, discussing the approaches of the courts in Canada, Australia and New Zealand.

[135] The status of the voluntary conveyance resulting trust may already be somewhat less secure than that of the purchase money resulting trust. It does not appear to be capable of arising in relation to land (see John Mee 'Resulting Trusts and Voluntary Conveyances of Land' [2012] Conv 307) and it is not recognized as a category of resulting trust in US law (*Scott and Ascher* (n 63) §40.1.1).

to provide the claimant with more than a personal remedy in the situations under discussion.[136]

The Normative Justification for Gap-Filling Resulting Trusts

It was argued in the previous section that there is no justification, in modern times, for presumed resulting trusts. The position is different, however, in the context of gap-filling resulting trusts. The context in which these resulting trusts arise is crucially different because the claimant has not merely intended to create a trust but has expressly stipulated that the recipient is to take on trust.

As a starting point in exploring a possible justification for the 'gap-filling' resulting trust,[137] it is necessary to look at the justification for the law's treatment of fully express trusts. Consider a situation where the settlor creates a trust by transferring property to the trustee to hold on trust for the beneficiary. On one view this can be seen as a straightforward instance of the settlor's having exercised his or her power to create an express trust, having satisfied all the requirements stipulated by the law. This is not very informative, however, because it leaves open the question of the justification for those requirements. In fact, it is clear that, although the trust is a legal device or institution that settlors consciously choose to rely upon, there is an underlying normative foundation to the shape of this institution. As both Professor Ben McFarlane and Professor Simon Gardner have noted, there must logically have been a point in legal history where the 'express trust' did not exist as a recognized institution in the law, so that at first a settlor who entrusted property to a trustee was not consciously availing himself or herself of an established legal device.[138] Thus, the settlor was reposing trust in the trustee by transferring the property to him or her. What was 'quaintly known as the problem of

[136] It is arguable that, in line with the views expressed by Deane J in *Calverley v Green* (1984) 155 CLR 242 (HCA) 266 in the context of a suggestion that the presumptions of resulting trust and advancement should be dropped, it would be best if the law were changed 'by legislative intervention which will not disturb past transactions which may conceivably have been structured by reference to [the existing law]'. On the other hand, the existence of a personal remedy in unjust enrichment would limit the extent of the impact on individuals of a change in the law and it may not be all that realistic to expect the change under discussion to be accomplished by legislation.

[137] Note the earlier discussion of this issue in Mee (n 24) 230–34.

[138] See Gardner, 'Reliance-Based Constructive Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (n 24) 84; Ben McFarlane 'The Centrality of Constructive and Resulting Trusts' in ibid 199.

the 'faithless feoffees'[139] arose when the trust of the settlor was betrayed and the trustee sought to keep the trust property for himself or herself. The law's response ultimately went beyond preventing the trustee from being unjustly enriched and extended to enforcing the trust in favour of the beneficiaries under the trust, including protecting their interest in the event of the trustee's bankruptcy and allowing them to trace the trust property into the hands of third parties.

As a volunteer, it does not appear that the beneficiary has any independent claim to this highly favourable treatment. The normative foundation of the law's protection of the third-party beneficiary must reside in the settlor's conduct in reposing trust in the trustee by entrusting the trust property to him or her, and nominating the third-party beneficiary as the person for whom the property should be held. Thus, in its origins, the duty that the trustee owes is to the settlor and it is the settlor's act in specifying the beneficiary that focuses that duty on the beneficiary instead. What, then, about the situation when there is no (validly) identified beneficiary? Does the absence of a validly nominated beneficiary mean that the settlor's transfer on trust imposes no duties on the recipient in terms of dealing with the property he or she has received, having no greater effect in this respect than eg a transfer of property made by mistake, with no intention of making the recipient a trustee?

The answer, it is submitted, is that the absence of a validly nominated beneficiary does not remove the normative foundations for the imposition of a trust upon the intended trustee. By accepting the property on trust, the trustee has accepted the settlor's stipulation that the trustee will not use the property for his or her own benefit. If he or she acts contrary to that duty, the trustee would be acting unconscionably and, in a situation where no beneficiary has been validly nominated, the person who would be wronged is the settlor; therefore, the law responds by making the trustee hold on trust for the settlor.

It should be noted that the legal response, the creation of a trust, matches the normative foundation of the settlor's claim. The most important difference between making available a personal remedy for unjust enrichment and the recognition of a trust is that the trust property never forms part of the trustee's patrimony and is not affected by his or her bankruptcy. This is an effect which the settlor deliberately acted to bring about, by making the transfer 'on trust'. This amounts to a specification by the settlor that the basis on which the trustee was being given the

[139] John H Langbein 'The Contractarian Basis of the Law of Trusts' (1995) 105 YLJ 625, 634.

property was that he or she could not use it for his or her own benefit and that it would not form part of his or her patrimony. As Maitland put it, 'I have made A a trustee for somebody, and a trustee he must be—if for no one else then for me or my representatives.'[140] The same point is also conveyed by the idea, discussed earlier in this article,[141] that resulting trusts arise because the trustee was not intended to take the beneficial interest in the property. This formulation emphasizes the key fact that, although the settlor has not validly specified beneficiaries under the intended trust, or has made an incomplete specification, he or she has expressly specified that the recipient is to be no more than a trustee.[142]

Conclusion

As a descriptive matter, resulting trusts arise only in situations where the claimant intended to make the defendant a trustee. The cases show that the presumption of resulting trust is a presumption that the claimant intended to make the defendant a trustee or, in other words, did not intend to pass the beneficial (ie equitable) interest to him or her. The doctrine of resulting trusts is a remarkably antiquated one. It reflects historical conditions that made it reasonable for the courts to accept a mere intention to create a trust as sufficient to justify the settlor's 'retention' of the beneficial interest. Having identified the outdated reasoning which still shapes the contours of the doctrine of resulting trusts, this article has argued that the retention idea is not defensible in doctrinal terms as a justification for the creation of a trust. It is a fiction that the law should no longer indulge.

A logical response would be to discard the category of presumed resulting trusts. As this article has noted, this process is, in fact, already well advanced in English law because the purchase money resulting trust has been completely eclipsed by the newer common intention constructive trust. The article has argued that it is important not to be misled by

[140] Maitland (n 66) 77.
[141] See text to nn 54–67.
[142] Following on from the suggestion that only this form of resulting trust should be recognized in the law, it could be argued that the category of 'resulting trusts' should be downgraded to a lower level in the hierarchy of trusts. It might be logical to divide trusts into only two categories and to allocate 'resulting trusts' to one or other category—either to the category of 'constructive trusts' or perhaps more appropriately, given the close relationship between gap-filling resulting trusts and express trusts, to a category of 'express (including resulting) trusts'. Space does not permit a full exploration of this point in the current article.

references in the cases to a continued role, in certain fact situations, for a 'presumption of resulting trust'. In light of the case law, these must be understood as referring to a default method of calculating the share under a common intention constructive trust. The article has suggested that it would also seem to make sense for the law to discard the less commonly invoked voluntary transfer resulting trust. The position is different, however, in relation to the final category, the gap-filling resulting trust. In this scenario, the claimant's intention to make the defendant a trustee has not remained in the realm of intention but has been expressly declared. As explained in the article, this means that the normative justification for the recognition of express trusts is engaged, so that the law is justified in giving effect to the claimant's express specification that the defendant will take the property as a mere trustee. Thus, having sought to establish, as a descriptive matter, the nature of resulting trusts, this article has ultimately concluded that, as a normative matter, resulting trusts should play a smaller role in the modern law, arising only in cases where the claimant has expressly declared a trust.

The orthodox understanding of resulting trusts that has been discussed in this article, and criticized as antiquated, emerges clearly from the case law. The main source of confusion in recent years has been the coming to prominence of the Birks/Chambers theory of resulting trusts. This theory, based on a mistaken understanding of the historically determined nature of the current law, regards resulting trusts as responding simply to unjust enrichment. Contrary to the position elaborated over centuries in the case law, and authoritatively confirmed by the House of Lords in *Westdeutsche*,[143] the relevant theory makes no requirement that this enrichment should occur in the context of the claimant's intention to make the defendant a trustee. Although space has not permitted a full-scale critique, this article has identified a number of flaws in the Birks/Chambers theory, including the difficulty in reconciling the theory with the requirement in the law of unjust enrichment that an unjust factor be identified and the fact that the theory requires that the presumption of resulting trust be regarded as something other than a presumption. When first advancing the theory, Professor Birks explained that if his 'experimental' view of the 'nature and mission of the resulting trust is wrong, it is important that this error should be exposed before a heresy takes root'.[144] It seems best to avoid the term 'heresy', with its overtones of a quasi-religious attachment to one's position. In more mundane

[143] [1996] AC 669.
[144] Birks (n 44) 373.

language, it may be concluded that Professor Birks' view was based on a misreading of the authorities and—notwithstanding the skill with which the theory has subsequently been championed by Professor Chambers—it should indeed be recognized as an error.